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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 23, 2004 and JUNE 23, 2005

IN THE

Supreme Court of Nebraska

VOLUME CCLXIX

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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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

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
FRANK E. GOODROE . . . . . State Court Administrator[1]
JANICE WALKER . . . . . Acting State Court Administrator[2]
JANICE WALKER . . . . . State Court Administrator[3]

[1]Until March 30, 2005
[2]As of March 31, 2005
[3]As of May 13, 2005

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
		Johnson, Vicky L.	Wilber
Second	Cass, Otoe, and Sarpy	George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	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	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Gerald E. Moran	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
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	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
		John E. Samson	Fremont
		William Binkhard	Dakota City
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	Ronald D. Olberding	Burwell
		Mark D. Kozisek	Ainsworth
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Harlan, Kearney, 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
		James E. Doyle IV	Lexington
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	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
		Max J. Kelch	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	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
		Craig Q. McDermott	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
		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	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas Luebe	Hartington
		Kenneth Vampola	Fremont
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
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		James M Worden	Gering

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
	Vernon Daniels	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
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 268

ALETA SUE ALLEN
LINDA FAYE ALLEN
THOMAS CAMPBELL ANSCHUTZ
CHRISTOPHER STEPHEN BARTLING
STEPHANIE DAWN BECKWITH
ROBERT SCOTT BEHM
AMY RENEE BEHNKE
ELIZABETH ANNE BENINATO
JENNIFER JANET BROWNING
JASON MARIO BRUNO
TABITHA JAYNE CAMPBELL
ANDREW JAMES CARAFELLI
SARAH LuRAE CARSTENSEN
DIANA WATEROUS CENTORINO
LEONIKA ROSE CHARGING
JEFFREY ALAN COATS
TRACI NICHOL COPPLE
AMY CHRISTINE CRAWFORD
CASEY DWIGHT DUNCAN
RICARDO ENRIQUEZ
ANDREW SCOTT EPSTEIN
CHRISTOPHER CLEMENT FAIRCHILD
JOSEPH PATRICK FLYNN
JONATHAN ERIC FRIESEN
JOCELYN WALSH GOLDEN
SCOTT RYAN GROPP
ROBERT ANDREW HARRIS
JULIE ANN HAVERLY
KELLY MELISSA HENRY-TURNER
STARLET JOY JAPP
NANCY S. JOHNSON
LEAH ELIZABETH JOSEPH
MICHAEL ADAM KAUFMAN
BRENDAN MICHAEL KELLY
COURTNEY ANNE KLEIN-FAUST
DANIELLE LYNN KUHLMAN
LINDSAY LEE LAMBERT
ANN MARY LANDIS
EMILY RAECHEL LANGDON
LARISSA NATASHA LANIGAR
JOVAN WAYNE LAUSTERER
DOUGLAS R. LEDERER
BRAD JASON LEE
ROBERT PING LUNG LI
JEFFREY SCOTT MAKOVICKA
RENEE LYNN MATHIAS
LIANE ELISE ADELE MEERKATZ
MARK ANDREW MENDENHALL
PAULETTE MERRELL
JAY WARNER MEZ
MATT EVAN MORRISSEY
THOMAS JOSEPH MORRISSEY
LESLIE KRISTIN NEUHAUS
CANDICE JO NOVAK
THOMAS JOSEPH O'BRIEN
ALISHA KRISTINE PARKS
STEVEN LEE PIER
JONATHAN VERNERS REHM
ARI DAVID RIEKES
CORY J. ROONEY
ERIC MATTHEW SAGEHORN
JOHN ANDREW SHARP
AMY ROSALEE SKALKA
MOLLY BETH SMITH

NEIL HOWARD SMITH
GEORGE WILLIAM SMITS
JAMES KEITH SPRICK
CRAIG DAVID STEIN
KEVIN J. STUDER
MICHAEL CHARLES STUMO
VALERIE NICOLE TEAL
JENNIFER MARY THIEL
DANA RENE ULRICH
KAYLA MICHELLE VANCANNON
KEVIN RICHARD WARREN
NATHAN RYAN WATSON
JUDITH ANN WELLS
KELLIE NICOLE WELLS
JONATHAN PATRICK IRVIN WENDT
SHERMAN PHILLIP WILLIS
BRYAN SCOTT WITHERWAX
ALEXANDER WYATT WRIGHT
VICTORIA CHACHOUA XIONG

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No. S-02-1307: **State v. Wiese**. Petition for further review reversed and remanded for further proceedings. Stephan, J.

No. S-03-262: **Lorimer v. Good Samaritan Health Sys**. Petition for further review affirmed. Per Curiam.

No. S-03-849: **24th & Dodge Ltd. Part. v. First National Bank**. Affirmed. Gerrard, J. Miller-Lerman, J., not participating.

No. S-03-940: **Hemsley v. Nava**. Affirmed. Connolly, J.

No. S-03-957: **Peterson v. Ohio Casualty Group**. Reversed and remanded for further proceedings. Miller-Lerman, J.

No. S-03-1031: **State v. Gochanour**. Affirmed. Hendry, C.J. Stephan, J., dissenting. Gerrard and Miller-Lerman, JJ., join in this dissent.

No. S-03-1219: **Pinnacle Bank v. Linsco Private Ledger**. Reversed and remanded with directions. Miller-Lerman, J. Stephan, J., not participating.

No. S-03-1230: **Dunson v. Metro Area Transit**. Affirmed. Miller-Lerman, J.

No. S-03-1249: **Lane v. Chapin**. Reversed and vacated, and cause remanded with directions. Miller-Lerman, J. Hendry, C.J., and Connolly, J., not participating.

No. S-03-1299: **Calhoun v. Calhoun**. Appeal dismissed. McCormack, J.

Nos. S-04-010, S-04-011: **In re Trust of Rosenberg**. Affirmed. McCormack, J. Wright, J., participating on briefs.

No. S-04-160: **Nesiba v. State Patrol**. Affirmed. McCormack, J. Wright, J., not participating.

No. S-04-665: **State v. Harris**. Affirmed. Gerrard, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-03-800: **Mumin v. T-Netix Telephone Co.** Summarily affirmed pursuant to rule 7A(1).

No. S-03-1303: **State v. Beeder.** Appeal dismissed. See *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

No. S-04-645: **State v. Aldaco.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-700: **Grooves, Inc. v. Nebraska Liquor Control Comm.** Stipulation allowed; appeal dismissed, each party to pay own costs.

No. S-04-706: **In re Interest of Rachel B. et al.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-803: **Hughes v. Motor Club Underwriters.** Stipulation allowed; appeal dismissed.

No. S-04-812: **State ex rel. Counsel for Dis. v. Heavey.** Motion of relator to dismiss formal charges sustained.

No. S-04-917: **State ex rel. Counsel for Dis. v. Wintroub.** Motion of relator to dismiss formal charges at relator's costs sustained.

No. S-04-1003: **State v. Sanders.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. S-04-1018, S-04-1019: **State v. Perkins.** Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. S-04-1045: **Zannini v. Ameritrade Holding Corp.** Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. S-04-1055: **State v. Russell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-1067: **State ex rel. Counsel for Dis. v. Meissner.** Motion of relator to dismiss this matter sustained; matter dismissed.

No. S-04-1073: **State v. Frickel.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-1093: **State v. Kern**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-1099: **State v. Harris**. Appeal dismissed. See rule 7D(1).

No. S-04-1323: **State ex rel. Counsel for Dis. v. Sutton**. Motion of relator to dismiss without prejudice sustained.

No. S-04-1324: **State v. Vela**. Appeal dismissed for lack of a final, appealable order. See rule 7B(1).

No. S-04-1332: **State v. Mata**. Appeal dismissed. See rule 7B(1).

No. S-04-1457: **State v. Franke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7A(1); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

No. S-05-061: **State ex rel. Counsel for Dis. v. Coe**. Request of relator to withdraw motion for temporary suspension sustained; application withdrawn.

No. S-05-163: **State ex rel. Counsel for Dis. v. Gilroy**. Respondent suspended from the practice of law in the State of Nebraska until further order of the court.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-02-854: **Pioneer Chem. Co. v. City of North Platte**, 12 Neb. App. 720 (2004). Petition of appellant for further review sustained on December 15, 2004.

No. A-03-098: **Knittel v. State**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-121: **Guenther v. Praest**. Petition of appellee for further review overruled on April 20, 2005.

Nos. A-03-200 through A-03-203: **State v. Evans**. Petitions of appellant for further review overruled on April, 20, 2005.

No. S-03-262: **Lorimer v. Good Samaritan Health Sys**. Petition of appellant for further review sustained on January 12, 2005.

No. A-03-291: **Edquist v. City of Bellevue**. Petition of appellee for further review overruled on December 15, 2004.

No. A-03-326: **State v. Gilpin**. Petition of appellant for further review overruled on February 16, 2005.

No. S-03-354: **Smeal Fire Apparatus Co. v. Kreikemeier**, 13 Neb. App. 21 (2004). Petition of appellant for further review sustained on March 30, 2005.

No. A-03-378: **Stevens v. Dakota Title & Escrow Co**. Petition of appellant for further review overruled on February 9, 2005.

No. A-03-460: **Pope v. Nebraska Bd. of Parole**. Petition of appellants for further review overruled on April 13, 2005.

No. A-03-544: **State v. Bruna**, 12 Neb. App. 798 (2004). Petition of appellant for further review overruled on January 20, 2005.

No. S-03-618: **Dyer v. Neth**. Petition of appellant for further review dismissed on December 22, 2004, as having been improvidently granted.

No. A-03-631: **State v. Loy**. Petition of appellant for further review overruled on January 20, 2005.

No. A-03-733: **State v. Gonzales**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-764: **Smith v. Smith**. Petition of appellant for further review overruled on May 11, 2005.

No. S-03-800: **Mumin v. T-Netix Telephone Co.**, 13 Neb. App. 188 (2004). Petition of appellant for further review sustained on February 16, 2005.

No. A-03-804: **Maas v. Sodoro, Daly**. Petition of appellee for further review overruled on June 8, 2005.

No. A-03-915: **Rayburn v. Darrell Bruns Constr**. Petition of appellant for further review overruled on March 23, 2005.

No. A-03-922: **Whitfield v. Sanders**. Petition of appellant for further review overruled on April 27, 2005.

No. A-03-962: **Savery v. Savery**. Petition of appellant for further review overruled on June 8, 2005.

Nos. A-03-974, A-03-1460: **Arias v. Arias**. Petitions of appellant for further review overruled on January 12, 2005.

No. A-03-1014: **State v. Bringus**. Petition of appellant pro se for further review overruled on December 29, 2004.

No. A-03-1079: **Lucas v. Anderson Ford**, 13 Neb. App. 133 (2004). Petitions of appellant for further review overruled on February 9, 2005.

No. A-03-1138: **In re Interest of Marisa R.** Petition of appellant for further review overruled on January 20, 2005.

No. A-03-1185: **State v. Pickard**. Petition of appellant for further review overruled on December 22, 2004.

No. A-03-1191: **State v. Morales**. Petition of appellant for further review overruled on March 30, 2005.

No. A-03-1191: **State v. Morales**. Petition of appellant pro se for further review overruled on March 30, 2005.

No. A-03-1198: **Haythorn Land & Cattle Co. v. Kingsley Cattle Co**. Petition of appellant for further review overruled on June 8, 2005.

No. A-03-1201: **Wiese v. American Fam. Mut. Ins. Co**. Petition of appellant for further review overruled on June 8, 2005.

No. A-03-1282: **State v. Clinebell**. Petition of appellant for further review overruled on December 22, 2004.

No. A-03-1288: **State v. Gunter**. Petition of appellant for further review overruled on May 16, 2005, as untimely filed.

No. A-03-1346: **State v. Sparr**, 13 Neb. App. 144 (2004). Petition of appellant for further review overruled on January 20, 2005.

No. A-03-1363: **State v. Purdy**. Petition of appellant for further review overruled on January 12, 2005.

No. A-03-1366: **State v. Seffron**. Petition of appellant for further review overruled on May 11, 2005.

No. A-03-1387: **Schwarck v. Schwarck**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-1462: **State v. Harper**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-023: **State v. Guzman-Gomez**, 13 Neb. App. 235 (2005). Petition of appellant for further review overruled on March 23, 2005.

No. S-04-028: **In re Interest of Shelby L.** Petition of appellant for further review sustained on March 9, 2005.

No. S-04-028: **In re Interest of Shelby L.** Petition of appellees for further review sustained on March 9, 2005.

No. A-04-029: **In re Interest of Jersey S.** Petition of appellant for further review overruled on February 24, 2005.

No. A-04-048: **State v. Siebrass**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-052: **State v. Rouse**, 13 Neb. App. 90 (2004). Petition of appellee for further review overruled on January 12, 2005.

Nos. A-04-061 through A-04-063: **Rushmore Borglum Ministry v. Washington Cty. Bd. of Equal**. Petition of appellee for further review overruled on April 13, 2005.

No. A-04-083: **State v. White**. Petition of appellee for further review overruled on April 20, 2005.

No. A-04-097: **Snyder v. Auto America Fleet & Lease Outfit**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-110: **Todd Harless Electric v. Baldwin**. Court treats the petition of appellant for writ of certiorari as a petition for further review and overrules same on January 28, 2005, as untimely filed.

No. A-04-143: **State v. Cutler**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-172: **In re Interest of Virginia L. et al.** Petition of appellant for further review overruled on March 9, 2005.

No. A-04-172: **In re Interest of Virginia L. et al.** Petition of appellee Timothy W. for further review overruled on March 9, 2005.

No. A-04-186: **Hatch v. Hatch**. Petition of appellant for further review overruled on March 9, 2005.

No. A-04-199: **Darnall Ranch v. Banner Cty. Bd. of Equal.** Petition of appellant for further review overruled on May 18, 2005.

No. A-04-211: **Blodgett-McDeavitt v. University of Nebraska**. Petition of appellant for further review overruled on January 20, 2005.

No. S-04-250: **In re Interest of Devin W. et al.**, 13 Neb. App. 392 (2005). Petition of appellee State for further review sustained on May 11, 2005.

No. A-04-277: **Biberos v. George Risk Indus**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-317: **State v. McCroy**. Petition of appellant pro se for further review overruled on February 8, 2005, as filed out of time.

No. A-04-321: **Shafer v. Sunset Motors**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-347: **State v. Ziegenbein**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-370: **Hajny v. Ag Processing**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-385: **In re Interest of Elizabeth S.** Petitions of appellees for further review overruled on February 9, 2005.

Nos. A-04-397, A-04-398: **State v. Williamson**. Petitions of appellant for further review overruled on December 29, 2004.

No. A-04-451: **State v. Casas**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-470: **In re Interest of Aquisha S. et al.** Petition of appellant for further review overruled on February 8, 2005, as filed out of time.

No. A-04-479: **Davis v. Davis**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-484: **In re Interest of E.M.**, 13 Neb. App. 287 (2005). Petition of appellant for further review overruled on March 30, 2005.

No. A-04-520: **In re Guardianship & Conservatorship of KC F.** Petition of appellant for further review overruled on May 11, 2005.

No. A-04-532: **Henke v. Guerrero**, 13 Neb. App. 337 (2005). Petition of appellant for further review overruled on April 27, 2005.

No. A-04-544: **State v. Krayenhagen**. Petition of appellant for further review overruled on January 12, 2005.

No. A-04-546: **State v. Heise**. Petition of appellant for further review overruled on May 26, 2005, for lack of jurisdiction.

No. S-04-547: **State v. Rice**. Petition of appellant for further review sustained on February 9, 2005.

No. A-04-548: **State v. Lopez**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-552: **In re Interest of Andre V.** Petition of appellant for further review overruled on February 24, 2005.

No. A-04-557: **State v. Goodrum**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-575: **Milliken v. Premier Indus.**, 13 Neb. App. 330 (2005). Petition of appellee for further review overruled on April 20, 2005.

No. A-04-586: **In re Interest of Emily H. et al.** Petition of appellant for further review overruled on March 9, 2005.

No. A-04-630: **State v. Charles**, 13 Neb. App. 305 (2005). Petition of appellant for further review overruled on March 30, 2005.

No. A-04-637: **In re Interest of Danielle S.** Petition of appellant for further review overruled on April 13, 2005.

No. A-04-653: **In re Guardianship & Conservatorship of April E.** Petition of appellant for further review overruled on April 13, 2005.

No. A-04-674: **State v. Caudillo**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-680: **In re Interest of Elizabeth S.** Petition of appellants and appellee Linda M. for further review overruled on February 9, 2005.

No. A-04-688: **State v. Lawver**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-691: **State v. Smith**, 13 Neb. App. 404 (2005). Petition of appellant for further review overruled on April 27, 2005.

No. A-04-692: **State v. Schmader**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-701: **State v. Schmader**, 13 Neb. App. 321 (2005). Petition of appellant for further review overruled on April 13, 2005.

No. S-04-723: **Merrill v. Griswold's, Inc**. Petition of appellant for further review sustained on April 20, 2005.

No. A-04-727: **State v. Campos**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-733: **Lencki v. Omaha Public Schools**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-751: **State v. Cardona**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-794: **State v. Svoboda**, 13 Neb. App. 266 (2005). Petition of appellant for further review overruled on February 14, 2005, as filed out of time.

No. A-04-809: **Hall v. Thurber**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-810: **State v. Iromuanya**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-859: **In re Interest of Willie P**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-860: **State v. Rickman**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-872: **State v. Cuddeford**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-882: **State v. Swift**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-888: **State v. Mayo**. Petition of appellant for further review overruled on February 14, 2005, as filed out of time.

No. A-04-891: **State v. Welch**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-904: **Pofahl v. Clarke**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-905: **State v. Witmer**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-908: **State ex rel. Wagner v. Caswell, Bell & Hillison**. Petition of appellants for further review overruled on March 16, 2005.

No. A-04-911: **Pawlak v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-925: **State v. Rickert**. Petition of appellant for further review overruled on February 16, 2005.

No. A-04-950: **State v. Onouye**. Petition of appellant for further review overruled on May 18, 2005.

No. A-04-956: **Tyler v. Schmidt**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-968: **State v. Shade**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-969: **State v. Colangelo**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-975: **State v. Jones**. Petition of appellant for further review overruled on April 1, 2005, as filed out of time.

No. A-04-977: **Moore v. Witthoff**. Petition of appellant for further review overruled on May 25, 2005.

Nos. A-04-1001, A-04-1002: **State v. McCardle**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1004: **In re Application A-18174**. Petition of appellants for further review overruled on December 15, 2004.

No. A-04-1012: **State v. Smothers**. Petition of appellant for further review overruled on March 16, 2005.

No. A-04-1022: **State v. Stott**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1031: **State v. Buggs**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-1033: **Pratt v. State Patrol**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-1051: **State v. McSwine**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-1058: **State v. Lamp**. Petition of appellant for further review overruled on March 23, 2005.

No. A-04-1059: **Kubik v. Ensz**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1074: **State v. Kelly**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1106: **State v. Robinson**. Petition of appellant for further review overruled on March 30, 2005.

No. A-04-1107: **Crofutt v. State Patrol**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-1116: **State v. Uden**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1180: **Blair v. Richardson**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-1194: **State v. Hauck**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1221: **Norris-Sykes v. Sykes**. Petition of appellant for further review overruled on February 23, 2005, as untimely filed.

No. A-04-1231: **State v. Dixon**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-1262: **State v. Smith**, 13 Neb. App. 477 (2005). Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1309: **State v. Goings**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1359: **Dyer v. Health & Human Servs**. Petition of appellant for further review overruled on February 16, 2005.

No. A-04-1371: **State v. Jenkins**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1423: **State v. Herngren**. Petition of appellant for further review overruled on April 20, 2005.

No. A-05-047: **Martin v. Board of Parole**. Petition of appellant for further review overruled on June 8, 2005.

No. A-05-067: **Martinez v. Douglas County**. Petition of appellant for further review overruled on May 18, 2005.

No. S-05-098: **Frain v. Portsche**. Petition of appellant for further review sustained on April 27, 2005.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY R. BENZEL, APPELLANT.
689 N.W.2d 852

Filed December 23, 2004. No. S-02-1492.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **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 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Effectiveness of Counsel: Proof: Presumptions.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
6. **Effectiveness of Counsel: Proof.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
7. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence

and questions of fact, including witness credibility and the weight to be given a witness' testimony.

8. **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.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jeffrey R. Benzel, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HENDRY, C.J., WRIGHT, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY and MOORE, Judges.

MILLER-LERMAN, J.

I. NATURE OF CASE

Jeffrey R. Benzel was convicted by a jury in 1984 of the first degree murder of Terry Atkinson, the attempted first degree murder of Kim Christensen, use of a firearm to commit a felony, and possession of a firearm by a felon. Although we reversed for resentencing, Benzel's convictions were otherwise affirmed on appeal to this court. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000). After an evidentiary hearing, the district court for Hall County denied Benzel's motion for postconviction relief on December 4, 2002. Benzel appeals.

II. STATEMENT OF FACTS

The facts of the underlying case were described in this court's opinion in the direct appeal as follows:

> The evidence reveals the defendant admitted shooting the decedent, Terry Atkinson, with a .357 Magnum on December 12, 1983. According to Lorene Golle, the defendant's girl friend, she, the defendant, and a friend had gone to the Atkinson-Christensen house on December [12] to purchase drugs. Prior to going, Lorene informed the defendant she had already paid Kim Christensen, the decedent's girl friend, for the drugs the preceding Friday night, December 9, although

she admitted in court she actually had not. En route to the house on December 12, the defendant told Lorene, "If I don't get what we came here for, someone's going to get dropped."

When Lorene and the defendant entered the house, Lorene asked to use the bathroom and borrow a brush. Kim showed her to the bathroom and asked what had happened to Lorene, as she appeared to have been beaten around the face. Kim left the bathroom as the defendant approached, wanting to talk to Lorene. The defendant entered, shut the door, and then Kim heard "a racket" in the bathroom, with Lorene shouting and some banging against the walls.

Terry came from the living room and twice told Lorene and the defendant to leave. The defendant grabbed Lorene and started pushing her toward the front door. Before pushing Lorene out, the defendant said he wanted to talk to Kim about being paid for the drugs. After Lorene left, Kim testified the defendant turned, grabbed her, and pointed a gun at her head, which prompted Terry to go to his bedroom where he kept a shotgun. The defendant followed and tried to kick the bedroom door in. When he could not, he returned to the living room, again grabbed Kim and put the gun to her head. He then told her, "Do you want to see something go on here? Do you want to see something happen, huh?" and then, "Better yet," and pointed the gun straight out in the direction of the bedroom, and said, "If your old man comes out and does what I think he's doing, he's going to be a dead man." As the decedent returned from the bedroom, defendant shot him in the mouth, and the victim fell to the floor.

The defendant then stood 5 or 6 feet from Kim, with his legs spread and both hands on the gun straight out "like that," as she crouched by the living room sofa. She heard the gun click and saw it (the cylinder) go around. She heard three more clicks and saw the defendant "looking at the gun like this," and then he ran from the house.

The defendant claims that only after the decedent returned to the living room with the shotgun leveled at him did he pull his gun and shoot the decedent in self-defense.

State v. Benzel, 220 Neb. 466, 468-70, 370 N.W.2d 501, 506 (1985).

At trial, Benzel denied having put a gun to Christensen's head or attempting to shoot her. Benzel also testified that at the time he shot Atkinson, Benzel was standing near the front door on his way out of the house rather than sitting next to Christensen on the sofa, as Christensen had testified. On direct appeal, Benzel raised issues regarding sufficiency of the evidence, jury selection, prosecutorial misconduct, and sentencing. This court rejected most of Benzel's arguments and affirmed his convictions but vacated his sentence on the attempted murder count and remanded the cause for resentencing on that count.

Benzel filed a motion for postconviction relief on September 3, 1993. Benzel subsequently made various amendments to the motion, and a hearing was held and evidence adduced on Benzel's third amended motion on September 27 and 28, 2001, and April 2, 2002. During the postconviction hearing, leave was granted for Benzel to further amend his motion. Benzel's fourth amended motion for postconviction relief, the operative motion in this case, was filed November 18, 2002. In the motion, Benzel made various claims of ineffective assistance of counsel at trial and on direct appeal, including: failure to investigate, consult with, retain, and utilize expert testimony; failure with respect to various jury instructions; failure to challenge various evidentiary rulings; failure to challenge prosecutorial misconduct; failure to challenge the credibility of various witnesses for the prosecution; and failure to challenge errors in the sentence enhancement proceedings.

At the postconviction evidentiary hearing, Benzel presented testimony of witnesses to support his assertion that trial counsel failed to properly investigate and use expert testimony. Dr. Robert Bux, a medical examiner, testified that he had reviewed the autopsy report, autopsy photographs, and relevant portions of the testimony and evidence from the original trial. Based on this review, he opined that the bullet traveled through Atkinson's head from front to back, going slightly right to left and slightly downward. Bux also opined that at the time Benzel shot Atkinson, Benzel was standing, which was consistent with Benzel's testimony at trial, rather than sitting, as Christensen had testified. However, Bux also testified that there were various additional questions he would have wanted answered by the witnesses in order to determine what occurred and that he did not know various

factors which might have been relevant to such a determination, including the location and position of Atkinson's body, the dimensions of the room, and where bullet fragments were found. Bux conceded on cross-examination that if more information were developed, his opinion might change.

Following Bux's testimony, the State called Dr. Jerry Jones, a pathologist, as a witness. Jones testified that he also had reviewed the autopsy report and relevant evidence and testimony from the trial. Contrary to Bux's testimony, Jones opined that the evidence was consistent with Christensen's testimony and was inconsistent with Benzel's testimony. Jones also testified that the person in the best position to opine on the bullet trajectory would be the pathologist who directly observed the angles at autopsy and that an opinion formed without such observation involves speculation. Jones noted that the pathologist who performed the autopsy had died before the original trial.

Benzel presented testimony regarding the gun he had used to shoot Atkinson. Benzel testified at trial and at the postconviction hearing that he had disposed of the gun shortly after the shooting. The gun had not been recovered by the time of the postconviction hearing. In the postconviction proceeding, Benzel presented the deposition of Lucien Haag, a criminalist. Haag had reviewed various documents and materials from the trial, including depositions, testimony, police reports, photographs, and physical evidence. Haag testified regarding various examinations he would have conducted upon the gun used by Benzel if it had been recovered. He stated that such tests could have provided information relevant to the case, including information either supporting or refuting Christensen's assertion that the gun had misfired when Benzel attempted to shoot her after the gun had properly fired when Benzel shot Atkinson. Haag also noted that the examination of additional ammunition to determine if it was degraded would be helpful. Without having examined the gun, he opined that assuming the gun were fully loaded, it was very unlikely to have several misfires following a successful fire. Haag was asked, "Now, can you tell me without an examination of the gun itself, and maybe perhaps the cartridges of the gun, can an opinion be stated within a reasonable degree of certainty that a revolver misfired?" Haag replied, "No, no."

At the postconviction hearing, the State presented the testimony of Mark Bohaty, a State Patrol officer assigned to firearms examinations. Bohaty had reviewed Haag's deposition and the testimony of various trial witnesses. Bohaty opined that it was possible that Benzel's gun could have had several misfires following a single successful firing, as Christensen had testified at trial. He described a number of reasons that such an event could have occurred. At Benzel's original trial, another State Patrol firearms examiner had given similar testimony regarding how a gun might misfire after a successful fire.

Benzel also presented the postconviction testimony of a private investigator who testified regarding investigative work that was not done that he believed would have been helpful in Benzel's case. Benzel's original trial counsel and Benzel himself also testified at the postconviction hearing regarding the manner in which trial counsel conducted Benzel's defense.

The State presented testimony at the postconviction hearing in addition to the testimony of Jones and Bohaty. Bradley Brush, a Grand Island police officer who investigated the shooting in 1983, testified regarding the investigation that was undertaken at that time. Brush's investigation included the observation of scarring on the ceiling tile of the Atkinson-Christensen house and debris from the scarring which had fallen on the kitchen counter. Brush also testified that within the year preceding the postconviction hearing, he had returned to the house where the shooting had occurred to take a measurement of the ceiling height and to retrieve material from the ceiling tile. A forensic chemist testified that material found on a bullet recovered from the scene of the shooting matched material taken from the kitchen ceiling.

Following the evidentiary hearings, the parties submitted briefs to the district court. On December 4, 2002, the court entered an 85-page opinion and order rejecting Benzel's claims and denying postconviction relief. The court made various findings in rejecting Benzel's claims. These included a finding that the physical evidence did not support Benzel's description of the shooting and was consistent with Christensen's testimony. The court also noted that the gun Benzel used to shoot Atkinson had not been retrieved and that Benzel's expert at postconviction stated that it would have been important to examine the gun before being able to

opine whether the condition of the gun supported the testimony of either Benzel or Christensen. The court concluded that, even assuming that trial counsel's failure to investigate and present expert testimony was deficient performance, Benzel had not shown prejudice caused by such failure because he failed to demonstrate a reasonable probability that the result of the trial would have been different had such testimony been presented. The court rejected each of Benzel's claims relating to jury instructions because either the instructions given were correct statements of law or Benzel had not shown prejudice caused by the giving or the omission of any instruction. The court rejected each of Benzel's claims relating to evidentiary issues because either the evidentiary ruling was correct or Benzel failed to show prejudice caused by admission of the evidence. The court rejected Benzel's claims relating to prosecutorial misconduct and examination of prosecution witnesses because Benzel failed to show prejudice resulting from these events or counsel's alleged deficiencies. Finally, the court concluded that Benzel could not properly challenge his prior convictions in the sentence enhancement proceeding. Having rejected Benzel's claims, the court denied postconviction relief. Benzel appeals the denial.

III. ASSIGNMENTS OF ERROR

In a brief prepared by counsel, Benzel asserts that the district court erred in denying postconviction relief and failing to find that trial and direct appeal counsel had provided ineffective assistance in the following respects: (1) failing to "investigate, consult with, retain, and utilize expert testimony"; (2) failing to ensure that the jury was properly instructed; (3) failing to challenge certain evidentiary rulings; (4) failing to challenge prosecutorial misconduct; and (5) failing to challenge the credibility of key prosecution witnesses.

In a supplemental pro se brief, Benzel asserts that the district court erred in (1) ruling that Benzel could not challenge the constitutionality of prior convictions used in the sentence enhancement phase of the trial and failing to consider Benzel's challenges to such prior convictions, (2) failing to find that trial counsel provided ineffective assistance by failing to challenge prior convictions used in sentence enhancement, and (3) failing

to find that trial counsel provided ineffective assistance in examining witnesses.

IV. STANDARDS OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

V. ANALYSIS

1. Ineffective Assistance of Counsel

Most of Benzel's assignments of error relate to the district court's rejection of his various claims of ineffective assistance of counsel. We will therefore first set forth the standards regarding claims of ineffective assistance of counsel which are applicable to all such assignments of error and then separately analyze each of Benzel's claims.

[4] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *McHenry, supra*. The two prongs of this test,

deficient performance and prejudice, may be addressed in either order. *Id.*

[5,6] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id.* When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

(a) Failure to Investigate and to Utilize Expert Testimony

Benzel's first claim of ineffective assistance of counsel is that trial counsel failed to adequately investigate in order to develop and utilize expert testimony that would have been helpful to his defense. We agree with the district court's determination that Benzel has failed to establish prejudice with respect to this claim.

Benzel's main argument with respect to expert testimony is that counsel could have presented expert testimony that would have supported his version of the events surrounding his shooting of Atkinson and would have discredited Christensen's testimony regarding such events. Both Christensen and Benzel testified at trial, and although their stories were similar in certain respects, they differed in respects that were potentially relevant to whether Benzel was acting in self-defense and whether Benzel attempted to shoot Christensen. In summary, Christensen testified that Benzel was seated next to her on the living room couch when he shot Atkinson, who was standing in the bedroom door. In contrast, Benzel testified that he was heading toward the front door to leave the house when Atkinson raised his shotgun to his shoulder and that Benzel thereafter shot Atkinson. Christensen testified that after Benzel shot Atkinson, he turned the gun on her and tried to shoot her but that the gun did not fire. Benzel denied attempting to shoot Christensen.

At the postconviction hearing, Benzel presented expert testimony referred to above which, he asserted, supported his story and disproved Christensen's story. Such testimony concerned, inter alia, the trajectory of the bullet that killed Atkinson and the

functioning of the gun. Benzel asserted that trial counsel was ineffective for having failed to adequately investigate and discover such expert evidence and for having failed to present it at trial.

The district court determined that Benzel failed to show that he was prejudiced by trial counsel's purported failure to discover and present such expert testimony. After hearing the evidence, the court discounted the reliability of the expert evidence Benzel presented at the postconviction hearing. The court noted that the opinion of Benzel's expert pathologist regarding the trajectory of the bullet was based solely on a review of autopsy reports and photographs and testimony presented at the original trial and that the expert relied on his own speculation rather than the findings of the pathologist who conducted the autopsy. The court also noted that Benzel's expert testified only that the misfiring of the gun when Benzel allegedly attempted to shoot Christensen was "highly improbable." The expert conceded that the gun itself would need to be examined to better support either version of events, but Benzel had disposed of the gun after the shooting and it had never been found. The court further noted that the State presented expert testimony at the postconviction hearing regarding bullet trajectory which supported Christensen's story and contradicted Benzel's and that both at trial and at the postconviction hearing, the State presented expert testimony that various circumstances could have caused the gun to misfire as Christensen had described. The court noted the "powerful and overwhelming evidence of [Benzel's] guilt" that was presented at trial and concluded that Benzel had failed to show prejudice due to trial counsel's purported failure to develop and present expert testimony.

[7] Benzel argues, inter alia, that it was not appropriate for the district court to weigh the credibility of the expert testimony he presented in the postconviction hearing, that instead the court should have decided that such evidence should be presented to a jury in a new trial, and that the jury should have been allowed to give whatever weight it chose to the testimony. However, we have held that in an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). Therefore, it was not

inappropriate for the district court to assess the credibility and weight of the expert testimony presented in this postconviction evidentiary hearing. Furthermore, the district court considered such testimony in the context of determining whether failure to develop such testimony and present such evidence constituted ineffective assistance of counsel. A defendant claiming ineffective counsel must demonstrate, inter alia, a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). The district court in this case examined the expert testimony presented by Benzel in the postconviction evidentiary hearing and appropriately determined that the expert testimony was not of a nature that would have caused a different result. We find no error in the district court's determination that Benzel failed to establish prejudice resulting from trial counsel's failure to develop and present such evidence, and we therefore reject this claim of ineffective assistance of counsel.

(b) Failure to Ensure That Jury Was Properly Instructed

Benzel asserts that the district court erred in rejecting his claims that trial counsel was ineffective for failing to properly challenge certain jury instructions and for failing to ensure that other instructions were given. Specifically, Benzel asserts that the trial court gave erroneous jury instructions regarding self-defense, malice, and flight, as well as an erroneous step instruction. He also asserts that the trial court failed to charge the jury regarding criminal intent. We conclude that the district court in this postconviction action did not err in rejecting Benzel's claims of ineffective counsel because either the instructions given were correct statements of law or the giving or failure to give the instructions at issue did not prejudice Benzel's defense.

(i) Self-Defense Instruction

Benzel argued that the self-defense instruction given at trial was erroneous because it did not instruct on when the duty to retreat attaches and because it did not define the phrase "deadly force." The district court in this postconviction action noted that the self-defense instruction given at trial mirrored the language of NJI Crim. 14.33 in effect at the time of the trial. The court concluded

that the instruction correctly stated the law with respect to the duty to retreat. The court further determined that the omission of a definition of "deadly force" was not prejudicial to Benzel because the jury obviously did not believe Benzel's story about self-defense.

(ii) Malice Instruction

Benzel argued that instruction No. 7 defining "malice" was erroneous because it used a definition no longer used by Nebraska courts. He also argued that the trial court erred in failing to include malice as an element of second degree murder. The district court in this postconviction action concluded that although the definition of "malice" given by the trial court was no longer included in the current pattern jury instruction, the previous version of the instruction had not been held to be incorrect and that the definition given at trial was a correct statement of law. The court also noted that because Benzel was convicted of first degree murder, it could be assumed the jury followed the step instruction and did not consider the charge of second degree murder, and that therefore, any misstatement regarding the second degree murder instruction was not prejudicial to Benzel. The court similarly rejected Benzel's claims regarding error in the manslaughter instruction because it could be assumed that the jury did not consider the charge of manslaughter.

(iii) Flight Instruction

Benzel argued that the trial court improperly instructed the jury on flight because the instruction improperly shifted the burden to Benzel to explain his reasons for departure. The postconviction court rejected Benzel's claim because the instruction given at trial was a correct statement of law.

(iv) Step Instruction

Benzel argued that the trial court erred in giving a step instruction on first degree murder, second degree murder, and manslaughter because the jury should have been allowed to consider the lesser offenses before rejecting the charge of first degree murder. The postconviction court concluded that the step instruction as given was not erroneous and cited recent cases including *State v. Myers*, 258 Neb. 300, 315, 603 N.W.2d 378, 390 (1999), in which we stated, "Step instructions which require consideration

of the most serious crime charged before consideration of lesser-included offenses are not erroneous."

(v) Criminal Intent Instruction

Benzel asserts that the trial court erred in failing to give NJI Crim. 14.11 or a similar instruction on criminal intent. The post-conviction court determined that the failure to instruct on criminal intent was not prejudicial to Benzel, because Benzel's defense was that his shooting of Atkinson was intentional but justified as self-defense and Benzel had not asserted at trial or on appeal that the shooting was not intentional.

(vi) Resolution

We have examined each of Benzel's arguments related to jury instructions and determine that the district court did not err in ruling that Benzel has failed to establish his claims of ineffective assistance of counsel with respect to these jury instruction issues. Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). In this regard, we note that we have stated that a defendant convicted of first degree murder could not have been prejudiced by error in the instructions on second degree murder and manslaughter because under a step instruction, the jury would not have reached the issues of second degree murder and manslaughter. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). We agree with the district court's determinations that certain of the jury instructions questioned by Benzel correctly stated the law and were not misleading and that therefore trial counsel was not ineffective for failing to object to such instructions. We also agree that Benzel has not established that he was prejudiced by the giving or failure to give any of the questioned jury instructions. The district court therefore did not err in rejecting these claims of ineffective assistance of counsel.

(c) Failure to Challenge Evidentiary Rulings

Benzel asserts that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by failing to properly challenge various evidentiary rulings. Such evidentiary rulings related to the testimony of (1) Francis Fastenau, a neighbor of

Atkinson and Christensen; (2) Benzel's girl friend, Lorene Golle, regarding her broken ribs; (3) police Capt. Gene Watson, regarding statements made by Benzel's friend, Joe McCarthy; and (4) State Patrol Investigator Chris Blubaugh, regarding Golle's veracity as an informant.

(i) Francis Fastenau

After Benzel left the Atkinson-Christensen house, Christensen ran to Fastenau's house. At Fastenau's house, Christensen placed a 911 emergency dispatch call. Fastenau was called to testify and was asked to recount what Christensen had said on the 911 call. Fastenau testified that Christensen told the 911 operator that Benzel had put a gun to her head and had attempted to shoot her. Benzel claimed during postconviction proceedings that a tape recording of the 911 call revealed that Christensen did not say this.

Benzel argued that counsel was ineffective for failing to assign error on appeal to the trial court's overruling of Benzel's hearsay objection to Fastenau's testimony. He also argued that counsel should have objected on a "best evidence" basis because the 911 tape was the best evidence of what Christensen said to the 911 operator. The postconviction court concluded that Fastenau's testimony was admissible because Christensen's statement to Fastenau was an excited utterance. Although it concluded that the trial court had erred by giving an erroneous limiting instruction to the jury in which it stated that the testimony could be used only for the purpose of supporting Christensen's testimony, the postconviction court found no prejudice to Benzel from the erroneous limiting instruction because it benefited Benzel, presumably because the jury was instructed to not consider Fastenau's testimony as substantive proof that Benzel had done what Christensen said he had done. The postconviction court also concluded that the best evidence rule was inapplicable to Fastenau's testimony because the State was not attempting to prove the contents of the 911 tape but instead was attempting to prove what Christensen had said to Fastenau.

(ii) Lorene Golle

Benzel argued that trial counsel was ineffective for failing to object to certain testimony given by Benzel's girl friend, Golle. At one point during her testimony, Golle was asked a question

about Benzel's consumption of alcohol on the night of the shooting. After responding to the question, Golle added, "My ribs were broke so I wanted to drink." Benzel argued that trial counsel should have objected to this testimony as prior bad act evidence because it characterized Benzel as a violent person. See Neb. Rev. Stat. § 27-404(2) (Reissue 1995). The postconviction court determined that Benzel failed to show how this testimony was prejudicial to him. We agree that the testimony was not prejudicial to Benzel and further that such testimony was not "prior bad act evidence" because, although Golle said that her ribs were broken, she did not state that Benzel had broken her ribs.

(iii) Capt. Gene Watson

Benzel claimed trial counsel was ineffective for failing to object to certain testimony by a police officer regarding statements made by a friend of Benzel's, McCarthy, who was with Benzel and Golle when they went to the Atkinson-Christensen house. McCarthy waited in the car when Benzel and Golle went into the house. Watson, of the Grand Island Police Department, testified at trial that he talked to McCarthy a few hours after the shooting and that when he asked McCarthy whose idea it was to go to the house, McCarthy said that it was Benzel's idea. McCarthy testified at trial that he had no recollection regarding whose idea it was to go to the house. Benzel argued that a limiting instruction should have been given in connection with Watson's testimony and that the jury should have been instructed to use such testimony only to impeach McCarthy. He also argued that in its closing argument, the prosecution urged the jury to use Watson's testimony as substantive evidence that it was Benzel's idea to go to the house. In analyzing Benzel's assignment of error relative to the admission of Watson's testimony, we are aware that ordinarily, the erroneous admission of evidence in a criminal case is considered prejudicial unless the State proves the error was harmless. See *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Further, as we read the district court's order, it appears that the postconviction court was aware of this principle as it considered Benzel's assignment of error relative to the admission of evidence as it pertained to the adequacy of counsel. The postconviction court concluded that although the admission of Watson's

testimony may have been erroneous, Benzel failed to show prejudice because the evidence against Benzel was so compelling that a conviction would have resulted even without the testimony.

(iv) State Patrol Investigator Chris Blubaugh

Benzel claimed that direct appeal counsel provided ineffective assistance by failing to appeal the trial court's sustaining the State's objection to certain testimony Benzel wished to elicit from Blubaugh, a State Patrol investigator. Blubaugh testified that Golle had contacted him after being jailed in connection with the Atkinson shooting incident and that she sought to gain release from jail in exchange for providing information. He testified that he had known Golle for a few years prior to the shooting and that contacts during that time involved Golle's exchanging information for help with her legal problems. On cross-examination, defense counsel attempted to ask Blubaugh whether Golle made a "habit" of contacting the authorities to try to help her get out of trouble. The trial court upheld the State's objection. The postconviction court concluded that Benzel failed to show prejudice because he failed to establish what Blubaugh would have testified and how such testimony would have helped his defense.

(v) Resolution

We agree with the district court's determination that with respect to each of these issues, Benzel failed to show prejudice from counsel's alleged deficient performance and that with respect to Golle's testimony regarding her broken ribs, such testimony was not "prior bad act evidence." We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of trial and appellate counsel.

(d) Failure to Challenge Prosecutorial Misconduct

Benzel asserts that the district court erred in rejecting his claims that counsel provided ineffective assistance by failing to effectively challenge various instances of prosecutorial misconduct. The alleged prosecutorial misconduct included (1) making inappropriate statements during closing argument, (2) eliciting McCarthy's testimony for the sole purpose of later discrediting it, and (3) making inappropriate remarks during its opening statement.

(i) Closing Argument

Benzel asserted that in closing argument, the prosecutor made various expressions of personal opinion. He argues that such statements included an inappropriate "expert" opinion to the effect that Atkinson's teeth deflected the bullet and changed its path. The postconviction court concluded that Benzel failed to show prejudice because the prosecutor's closing argument did not unduly mislead or influence the jury. The court noted that the prosecutor prefaced his remarks by stating that such remarks were not evidence and need not be accepted by the jury if they were not supported by the evidence.

(ii) Joe McCarthy's Testimony

At trial, the prosecution elicited testimony from McCarthy to the effect that it was Golle's idea to go to the Atkinson-Christensen house. Benzel asserted that the prosecution's sole purpose in eliciting this testimony was to later impeach McCarthy with Watson's testimony that McCarthy told Watson that it was Benzel's idea to go to the Atkinson-Christensen house. Benzel argued that this sequence amounted to prosecutorial misconduct. Similar to its determination with respect to counsel's purported failure to challenge the evidentiary ruling on Watson's testimony, the postconviction court determined that Benzel failed to show prejudice because the evidence against Benzel was so compelling that conviction would have resulted even without the testimony that it was Benzel's idea to go to the house.

(iii) Opening Statement

In its opening statement, the State said that "there are some witnesses that will be presented that have had an opportunity to talk to . . . Benzel. Close, personal friends of him [sic] have talked to him since the incident and so forth." Benzel argued that this statement was an inappropriate remark suggesting that McCarthy and Golle had contrived with Benzel in preparing his defense. Benzel also asserted that the prosecution made statements to the effect that Benzel had been to the Atkinson-Christensen house before the night of the shooting but that such statements were contrary to the evidence. At the close of the State's evidence, defense counsel moved for mistrial based on the prosecutor's opening statement. The motion was overruled, and the issue was

not raised on appeal. Benzel argued that appellate counsel was ineffective for failing to raise the issue on appeal. The postconviction court concluded that Benzel failed to show prejudice in light of the fact that prior to opening statements, the court had instructed the jury that comments made in opening statements were not to be considered as evidence.

(iv) Resolution

We agree with the district court's rulings with respect to each of these issues, including the ruling that Benzel failed to establish prejudice from counsel's alleged deficient performance. We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of trial and appellate counsel.

(e) Failure to Challenge Credibility of Key Witnesses

Benzel asserts that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by failing to properly challenge the testimony of key prosecution witnesses including Christensen, Golle, and McCarthy. Benzel asserts, inter alia, (1) that the audiotape of Christensen's 911 call should have been used to confront Christensen with the fact that during the call she did not make the statements that Fastenau claimed to have heard, (2) that Christensen should have been asked questions about Atkinson's behavior before the shooting which Benzel asserts would have shown that Atkinson was the aggressor, and (3) that other evidence could have been used to discredit certain testimony by Golle and by McCarthy. The district court in this postconviction action generally determined that counsel made reasonable tactical and strategic decisions to not pursue the lines of questioning suggested by Benzel and noted that such questioning may have led to information adverse to Benzel.

In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.* The district court did not err in its determination that trial counsel made reasonable strategic decisions to not pursue the lines of questioning suggested by Benzel in this

postconviction proceeding. We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of counsel.

2. Use of Prior Conviction to Enhance Sentence

Benzel asserts various challenges to a prior conviction which was used to enhance his sentence in the present case and argues that trial counsel did not effectively challenge use of the prior conviction in the sentence enhancement proceeding. The district court noted that because the record established that Benzel was represented by counsel at the time of the prior conviction, the conviction was not subject to challenge in the sentence enhancement proceeding. The court further noted that trial counsel had attempted unsuccessfully to challenge use of the prior conviction at the enhancement proceeding and had unsuccessfully raised the issue in the direct appeal.

[8] 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. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). Issues regarding the use of prior convictions were previously litigated and decided in favor of the State in Benzel's direct appeal wherein we stated that any objections to the validity of prior convictions, other than effective assistance of counsel or waiver thereof, should have been raised in the direct appeal of such prior convictions. See *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

In the present appeal, Benzel makes various arguments regarding the validity of a prior conviction, including an argument regarding the constitutionality of the statute which formed the basis of his prior conviction. To the extent that Benzel's arguments in this proceeding are the same as those he presented in his direct appeal, the present postconviction action cannot be used to secure an additional review of the same issues. See *Perry, supra*. To the extent Benzel's arguments raise new issues regarding the validity of his prior conviction, our statement in the direct appeal, that objections to the validity of prior convictions are to be raised in the direct appeal of such prior convictions, applies equally to such new arguments. See *Benzel, supra*. Therefore Benzel could

not properly have used such arguments to challenge his prior conviction in the sentence enhancement proceeding and because such challenges would have been inappropriate, counsel was not ineffective for any failure to raise such challenges. The district court in this postconviction action did not err in rejecting Benzel's claims regarding use of the prior conviction to enhance his sentence and counsel's purported failure to challenge such use.

VI. CONCLUSION

The district court did not err in rejecting Benzel's postconviction claims of ineffective assistance of counsel and his claims relating to the validity of a prior conviction used to enhance his sentence. We therefore affirm the district court's order denying Benzel's motion for postconviction relief.

AFFIRMED.

CONNOLLY and STEPHAN, JJ., not participating.

JEFF SWOBODA, APPELLEE, V. VOLKMAN PLUMBING AND EMCASCO INSURANCE COMPANY, APPELLANTS.

690 N.W.2d 166

Filed December 23, 2004. No. S-04-593.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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.** 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.
5. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes

eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

6. ____: ____. For purposes of workers' compensation, repetitive trauma injuries are tested under the statutory definition of accident, as opposed to occupational disease.
7. **Workers' Compensation: Proof.** Three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
8. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
9. **Workers' Compensation: Time: Proof: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, the time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.
10. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

Jenny L. Panko and Brenda S. Spilker, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Edward F. Pohren, of Dwyer, Smith, Grimm, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

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

STEPHAN, J.

Jeff Swoboda sought workers' compensation benefits for injuries allegedly arising out of and in the course of his employment with Volkman Plumbing. Swoboda sought benefits for injuries to his head and neck resulting from an accident on April 21, 2000, and for injuries to both shoulders allegedly resulting from repetitive trauma. The trial judge found that the head and neck injuries were compensable, but concluded that Swoboda had failed to prove a work-related accident and resulting injuries to his

shoulders. A review panel of the compensation court reversed in part, and remanded for further proceedings. Volkman Plumbing and its insurance carrier, EMCASCO Insurance Company (collectively Volkman), perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTS

Swoboda began working at Volkman Plumbing in Norfolk, Nebraska, in 1990. He was initially employed as a plumber's helper but soon became a foreman. His duties included overhead ceiling work, which involved heavy lifting. He regularly performed such overhead activities for at least 3 or 4 hours a day, and sometimes for an entire shift.

On April 21, 2000, Swoboda sustained an injury to his head and neck when he struck his head on a sprinkler head while climbing a ladder. Swoboda sought medical treatment for the injury and was off work from May 1 until September 9, 2000. He initially returned to work without restrictions. However, Swoboda continued to experience chronic headaches and pain, and in March 2002, specifically due to the neck injury, his physician imposed physical restrictions of "no overhead work or prolonged cervical flexion." In April, his physician opined that there was no ongoing treatment that would significantly improve Swoboda's symptoms and concluded that he had a 5-percent permanent partial impairment of the body as a whole. A second physician had earlier made the same assessment, noting that Swoboda suffered "persistent myofascial symptoms and functional deficit." The trial court concluded that as a result of this injury, Swoboda had sustained a 45-percent loss in earning capacity.

Swoboda also claimed compensation for work-related injuries to both shoulders. Swoboda went on a fishing trip to Canada over the Labor Day weekend of 2001. He is right handed, and holds a fishing pole in his right hand while reeling with his left. Swoboda slept in a tent while on the fishing trip. One morning when he awoke, he experienced extreme pain and was unable to move his left arm. When he returned to Nebraska, he made an appointment with Dr. Gregory Nunez for September 6, 2001. Prior to the fishing

trip, Swoboda had experienced aching in his right shoulder and "a little" pain in his left shoulder. In his words, he had had "problems with both shoulders for [years]" and his left shoulder had "hurt for a [year] or two."

After examining Swoboda, Nunez ordered an MRI and referred him to Dr. Terry Schwab, an orthopedic surgeon, who began treating him on September 20, 2001. A report of an MRI performed on the left shoulder on September 12, 2001, indicated a "full thickness tear" in the supraspinatus tendon adjacent to an area of calcification. After his first examination of Swoboda, Schwab noted his disagreement with this diagnosis. Schwab's initial diagnosis was "[p]artial rotator cuff tear/tend[o]nitis left shoulder with calcific tend[o]nitis." During his second office visit, Swoboda told Schwab that he was surprised that his left shoulder was injured because his right shoulder "had been the one that had bothered me." Schwab thereafter began treating Swoboda's right shoulder as well.

On October 10, 2001, Dr. Dean Wampler reviewed Swoboda's medical records and opined:

> Overhead work duties are the most likely cause for . . . Swoboda's underlying shoulder problem. [O]nce advanced degenerative disease and tendon thinning are present, relatively minimal activities can result in tendon tear. I believe . . . Swoboda's supraspinatus tear occurred during his fishing trip from a change in activities or different shoulder stress of sleeping on the ground.

(Emphasis in original.)

Due to his shoulder injuries, Swoboda was off work from September 21 through October 7, 2001. He returned to work briefly, but then experienced additional problems with his left shoulder on November 9, and did not return to work thereafter. On November 20, Schwab performed an arthroscopy of Swoboda's left shoulder with subacromial decompression. His postoperative diagnosis was "[c]alcific tendon, rotator cuff tendonitis, left shoulder." The rotator cuff was observed during surgery and, contrary to the initial diagnosis, "showed no tears throughout its entirety." On December 5, 2001, Schwab performed an arthroscopy of Swoboda's right shoulder with subacromial decompression. His postoperative diagnosis was "[c]alcific rotator cuff tendonitis

of the right shoulder," and no tears were noted. Schwab opined that Swoboda's bilateral shoulder problems were caused by the overhead work he did in the course of his employment.

Following trial, a single judge of the compensation court found that as a result of the April 21, 2000, accident, Swoboda was temporarily totally disabled from May 1 through September 9, 2000, and "thereafter sustained a 45 percent loss in earning capacity," entitling him to workers' compensation benefits. With respect to the alleged shoulder injuries, the court determined that there was a conflict in the opinions of Schwab and Wampler regarding causation. It further found that Swoboda had failed to prove that the injuries to his shoulders occurred "suddenly and violently" because there was no particular incident at work that had caused him pain. The court concluded that Volkman was entitled to a credit for benefits it voluntarily paid to Swoboda for his right shoulder injury against amounts it owed Swoboda for the April 2000 injuries to his head and neck.

Swoboda timely appealed to a three-judge review panel of the compensation court, and Volkman cross-appealed. The review panel interpreted the trial court's order as citing two grounds as a basis for its conclusion that Swoboda failed to show compensable injuries to his shoulders: (1) that there was a conflict in the medical evidence as to causation and (2) that the injuries did not occur suddenly and violently because they did not manifest at work. The review panel concluded that the opinions of Schwab and Wampler were not in conflict because the rotator cuff tear referred to by Wampler was subsequently proved by Schwab's surgery not to exist, leaving both physicians in agreement that the shoulder problems were caused by Swoboda's work activities. The panel thus determined that the trial judge's finding with respect to conflicting evidence on medical causation was clearly erroneous and should be reversed and the cause remanded

> for the trier of fact to determine whether the reversal by the panel of this factual finding serves, in and of itself, to sway the fact finder's ultimate conclusion on medical causation. In other words, it remains for the fact finder to weigh and assess the evidence on causation.

With respect to the requirement that a compensable accident involving repetitive trauma occurs "suddenly and violently," the

review panel determined, contrary to the findings of the single judge, that "the record clearly establishes that [Swoboda] satisfied this element relative to both upper extremities." The review panel held that Swoboda was not required "to identify a specific event or activity that occurred at work that caused him to stop working." The panel determined that the "record does not support a finding that Swoboda's injury did not occur at an identifiable point in time" and that the "evidence is also uncontroverted that [Swoboda] sought medical treatment and missed work."

The review panel also concluded that the Workers' Compensation Court lacked jurisdiction to award a credit against liability on a compensable claim for payments made on a noncompensable claim. Finally, it concluded that there was sufficient evidence to support the trial court's finding that Swoboda suffered a 45-percent loss of earning capacity as a result of the April 2000 injury.

ASSIGNMENTS OF ERROR

Volkman assigns, restated, that (1) Swoboda failed to meet the requirements of a repetitive trauma accident with regard to his left and right shoulder conditions, (2) the review panel erred in reversing the trial court's decision regarding Swoboda's left and right shoulder injuries on the basis that there was not a dispute as to medical causation, (3) it was entitled to a credit against amounts owed for the April 2000 injury for indemnity and medical payments voluntarily made on the noncompensable shoulder injuries, and (4) the trial court erred in awarding Swoboda a 45-percent loss of earning power for the injuries sustained in the April 2000 accident.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004); *Veatch v. American Tool, supra.*

ANALYSIS

Head and Neck Injuries

[4,5] Volkman does not contest the compensability of the head and neck injuries which Swoboda sustained in the accident in April 2000, but contends that the compensation court erred in determining that Swoboda sustained a 45-percent loss of earning capacity as a result of such injuries. 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. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Frauendorfer v. Lindsay Mfg. Co., supra.*

Volkman argues that Swoboda continued to work as a plumber after the 2000 accident and was able to perform his duties until after the 2001 shoulder injuries. The record reflects that Swoboda returned to work without restrictions after the 2000 accident. However, there is also evidence in the record that Swoboda continued to suffer pain while performing his work duties after the 2000 accident. In addition, his physician eventually restricted

Swoboda's ability to do overhead work as a result of his head and neck injuries. Two physicians also essentially opined that no further treatment could alleviate his symptoms. Because Swoboda's work as a plumber involved substantial overhead activities and there is evidence that he was not qualified to perform many other work functions, we conclude that there is competent evidence in the record to support the trial court's finding of a 45-percent loss of earning capacity.

Bilateral Shoulder Injuries

After noting what he perceived as a conflict in the medical evidence on the issue of whether the degenerative condition of Swoboda's shoulders was caused by the heavy overhead work required by his employment with Volkman Plumbing, the trial judge stated:

> The Court has reviewed in detail the medical evidence concerning causation, and the Court finds by a preponderance of the evidence that [Swoboda] has failed to prove that he sustained an accident and injury as defined by § 48-151(2) to his left and right shoulders and arms that arose out of and in the course and scope of his employment on September 6, 2001. *Specifically, the Court finds that [Swoboda] failed to prove an accident that happened "suddenly and violently producing at the time objective symptoms."*

(Emphasis supplied.) The review panel noted that the conflict in medical evidence served "as at least one basis for [the trial judge's] rejecting [Swoboda's] claim" and concluded that the finding by the trial judge was clearly erroneous because "the opinions of both Dr. Wampler and Dr. Schwab are uniform as to the cause of [Swoboda's] shoulder injuries." In assigning error to this determination, Volkman does not contend that the medical opinions were in conflict, but, rather, argues that this issue was not a basis for the trial court's determination that the injuries were not compensable. Volkman contends that the trial court's determination was based solely upon its finding that Swoboda failed to show he met the suddenly and violently element of a repetitive trauma claim.

While we agree with the review panel that the medical causation evidence is not in conflict, we also agree with Volkman

that the conflict perceived by the trial judge was not the basis for denial of Swoboda's claim. As we read the award, compensation was denied because the trial judge specifically found that Swoboda did not prove an accident which happened suddenly and violently and produced objective symptoms. We therefore accept Volkman's argument that this is the sole dispositive issue as to whether Swoboda is entitled to workers' compensation for his shoulder injuries.

[6,7] For purposes of workers' compensation, repetitive trauma injuries are tested under the statutory definition of accident, as opposed to occupational disease. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003) (citing cases). The Nebraska Workers' Compensation Act defines an accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 2002). 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. *Dawes v. Wittrock Sandblasting & Painting, supra*. Only the second of these elements is at issue in this case.

[8,9] In considering the "suddenly and violently" element of accidental injury in the context of repetitive trauma injuries, we have recognized that given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Dawes v. Wittrock Sandblasting & Painting, supra*; *Sandel v. Packaging Co. of* America, 211 Neb. 149, 317 N.W.2d 910 (1982). Thus, for purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999); *Frank v. A & L Insulation*, 256 Neb. 898,

594 N.W.2d 586 (1999). The time of an accident is sufficiently definite " 'if *either* the cause is reasonably limited in time *or* the result materializes at an identifiable point.' " (Emphasis omitted.) *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. at 556, 667 N.W.2d at 193; *Sandel v. Packaging Co. of America, supra.*

This disjunctive test is consistent with general principles of workers' compensation. In his treatise, Professor Larson explains the concept of "time-definiteness" with respect to an accidental injury as "applying to either the cause or the result." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 50.01 at 50.02 (2000). Professor Larson states that the necessary "suddenness" of the accident may be found either in a sudden cause, such as a relatively brief exposure to toxic fumes, or in a sudden result, such as a sudden collapse on a particular day after repeated exposure to a work trauma. *Id.* Understood in this light, our test allows the requisite suddenness to be found if either the cause of an accident is sudden, i.e., occurring within a reasonably limited time, or if the effect or result of the accident is sudden, i.e., occurring at an identifiable point in time. Volkman argues on appeal that Swoboda failed to meet either of these tests and thus did not prove an accident occurring suddenly and violently.

Volkman reads *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), to require that the identifiable point in time at which the result of an accident materializes must occur during working hours in order for there to be a compensable accidental injury. It argues that as to Swoboda's left shoulder injury, "[t]here was never any work event requiring him to miss work and seek treatment. Rather, he suffered the disabling left shoulder symptoms during the fishing trip . . . ." Brief for appellants at 20. With respect to Swoboda's right shoulder, Volkman argues that there was never a point where his injury manifested at work and prevented him from doing work activities.

This argument reads too much into *Dawes*. In that opinion, we simply stated that "Dawes seriously injured his back in October 1999 and stopped work to seek medical treatment." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. at 531, 667 N.W.2d at 177. *Dawes* does not hold that the identifiable point in time at which the injurious result of repetitive trauma materializes must fall within the employee's working hours in

order to be compensable, and we decline to impose such a requirement here. There is no logical reason to condition compensability upon the worker being "on the clock" at the identifiable point in time when an injury resulting from work-related trauma materializes. Thus, the fact that Swoboda's shoulder injury materialized at a point in time when he was engaged in recreational activities unrelated to his work does not in and of itself defeat his claim for compensation. The record reflects that Swoboda sought medical treatment for his left shoulder as soon as he returned from the fishing trip.

Volkman also argues that because Swoboda did not stop work and seek medical treatment for his right shoulder, the injury was not compensable. In *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), an employee undergoing a functional capacity evaluation for an unrelated injury mentioned to his physician that he was experiencing problems with his right shoulder. We found this sufficient to meet the requirement that an employee seek medical treatment for the condition for which he seeks compensation. Thus, although Swoboda did not initially make an appointment with his doctor in connection with his right shoulder injury, the record reflects that he sought medical treatment for that injury as well as the injury to his left shoulder. Within a short time thereafter, he discontinued his employment.

For these reasons, we agree with the review panel that the record conclusively establishes that Swoboda's bilateral shoulder injuries, which were the result of repetitive work-related trauma, materialized at an identifiable point after which he sought medical treatment and discontinued his employment. Because this satisfies the disjunctive test for whether accidental injury occurs suddenly and violently, we need not consider whether the cause of such injuries is reasonably limited in time. See *Dawes v. Wittrock Sandblasting & Painting, supra.*

CREDIT

[10] Volkman assigns error to the determination by the review panel that the trial judge lacked jurisdiction to award Volkman a credit against its liability on the compensable head and neck injury claim for amounts which it voluntarily paid on the right shoulder injury claim before the trial judge determined that such

claim was not compensable. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002); *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). Because we determine that all of Swoboda's injuries were compensable, the issue of whether the trial court had jurisdiction to order the credit is moot, and we therefore do not address it.

CONCLUSION

The review panel did not err in affirming the trial judge's finding that Swoboda sustained a 45-percent loss of earning capacity as a result of the April 21, 2000, accident in which he sustained injuries to his head and neck. The review panel correctly determined that the trial judge erred in finding that Swoboda failed to prove that his shoulder injuries were caused by an accident occurring suddenly and violently within the meaning of the Nebraska Workers' Compensation Act. Because we conclude that resolution of the latter issue establishes that the bilateral shoulder injuries are compensable, we modify the judgment of the review panel by directing that upon remand to the trial judge, the only issues remaining for resolution are those pertaining to the workers' compensation benefits which Swoboda is to be awarded for the shoulder injuries.

AFFIRMED AS MODIFIED.

24TH & DODGE LIMITED PARTNERSHIP, APPELLANT, V. ACCEPTANCE INSURANCE COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

690 N.W.2d 769

Filed January 7, 2005. No. S-02-447.

1. **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.

2. ____: ____. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of the inferior court.
4. **Real Estate: Mortgages: Liens: Security Interests: Title.** Pursuant to Neb. Rev. Stat. § 76-276 (Reissue 2003), a mortgagee's status is that of a lienholder. Under this theory, the mortgagee is regarded as owning a security interest in real estate only and the mortgagor retains both the legal title and right of possession.
5. **Real Estate: Mortgages: Security Interests: Title.** Pursuant to Neb. Rev. Stat. § 76-276 (Reissue 2003), although title and possession remain in the mortgagor, mortgagees may create a security interest in rents arising from real estate.
6. **Contracts: Security Interests.** Pursuant to Neb. Rev. Stat. § 52-1705 (Reissue 2004), a security interest in rents may be enforced by the recovery of rents as part of the enforcement of an assignment of rents instrument.
7. **Mortgages: Foreclosure.** A mortgagee in possession before foreclosure must not only account for rents and profits received, but also for rents which the mortgagee could have received with reasonable diligence.
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. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
10. **Actions: Equity: Foreclosure: Trusts: Deeds: Sales.** A party may bring an action in equity to set aside a foreclosure sale conducted under a power of sale in a trust deed.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Boecker, L.L.C., for appellant.

Patrick B. Griffin, of Kutak Rock, L.L.P., for appellees Acceptance Insurance Company and Acceptance Insurance Companies.

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

McCORMACK, J.

NATURE OF CASE

The appellant, 24th & Dodge Limited Partnership (24th & Dodge), brought an action for wrongful declaration of default and wrongful foreclosure by the appellees, Acceptance Insurance Company, a Nebraska corporation (Nebraska Acceptance); Acceptance Insurance Companies, a Delaware corporation doing business in Nebraska (Delaware Acceptance); and John J. Jolley, Jr., trustee. The appellees demurred to 24th & Dodge's third amended petition (petition). The demurrer was sustained, and after 24th & Dodge elected to stand on its petition, the district court for Douglas County dismissed the petition with prejudice.

BACKGROUND

In November 1995, Delaware Acceptance loaned 24th & Dodge approximately $9,747,548.33. The loan was secured by a deed of trust encumbering real property commonly known as the 24th & Dodge building, which is located in Omaha, Nebraska, and by an assignment of rents from that property. In September 1996, the aforementioned loan was refinanced and Nebraska Acceptance acquired an interest in the property pursuant to an amendment to the deed of trust.

On an unidentified date, Nebraska Acceptance declared 24th & Dodge in default of its loan obligation. Jolley, as trustee, recorded a notice of default and an amended notice of default with the Douglas County register of deeds. A notice of sale indicating the property would be sold on June 4, 2001, was then published. Delaware Acceptance, through Jolley as trustee, asserted that the outstanding balance of the loan was $8,777,526.92, which included a principal balance of $8,766,877.50. A temporary restraining order was sought by 24th & Dodge to halt the foreclosure, but the request was denied and the property was sold at the trustee's sale for $12 million.

Subsequently, 24th & Dodge brought suit against the appellees alleging the wrongful foreclosure of the 24th & Dodge property. In its petition, 24th & Dodge alleged that it was not in default of its loan obligation at the time of Jolley's notice of default. It alleged that Delaware Acceptance had collected the

rents from First National Bank of Omaha (tenant) under the assignment of rents and further that such rents satisfied the monthly principal payment. Alternatively, 24th & Dodge alleged that if it was in default of its loan obligation, any actual or technical noncompliance with the loan arose out of the negligence or misconduct of Delaware Acceptance and Nebraska Acceptance by failing to collect all rents owed by the tenant under the assignment of rents. Finally, 24th & Dodge asserted that pursuant to Neb. Rev. Stat. § 76-1006(2) (Reissue 2003), the appellees were required to give notice of the outstanding balance on the underlying loan obligation, including unpaid principal and interest. It is 24th & Dodge's claim that the appellees failed to disclose the accurate amount owing, which prevented it from curing any technical or actual default.

The appellees demurred to 24th & Dodge's petition, claiming that the petition does not state facts sufficient to constitute a cause of action. On January 10, 2002, the district court sustained the demurrer without providing legal reasoning or discussion of the court's rationale. Although given leave to amend, 24th & Dodge elected to stand on its petition. On March 28, the district court entered an order dismissing the case with prejudice. On April 22, 24th & Dodge filed this appeal, and we moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

The sole assignment of error by 24th & Dodge is that the district court erred in failing to find that its petition stated facts sufficient to constitute a cause of action.

STANDARD OF REVIEW

[1] 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. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367

(2004); *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003).

[2,3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of the inferior court. *Kubik v. Kubik, supra.*

ANALYSIS

MORTGAGEE'S FAILURE TO COLLECT RENT

In its petition, 24th & Dodge alleged that Delaware Acceptance and Nebraska Acceptance wrongfully foreclosed the mortgage because Delaware Acceptance and Nebraska Acceptance failed to "recover sums owed to 24th & Dodge by the tenant . . . which such sums Delaware Acceptance and Nebraska Acceptance were obligated to recover by virtue of their acting upon an assignment of rents."

[4-6] In Nebraska, a mortgagee's status is that of a lienholder. See Neb. Rev. Stat. § 76-276 (Reissue 2003). Under this theory, the mortgagee is regarded as owning a security interest in real estate only and the mortgagor retains both the legal title and right of possession. *Id.* See, also, Restatement (Third) of Property: Mortgages § 4.1 (1997). Although title and possession remain in the mortgagor, mortgagees may create a security interest in rents arising from real estate. § 76-276. The security interest may be enforced by the recovery of rents as part of the enforcement of an assignment of rents instrument. Neb. Rev. Stat. § 52-1705 (Reissue 2004).

[7] There is little Nebraska case law regarding the collection of rents under an assignment of rents agreement. We have, however, made it clear that a mortgagee in possession before foreclosure must not only account for rents and profits received, but also for rents which the mortgagee could have received with reasonable diligence. *Hays v. Christiansen*, 105 Neb. 586, 181 N.W. 379 (1921). See, also, *Kemp v. Small*, 32 Neb. 318, 49 N.W. 169

(1891); *Comstock v. Michael*, 17 Neb. 288, 22 N.W. 549 (1885) (superseded by statute on other grounds).

In the present case, 24th & Dodge has not alleged that Delaware Acceptance and Nebraska Acceptance were in possession of the mortgaged property. Rather, 24th & Dodge alleges that they "were obligated to recover [the rents] by virtue of their acting upon an assignment of rents for the subject property." Brief for appellant at 9. Thus, the issue presented is whether a mortgagee who acts upon the assignment of rents without taking actual possession of the mortgaged property must account for rents which could have been collected from the tenant.

There is no case law cited by 24th & Dodge which supports its position that a mortgagee becomes obligated to account for rents merely by acting upon an assignment of rents. In *In re Olick*, 221 B.R. 146 (Bankr. E.D. Pa. 1998), the U.S. Bankruptcy Court for the Eastern District of Pennsylvania addressed a claim that debtors were entitled to certain credits and offsets based upon the mortgagee's failure to collect rents and otherwise manage the mortgaged property pursuant to its alleged responsibilities under an assignment of rents agreement. The *In re Olick* court concluded that the mortgagee was not obligated to collect rents. The relevant portion of the *In re Olick* opinion is set forth below:

> Our research reveals that the cases most supportive of the Debtors' theory concern the duties of mortgagees-in-possession. Mortgagees-in-possession are held to be *quasi* trustees, with a duty to collect and account for rents. . . . "The mortgagee in possession has a duty to collect the rents and profits which accrue during his occupancy and apply them to the mortgage debt. . . . Moreover, the mortgagor is entitled to an accounting from his mortgagee who has taken possession . . . .". . .
>
> . . . In the present case, however, the Debtors have not met their burden of showing that [the creditor, National Penn Bank (NPB),] should be held to this high standard since they failed to establish that NPB was a mortgagee-in-possession. To explain, a creditor becomes a mortgagee-in-possession when it takes actual possession and control over a debtor's property. . . . In the present case, however, the record is devoid of evidence that NPB took actual

> possession of the Commercial Property. NPB exercised its rights under the assignment of rents by sending the tenant a letter demanding the payment thereof, and, upon the tenant's noncompliance, NPB garnished the rent. By sending the demand letter to the tenant, NPB was deemed to have taken constructive possession of the property . . . thus permitting NPB to collect the rents, but the applicable case law appears to require a creditor to take actual possession to achieve the status of mortgagee-in-possession.

(Citations omitted.) (Emphasis omitted.) 221 B.R. at 156-57.

We agree with the *In re Olick* court that in order for a mortgagee to become accountable for rents under an assignment of rents, the mortgagee must be in actual possession of the mortgaged property, as opposed to merely collecting rents under an assignment of rents. This view is not only consistent with our holding in *Hays v. Christiansen*, 105 Neb. 586, 181 N.W. 379 (1921), it is also consistent with case law from other jurisdictions and secondary sources. See, *U.S. Fid. & Guar. v. Old Orchard Plaza*, 284 Ill. App. 3d 765, 773, 672 N.E.2d 876, 882 (1996) ("[p]ossession means 'physical possession of the mortgaged real estate to the same extent to which the mortgagor, absent the foreclosure, would have been entitled to physical possession' "); *Prince v. Brown*, 856 P.2d 589 (Okla. App. 1993) (explaining mortgagee who receives rents does not become mortgagee in possession unless he has also entered into continued physical possession and exercises exclusive operating control of property); 54A Am. Jur. 2d *Mortgages* § 213 (1996) (defining possession as exclusive actual control over property to exclusion of mortgagor); 55 Am. Jur. 2d, *supra*, § 1319 (stating general rule that one who takes possession of property as mortgagee must account for rents).

There is no allegation in the present case that Delaware Acceptance and Nebraska Acceptance were in actual possession of the physical property to the exclusion of 24th & Dodge. Consequently, we conclude that Delaware Acceptance and Nebraska Acceptance had no duty to collect rents after exercising their rights under the assignment of rents. Therefore, 24th & Dodge's allegation that Delaware Acceptance and Nebraska

Acceptance were negligent in their failure to collect rents under the assignment of rents did not state a cause of action.

§ 76-1006

Next, 24th & Dodge argues that the appellees failed to give proper notice of the outstanding balance on the underlying loan obligation as required by § 76-1006. According to 24th & Dodge, § 76-1006(2)(b) required Jolley, as trustee, "to provide a statement of the amount of the entire unpaid principal sum secured by the trust deed, together with interest and a per diem [rate]." Brief for appellant at 17.

Section 76-1006(1) sets out what the notice of default must contain. In *Gilroy v. Ryberg*, 266 Neb. 617, 628, 667 N.W.2d 544, 555 (2003), we stated:

> Every notice of default, regardless of the type of property secured by the trust deed, must identify "the trust deed by stating the name of the trustor named therein and giving the book and page or computer system reference where the same is recorded and a description of the trust property, containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and *setting forth the nature of such breach* and of [the trustee's] election to sell or cause to be sold such property to satisfy the obligation."

(Emphasis in original.) In contrast, the additional procedural requirements set forth in § 76-1006(2) apply to the foreclosure by trustee's sale of trust property used in farming operations by the borrower outside of any incorporated city.

In *Gilroy*, we rejected the argument that the requirements in § 76-1006(2) were subsumed in the requirements of § 76-1006(1). In reaching that conclusion, we noted that had the Legislature intended the requirements in § 76-1006(2) to be incorporated into the requirements in § 76-1006(1), it would have been unnecessary for it to set out the additional requirements in § 76-1006(2) for trust deeds on agricultural property. *Id.*

[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.

Mitchell v. French, 267 Neb. 656, 676 N.W.2d 361 (2004); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). The language of § 76-1006(2) clearly states that it applies to property used for farming which is not located within an incorporated city. The property involved in the present dispute was a building located in downtown Omaha and leased to a commercial tenant. As such, it did not fall within the parameters of § 76-1006(2). Because § 76-1006(2) was inapplicable, it was only necessary for the appellees to comply with the requirements set forth in § 76-1006(1). That section does not require a mortgagee to set forth the outstanding loan obligation in the notice of default. Therefore, we find that 24th & Dodge's argument on this issue is without merit.

DEMURRER

[9] At issue in this case is whether 24th & Dodge's petition alleged facts sufficient to withstand the appellees' demurrer. The petition of 24th & Dodge predated the recent enactment of the Nebraska Rules of Pleading in Civil Actions. Therefore, in order to survive the appellees' demurrer, the petition needed to contain "a statement of the facts constituting the cause of action." Neb. Rev. Stat. § 25-804(2) (Reissue 1995) (repealed by 2002 Neb. Laws 876, operative January 1, 2003). A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003).

[10] The petition of 24th & Dodge alleged that its property was wrongfully foreclosed upon by the appellees. Nebraska has recognized that a party may bring an action in equity to set aside a foreclosure sale conducted under a power of sale in a trust deed. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Here, 24th & Dodge claims that the sale was wrongful, but does not seek to set aside the sale in equity. Rather, it claims that it has a common-law action for damages suffered as a result of the alleged wrongful foreclosure of its property. This court has not, as yet, recognized a common-law action for wrongful foreclosure. It is unnecessary, however, for us to determine whether we would recognize such an action in this case because here, based

on a careful examination of the petition, we determine that 24th & Dodge has not alleged facts upon which we would recognize a cause of action for wrongful foreclosure.

CONCLUSION

For the reasons set forth above, we determine that 24th & Dodge's claim that Delaware Acceptance and Nebraska Acceptance were negligent in their failure to collect rents under the assignment of rents did not state a cause of action because Delaware Acceptance and Nebraska Acceptance were not in actual possession of the mortgaged property. We further determine that § 76-1006(2), and specifically the requirement therein that the notice of default set forth the amount of the unpaid principal sum, is inapplicable for the reasons set forth in this opinion. We finally determine as a matter of law that the facts set forth in 24th & Dodge's petition, if proved, do not state a cause of action for wrongful foreclosure. Because 24th & Dodge exercised its right to stand on its petition after being given an opportunity to amend, we conclude the district court did not err in sustaining the appellees' demurrer and in dismissing the action. The district court's dismissal of the petition is, therefore, affirmed.

AFFIRMED.

LUKE A. KELLOGG, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

690 N.W.2d 574

Filed January 7, 2005. No. S-03-603.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Actions: Pleadings.** In determining whether a complaint states a cause of action, a court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.
3. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.

4. **Pleadings.** A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.
5. **Motions to Dismiss: Pleadings.** Attachments to the complaint become a part of the complaint, and the court may consider those documents in ruling on a motion to dismiss.
6. **Constitutional Law: Civil Rights: Jurisdiction: States.** The states have concurrent jurisdiction to entertain actions under 42 U.S.C. § 1983 (2000); however, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983.
7. **Actions: Administrative Law: Jurisdiction: Civil Rights: Prisoners.** The exhaustion requirement of 42 U.S.C. § 1997e(a) (2000) is not jurisdictional, and prisoners are required to exhaust available administrative remedies before bringing an action under 42 U.S.C. § 1983 (2000).
8. **Administrative Law.** The exhaustion requirement of 42 U.S.C. § 1997e(a) (2000) is an affirmative defense.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Johnson County, DANIEL BRYAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Sue Ellen Wall, of Wall Law Office, for appellant.

Luke A. Kellogg, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant Luke A. Kellogg is currently committed to the Nebraska Department of Correctional Services (DCS) and, at all times relevant hereto, was incarcerated at the Tecumseh State Correctional Institution. On February 21, 2003, Kellogg filed a complaint in the district court for Johnson County against the DCS and the following DCS employees, individually and in their official capacities: Harold W. Clarke, Randy Kohl, Frank Hopkins, Mike Kenney, Dallen Johnsen, and Richard Elliott (collectively appellees). In his complaint, Kellogg alleged that

appellees had violated his constitutional and statutory rights and privileges under Neb. Rev. Stat. § 20-148 (Reissue 1997); title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131 to 12165 (2000 & Supp. I 2001); and 42 U.S.C. § 1983 (2000). Appellees filed a motion to dismiss. Following a hearing, the district court sustained appellees' motion and dismissed Kellogg's complaint without leave to replead.

Kellogg appealed to the Nebraska Court of Appeals. Appellees filed a motion for summary affirmance under Neb. Ct. R. of Prac. 7B(2) (rev. 2001), in which they acknowledged having been served individually and officially. The Court of Appeals granted the motion and summarily affirmed without an opinion the district court's order of dismissal. Kellogg filed a petition for further review which this court granted.

For the reasons explained below, we determine that Kellogg has abandoned his purported claim under § 20-148 and that his ADA claim has been rendered moot. With regard to Kellogg's § 1983 claim, we conclude that Kellogg's complaint is sufficient to state a cognizable claim and in particular that, contrary to appellees' assertion on appeal, Kellogg has sufficiently alleged that he has exhausted his available administrative remedies. We therefore determine that the district court erred in dismissing Kellogg's complaint and that the Court of Appeals erred in affirming the order of the district court. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

STATEMENT OF FACTS

On February 21, 2003, Kellogg filed a complaint against appellees. As we read the complaint, Kellogg alleges that appellees violated his rights under § 20-148 (generally pertaining to deprivation of constitutional and statutory rights, privileges, or immunities); title II of the ADA (generally prohibiting discrimination in denial of benefits by public entity due to disability); and § 1983 (generally providing for civil action to enforce civil rights). In support of these three claims, Kellogg has made a variety of allegations, some of which we summarize. Kellogg claims

to suffer from multiple sclerosis, "chronic urinary retention," and "hypospadious [sic]." Kellogg alleges that appellees have subjected him to "bodily harm" due to their "arbitrariness," "negligence," and "deliberate indifference" concerning Kellogg's medical conditions. He further alleges that due to these conditions, he has been unable to provide a urine sample within the given time period required to comply with the DCS' drug testing program. Kellogg alleges that appellees have discriminated against him by failing to provide him with reasonable accommodations to meet his alleged disabilities. In this regard, Kellogg claims that he had requested and been denied accommodation in the form of a blood test as an alternative to providing a urine sample.

Kellogg further alleges that due to his inability to provide a urine sample to permit him to comply with the drug testing requirement, and, pursuant to Drug Offender Classification Policy Directive 00-013 (DOC rules), he has been classified as a drug offender and disciplined several times therefor. The "discipline" imposed includes suspension of visitation and telephone privileges. Kellogg also alleges he has lost "good time." Finally, Kellogg alleges that he "has exhausted available administrative remedies pursuant to Title 42 U.S.C.A. §§1997(e) [sic]." For relief, Kellogg seeks, inter alia, a temporary restraining order, injunctive and declaratory relief, restoration of good time, restoration of telephone and visitation privileges, and $1.5 million in compensatory damages.

Because this action was filed after January 1, 2003, it is governed by the new rules for notice pleading, which apply to all "civil actions filed on or after January 1, 2003." See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). In response to Kellogg's complaint, appellees filed a motion to dismiss, claiming that the court lacked jurisdiction and that Kellogg's complaint failed to state a claim for relief. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). On April 16, 2003, a hearing was held in district court on appellees' motion to dismiss. In an order filed April 24, the district court determined, inter alia, that Kellogg had stated no claims for which he might be entitled to relief and dismissed Kellogg's action without leave to replead.

Kellogg appealed the district court's order to the Court of Appeals. On appeal, Kellogg claimed essentially that the district

court erred in dismissing his ADA and § 1983 claims. On October 24, 2003, appellees moved for summary affirmance of the district court's order. On April 15, 2004, without opinion, the Court of Appeals sustained the motion.

Kellogg filed a petition for further review, which this court granted. During oral argument before this court, the parties advised the court that during the pendency of appellate proceedings, Kellogg had been seen by a urologist and had been transferred from the Tecumseh State Correctional Institution to another DCS facility. The court was further advised that Kellogg's good time had been restored, his visitation privileges had been restored, and he had been "accommodated" with regard to his participation in the drug testing program.

ASSIGNMENT OF ERROR

In his petition for further review, Kellogg assigns two errors that we restate as one. Kellogg claims the Court of Appeals erred in sustaining appellees' motion for summary affirmance of the district court's order dismissing his complaint.

STANDARDS OF REVIEW

[1-3] As discussed above, this action was filed on February 21, 2003, and thus, we apply the new rules for notice pleading. See rule 1. This court has not previously discussed the standard of review for a motion to dismiss filed under rule 12(b). Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). As do the federal appellate courts, we will and do hereby review a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See *Maki v. Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004). See, also, *Pogge v. American Farm Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004). We are, however, " 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.' " See *Farm Credit Services v. American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (quoting *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868 (8th Cir. 2002)). Complaints should

be liberally construed in the plaintiff's favor and " 'should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Rucci v. City of Pacific*, 327 F.3d 651, 652 (8th Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

ANALYSIS

[4,5] Kellogg's complaint was dismissed by the district court pursuant to rule 12(b)(1) and (6). As a preliminary matter, we note that a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. Neb. Ct. R. of Pldg. in Civ. Actions 10(c) (rev. 2003). Thus, although we are limited in our review to the allegations contained in the complaint and any reasonable inferences that may be drawn therefrom, *Maki v. Allete, Inc., supra*, attachments to the complaint become a part of the complaint, and the court may consider those documents in ruling on a motion to dismiss, *Witzke v. Femal*, 376 F.3d 744 (7th Cir. 2004).

Taking the complaint and its attachments together, we turn to an assessment of the substance of Kellogg's claims as alleged in his complaint and we analyze his arguments on appeal.

With regard to his purported claim under § 20-148, we note that in his appeal before the Court of Appeals, Kellogg did not assign as error the district court's dismissal of his purported claim under § 20-148. By not challenging the district court's ruling as it related to § 20-148, Kellogg has abandoned this claim on appeal and we need not address Kellogg's claim under § 20-148. See *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

With regard to Kellogg's claim under title II of the ADA, we note that during oral argument the parties advised the court that during the pendency of these proceedings, Kellogg has been "accommodated" regarding his purported disability, in that he has been seen by a urologist and that, notwithstanding the persistence of DOC rules, Kellogg's visitation privileges have been restored. We also understand Kellogg's good time has been restored. We determine that the claim under title II of the ADA had been rendered moot. See *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004). As a result, we make no further comment on Kellogg's claim based upon title II of the ADA.

With regard to Kellogg's claim under § 1983, we note that in support of their successful motion for summary affirmance, appellees argue on appeal that Kellogg failed to state a claim and failed to exhaust his administrative remedies before bringing his § 1983 action and that therefore, his complaint was properly dismissed by the district court. On further review before this court, Kellogg argues that the Court of Appeals erred in affirming the district court's dismissal of his § 1983 claim. We determine that Kellogg has stated a cognizable claim under § 1983 and that, as discussed below in detail, his allegations of exhaustion meet the requirements of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (2000), and case law thereunder.

[6] Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983. *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). With regard to exhaustion, we note that "[o]rdinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court." See *Porter v. Nussle*, 534 U.S. 516, 523, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002). However, as stated in *Porter v. Nussle* and previously recognized by this court in *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002), pursuant to the PLRA, § 1997e(a), prisoners are required to exhaust administrative remedies before bringing an action under § 1983. In *Pratt v. Clarke*, 258 Neb. 402, 406, 604 N.W.2d 822, 825 (1999), *overruled on other grounds, Cole v. Isherwood, supra*, we described this requirement and stated as follows:

> On April 26, 1996, the [PLRA] was signed into law. Prior to the adoption of the PLRA, 42 U.S.C. § 1997e(a) (1994) granted district courts discretion to require a prisoner to exhaust administrative remedies, and a district court's dismissal for failure to exhaust was reviewed only for an abuse of discretion. See *Irwin v. Hawk*, 40 F.3d 347 (11th Cir. 1994). The PLRA now requires, inter alia, that prisoners

> exhaust administrative remedies prior to filing actions under § 1983 or any federal law. Specifically, 42 U.S.C. § 1997e(a) (Supp. III 1997) states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." As stated in *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998), "Congress enacted this mandatory exhaustion requirement in section 1997e(a) as part of the PLRA's effort to curtail frivolous and abusive prisoner litigation."

See, also, *Porter v. Nussle*, 534 U.S. at 524 (stating "exhaustion in cases covered by § 1997e(a) is now mandatory").

[7] We have previously recognized in a prisoner case that exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to § 1983. See *Cole v. Isherwood, supra*. In this regard, we observe that numerous federal courts of appeals have examined the issue of whether the language of § 1997e(a) should be read as indicating a jurisdictional bar rather than as a mere codification of administrative exhaustion requirements. The vast majority of federal appellate courts, both before and after the filing of the U.S. Supreme Court opinion in *Porter v. Nussle*, have concluded that the exhaustion requirement of § 1997e(a) is not jurisdictional. See, e.g., *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (10th Cir. 2003); *Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003); *Casanova v. Dubois*, 289 F.3d 142 (1st Cir. 2002); *Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002); *Ali v. District of Columbia*, 278 F.3d 1 (D.C. Cir. 2002); *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001); *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000), *cert. denied* 531 U.S. 1156, 121 S. Ct. 1106, 148 L. Ed. 2d 977 (2001); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999), *cert. denied* 532 U.S. 1065, 121 S. Ct. 2214, 150 L. Ed. 2d 208 (2001); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), *cert. denied* 528 U.S. 1074, 120 S. Ct. 787, 145 L. Ed. 2d 664 (2000), *overruled on other grounds, Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). We do not read *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002), as treating § 1997e(a) as

jurisdictional, and, therefore, we continue to adhere to our holding in *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002), that the exhaustion requirement of § 1997e(a) is not jurisdictional. To the extent that the recent case of *Mumin v. T-Netix Telephone Co.*, 13 Neb. App. 188, 690 N.W.2d 634 (2004), holds to the contrary, it is disapproved.

[8] In assessing the pleading consequences of the exhaustion requirement of § 1997e(a), the majority of federal appellate courts have recognized that the PLRA's exhaustion requirement is an affirmative defense. See *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (cases collected). We have previously so held in *Cole v. Isherwood*. In *Ray v. Kertes, supra*, the Court of Appeals for the Third Circuit referred to *Porter v. Nussle*, noted that the exhaustion requirement was not jurisdictional, and explored the burdens of pleading and proof occasioned by treating the exhaustion provision as an affirmative defense.

The *Ray v. Kertes* court recognized that in enacting the exhaustion requirement found in § 1997e(a), Congress had two primary concerns. The first was a desire to lessen the judicial burden of entertaining frivolous prisoner claims. The second was to reinforce the power of prison administrators to control prison problems by minimizing the interference of courts in matters of prison administration. The *Ray v. Kertes* court observed that these policies are not inconsistent with construing the exhaustion requirement of § 1997e(a) as an affirmative defense, whereby the burden of pleading and proving failure to exhaust is placed on the defendants. Referring to the expertise and resources available to prison officials, the *Ray v. Kertes* court noted that prison officials are best situated to articulate and show that a prisoner has failed to exhaust his or her administrative remedies. Thus, the *Ray v. Kertes* court observed that categorizing the exhaustion requirement as an affirmative defense with its customary burdens of pleading and proof is consistent with policy and fairness.

We note that § 1997e(c) provides for dismissal of a prisoner action sua sponte if the court is satisfied that the action (1) is frivolous, (2) is malicious, (3) fails to state a claim upon which relief can be granted, or (4) seeks monetary relief from a defendant who is immune from such relief. However, sua sponte dismissal on the basis of failure to exhaust is not listed in the PLRA.

In the instant case, Kellogg's action was dismissed not sua sponte, but, rather, as a result of a motion to dismiss filed by appellees. Within the federal circuits which recognize exhaustion as an affirmative defense, it has been acknowledged that a motion to dismiss based on failure to exhaust is not absolutely precluded. E.g., *Ray v. Kertes*, 285 F.3d 287, 295 n.8 (3d Cir. 2002). However, a complaint alleging exhaustion is ordinarily not vulnerable to a motion to dismiss based on a failure to plead exhaustion. Exhaustion can be explored by other procedural devices. In this regard, it has been observed by a federal appellate court which recognizes exhaustion as an affirmative defense that "no provision of the PLRA requires pleading exhaustion with particularity." *Ray v. Kertes*, 285 F.3d at 297. Contra *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1211 (10th Cir. 2003) (stating in federal circuit which rejects exhaustion as affirmative defense that "Congress, not this court, has required a prisoner to plead specific exhaustion information"). We agree with the federal appellate courts which have both concluded that exhaustion is an affirmative defense and declined to impose a heightened pleading requirement on a prisoner.

Given our conclusions that exhaustion of available administrative remedies under § 1997e(a) is not jurisdictional and further that exhaustion is an affirmative defense, we turn to the instant complaint which appellees claim on appeal should stand dismissed for failure to exhaust. In reviewing Kellogg's allegations in his complaint, we note that he states generally that he "has exhausted available administrative remedies pursuant to Title 42 U.S.C.A. §§ 1997(e) [sic]." Attached to the complaint, and thus considered a part thereof, see rule 10(c), are numbered exhibits which indicate Kellogg's efforts to administratively resolve his claims.

Regarding prisoners' civil rights claims, we have observed that various procedures are available to prisoners. In *Cole v. Isherwood*, 264 Neb. 985, 993, 653 N.W.2d 821, 828 (2002), we referred to *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), which we overruled on other grounds, and observed that an inmate has "a number of administrative remedies available to him which [should be] exhausted prior to filing [a] § 1983 action [including] Neb. Rev. Stat. §§ 83-4,111 and 83-4,135 through 83-4,139 (Reissue 1999) and 68 Neb. Admin. Code, ch. 2 (1994)."

In *Pratt v. Clarke, supra*, we noted that other remedies are not precluded. "In particular, 68 Neb. Admin. Code, ch. 2, § 005.01 (1994), stated: 'Claims against the [DCS] involving miscellaneous or tort claims for money damages may be filed pursuant to the State Tort Claims Act.' " 258 Neb. at 407, 604 N.W.2d at 826. In *Cole v. Isherwood*, we approved the statement in *Pratt v. Clarke* to the effect that prisoners in Nebraska must adhere to and exhaust available procedures before bringing a § 1983 claim. Our review of the instant complaint indicates that Kellogg has alleged that he has pursued available administrative remedies and that his allegations are sufficient to withstand a motion to dismiss.

Given the nature of the allegations in Kellogg's § 1983 claim, the district court erred in dismissing his complaint and the Court of Appeals erred in affirming this ruling.

CONCLUSION

The record demonstrates that Kellogg obtained service of process over appellees in both their official and individual capacities. The record further shows that Kellogg has abandoned his purported claim under § 20-148 and that Kellogg's ADA claim is moot. With regard to Kellogg's § 1983 claim, Kellogg has pleaded the exhaustion of his available administrative remedies under § 1997e(a) and a cognizable claim for relief, and we reject appellees' assertions to the contrary.

The district court erred when it dismissed Kellogg's complaint, and the Court of Appeals erred in affirming this order. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES G. FITL, APPELLEE, V. MARK STREK, DOING BUSINESS AS STAR CARDS OF SAN FRANCISCO, APPELLANT.
690 N.W.2d 605

Filed January 7, 2005. No. S-03-836.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
2. **Sales: Uniform Commercial Code: Notice: Time.** The notice requirement set forth in Neb. U.C.C. § 2-607(3)(a) (Reissue 2001) serves three purposes. It provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them.
3. **Fraud.** A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Joel M. Carney and James J. Bemis, Jr., of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Patrick M. Heng, of Raynor, Rensch & Pfeiffer, for appellee.

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

WRIGHT, J.

NATURE OF CASE

James G. Fitl purchased a baseball card from Mark Strek, doing business as Star Cards of San Francisco. When Fitl discovered that the baseball card had been altered and was of no value, he sued Strek for what he argued was the current fair market value of an unaltered version of the same card. Following a bench trial, judgment was entered against Strek in the amount of $17,750 plus costs. Strek appeals.

SCOPE OF REVIEW

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

FACTS

In September 1995, Fitl attended a sports card show in San Francisco, California, where Strek was an exhibitor. Fitl subsequently purchased from Strek a 1952 Mickey Mantle Topps baseball card for $17,750. According to Fitl, Strek represented that the card was in near mint condition. After Strek delivered the card to Fitl in Omaha, Nebraska, Fitl placed it in a safe-deposit box.

In May 1997, Fitl sent the baseball card to Professional Sports Authenticators (PSA), a grading service for sports cards that is located in Newport Beach, California. PSA reported to Fitl that the baseball card was ungradable because it had been discolored and doctored.

On May 29, 1997, Fitl wrote to Strek and indicated that he planned to pursue "legal methods" to resolve the matter. Strek replied that Fitl should have initiated a return of the baseball card in a timely fashion so that Strek could have confronted his source and remedied the situation. Strek asserted that a typical grace period for the unconditional return of a card was from 7 days to 1 month.

In August 1997, Fitl sent the baseball card to ASA Accugrade, Inc. (ASA), in Longwood, Florida, for a second opinion. ASA also concluded that the baseball card had been refinished and trimmed.

On September 8, 1997, Fitl sued Strek, alleging that Strek knew the baseball card had been recolored or otherwise altered and had concealed this fact from him. Fitl claimed he had reasonably relied upon Strek's status as a reputable sports card dealer. Strek's answer generally denied Fitl's allegations.

In a trial to the court, Fitl appeared with counsel and offered evidence. Strek was represented by counsel but did not appear or offer any evidence. Fitl testified that he was in San Francisco over the Labor Day weekend of 1995, where he met Strek at a sports card show. Fitl subsequently purchased from Strek a 1952 Mickey Mantle Topps baseball card and placed it in a safe-deposit box. In 1997, Fitl retrieved the baseball card and sent it to PSA, a sports card grading service.

Steve Orand testified that he had been a sports card collector for 27 years and that he bought, sold, and traded cards. He testified that PSA originated in 1996 or 1997 and was a leader in the sports card grading industry. He stated that PSA would not grade

an altered card because alteration would totally devalue the card. He opined that any touchup or trimming of a card would render the card valueless and that an altered card is worth no more than the paper on which it is printed.

Orand examined the baseball card in question the week before trial and said that the edges of the card had been trimmed and reglued. One spot on the front of the baseball card and a larger spot on the back had been repainted, which left the card with no value. He testified that the standard for sports memorabilia was a lifetime guarantee and that a reputable collector would stand behind what he sold and refund the money if an item were fake or had been altered.

The district court entered judgment for Fitl in the amount of $17,750 and costs. The court found that Fitl had notified Strek as soon as he realized the baseball card was altered and worthless and that Fitl had notified Strek of the defect within a reasonable time after its discovery. The court rejected Strek's theory that Fitl should have determined the authenticity of the baseball card immediately after it had been purchased.

ASSIGNMENT OF ERROR

Strek claims that the district court erred in determining that notification of the defective condition of the baseball card 2 years after the date of purchase was timely pursuant to Neb. U.C.C. § 2-607(3)(a) (Reissue 2001).

ANALYSIS

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). The district court found that Fitl had notified Strek within a reasonable time after discovery of the breach. Therefore, our review is whether the district court's finding as to the reasonableness of the notice was clearly erroneous.

Section 2-607(3)(a) states: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]" "What is a reasonable time for

taking any action depends on the nature, purpose and circumstances of such action." Neb. U.C.C. § 1-204(2) (Reissue 2001).

[2] The notice requirement set forth in § 2-607(3)(a) serves three purposes. It provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them. See *Cheyenne Mountain Bank v. Whetstone Corp.*, 787 P.2d 210 (Colo. App. 1990). "Whether the notice given is satisfactory and whether it is given within a reasonable time are generally questions of fact to be measured by all the circumstances of the case." *Id.* at 213.

In *Maybank v. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681 (1981), the court reviewed the policies behind the notice requirement. The most important one is to enable the seller "to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability." *Id.* at 134, 273 S.E.2d at 684. A second policy is to provide the seller "a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit." *Id.* A third policy, designated the "least compelling" by the court, is the same as the policy behind statutes of limitation: "to provide a seller with a terminal point in time for liability." *Id.* at 135, 273 S.E.2d at 684.

[3] Fitl purchased the baseball card in 1995 and immediately placed it in a safe-deposit box. Two years later, he retrieved the baseball card, had it appraised, and learned that it was of no value. Fitl testified that he had relied on Strek's position as a dealer of sports cards and on his representations that the baseball card was authentic. In *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000), we stated that a party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity. In order for Fitl to have determined that the baseball card had been altered, he would have been required to conduct an investigation. We find that he was not required to do so. Once Fitl learned that the baseball card had been altered, he gave notice to Strek.

As the court noted in *Maybank v. Kresge Co., supra*, one of the most important policies behind the notice requirement of North Carolina's equivalent to § 2-607(3)(a) is to allow the seller to cure

the breach by making adjustments or replacements to minimize the buyer's damages and the seller's liability. However, even if Fitl had learned immediately upon taking possession of the baseball card that it was not authentic and had notified Strek at that time, there is no evidence that Strek could have made any adjustment or taken any action that would have minimized his liability. In its altered condition, the baseball card was worthless.

Strek claimed via his correspondence to Fitl that if Strek had received notice earlier, he could have contacted the person who sold him the baseball card to determine the source of the alteration, but there is no evidence to support this allegation. In fact, Strek offered no evidence at trial. His letter is merely an assertion that is unsupported. Earlier notification would not have helped Strek prepare for negotiation or defend himself in a suit because the damage to Fitl could not be repaired. Thus, the policies behind the notice requirement, to allow the seller to correct a defect, to prepare for negotiation and litigation, and to protect against stale claims at a time beyond which an investigation can be completed, were not unfairly prejudiced by the lack of an earlier notice to Strek. Any problem Strek may have had with the party from whom he obtained the baseball card was a separate matter from his transaction with Fitl, and an investigation into the source of the altered card would not have minimized Fitl's damages.

Strek represented himself as a sports card dealer at a card show in San Francisco. After Fitl expressed interest in a specific baseball card, Strek contacted Fitl to sell him just such a card. Orand stated that a reputable dealer will stand behind what he sells and refund the money if an item is fake or has been altered. In the context of whether a rejection of goods was made in a reasonable amount of time, we have stated that "when there is no precise rule of law which governs, the question of what, under the circumstances of a particular case, is a reasonable amount of time is usually a question for the jury." See *Smith v. Paoli Popcorn Co.*, 255 Neb. 910, 917, 587 N.W.2d 660, 664 (1999).

The district court found that it was reasonable to give Strek notice of a defect 2 years after the purchase. This finding was not clearly erroneous. Pursuant to § 2-607(4), the burden is on the buyer to show a breach with respect to the goods accepted. Fitl presented evidence that the baseball card was not authentic, as he

had been led to believe by Strek's representations. Strek did not refute Fitl's evidence.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIAN J. MARSHALL, APPELLANT.
690 N.W.2d 593

Filed January 7, 2005. No. S-03-893.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **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.
4. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
6. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
7. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

9. **Pleadings.** A denial of a plea in bar involves a question of law.
10. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
11. **Double Jeopardy: Juries.** Under Neb. Const. art. I, § 12, in a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.
12. **Constitutional Law: Double Jeopardy.** The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, the defendant is entitled to go free if the trial fails to end in a final judgment.
13. **Constitutional Law: Double Jeopardy: Final Orders: New Trial.** Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.
14. **Constitutional Law: Double Jeopardy: Motions for Mistrial.** In cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. The issue in such cases is whether the mistrial terminated jeopardy and thus triggered the constitutional protection against double jeopardy as a bar to subsequent prosecution.
15. **Double Jeopardy: Motions for Mistrial.** Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.
16. **Motions for Mistrial: Final Orders: Postconviction: Appeal and Error.** A mistrial is required by manifest necessity where a criminal trial is flawed by a defect which could not be waived by the defendant's failure to object, and could be asserted on appeal or in a postconviction proceeding to overturn a final judgment of conviction.
17. **Juries: Discrimination.** Although peremptory challenges play a recognized role in reinforcing a defendant's right to trial by an impartial jury, they are not of federal constitutional dimension.
18. ___: ___. With respect to a state criminal prosecution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the right to peremptory challenges is denied or impaired only if the defendant does not receive that which state law provides.
19. **Criminal Law: Juries: Discrimination: Appeal and Error.** Depriving a defendant in a criminal proceeding of the peremptory challenges to which the defendant is statutorily entitled is structural error.
20. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Affirmed.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

In 1996, Damian J. Marshall was tried before a jury and convicted of second degree murder, attempted second degree murder, and two counts of using a firearm to commit a felony. His convictions were affirmed by this court on direct appeal. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). On January 31, 2003, Marshall filed a pro se motion for postconviction relief. The district court for Douglas County denied the motion without conducting an evidentiary hearing. Marshall appeals from that order.

FACTS

The facts underlying Marshall's convictions are set forth in detail in our opinion in *State v. Marshall, supra*, and need not be fully reiterated here. Rather, we summarize those facts which relate directly to this postconviction proceeding.

Prior to Marshall's jury trial and conviction, two mistrials were declared, resulting in the discharge of the two jury panels which had been sworn. The first jury selection occurred on January 30, 1996. The court called 24 prospective jurors for voir dire. Following voir dire, each party exercised six peremptory challenges. The remaining 12 jurors and a subsequently selected alternate were sworn.

During the noon recess, C.B., one of the 12 sworn jurors, advised the bailiff that he was not sure he could hear the case. C.B. was brought into chambers and questioned by the judge and counsel. C.B. stated that he had read about the case in the newspapers and that he had been charged with manslaughter 12 years earlier, but the charges were dismissed because "it was ruled self-defense." Upon questioning, C.B. indicated that he did not think his knowledge and personal experience would reflect on his ability to be a fair and impartial juror. The judge expressed concern about whether C.B. should be removed from the jury based upon his statements and requested counsel to bring case law on the subject after a recess.

When court reconvened, the judge advised counsel that he would have excused C.B. on his own motion during voir dire if the information about C.B.'s previous arrest and manslaughter charge had been disclosed at that time. The prosecutor presented the court with documents pertaining to the charges which had been filed against C.B., which documents disclosed that the case had progressed further than indicated by C.B. before it had been dismissed. The prosecutor thereafter made a motion for mistrial without prejudice. Marshall's trial counsel opposed the motion.

After further discussion with both counsel on the same day, the judge advised counsel that because of potential bias on the part of C.B., "in good conscience I simply can't let the trial progress." He thereafter sustained the State's motion for mistrial without prejudice and discharged the jury. The record reflects no discussion with respect to replacing C.B. with an alternate juror.

On March 1, 1996, Marshall filed a plea in bar alleging that the mistrial was granted in error and that another trial would subject him to double jeopardy. The motion was heard and taken under advisement on April 22, 1996. On the same day, the second jury selection was conducted. Thirty-six prospective jurors were randomly chosen for voir dire. At the conclusion of voir dire, the prosecution and Marshall each exercised 12 peremptory challenges and the remaining 12 jurors were sworn. After a recess, the judge and counsel met with one of the jurors who disclosed that he had formed an opinion about Marshall's guilt. He was excused from the jury. The judge then proposed to counsel that two jurors be selected from a pool of six prospective jurors in order to provide one alternate and another juror to replace the juror who was excused. A discussion ensued about whether a mistrial should be declared instead. The judge declared a mistrial without prejudice to the prosecution, stating that it "would be unfair to the defendant to proceed" and "further participation of this jury in this case would lead to a substantial miscarriage of justice." Defense counsel, who had argued that a mistrial was the correct procedure, did not object.

On June 25, 1996, defense counsel made an oral plea in bar with respect to the second mistrial. On that same date, the district court overruled both pleas in bar. No appeal was taken from that order. Later the same day, a third jury selection was conducted.

Thirty-six prospective jurors were randomly selected by the court for voir dire, each side exercised 12 peremptory challenges, and the jury was sworn. Thereafter, an alternate was selected and sworn and trial commenced. After the jury returned verdicts of guilty and sentences were imposed, Marshall filed his direct appeal.

Marshall's trial counsel did not represent him on appeal. His appellate counsel assigned 10 errors, including the granting of both mistrials and ineffective assistance of trial counsel. Appellate counsel argued that because the mistrials were erroneously granted, jeopardy attached, and that the trial court therefore erred in overruling Marshall's pleas in bar. We held that because Marshall did not file a timely appeal from the order denying his pleas in bar, we lacked jurisdiction to review the double jeopardy claim. We considered and rejected Marshall's contention that his trial counsel was ineffective for four specific reasons. However, Marshall did not assign on direct appeal that his trial counsel was ineffective in not perfecting a timely appeal from the denial of his pleas in bar.

Marshall filed his motion for postconviction relief on January 31, 2003, asserting ineffective assistance of trial counsel, ineffective assistance of appellate counsel in several particulars, prosecutorial misconduct, and denial of due process. Marshall specifically alleged that his trial counsel was ineffective in failing to commence a timely appeal from the denial of his pleas in bar and that his appellate counsel was ineffective in failing to raise this and other issues on direct appeal. In an order entered on July 16, the district court denied postconviction relief without an evidentiary hearing based upon its conclusion that the issues raised in the postconviction motion could have been raised on appeal and were therefore procedurally barred. With respect to the fact that no timely appeal was taken from the denial of the pleas in bar, the court noted:

> At the time of the failure to timely appeal the denial of the plea in bar, the record clearly reveals [Marshall] was represented by his trial counsel and not his appellate counsel. Therefore, as previously noted, since this failure is apparent from the record on appeal and was not raised on appeal by

different appellate counsel, this issue is procedurally barred on post-conviction review.

Marshall, through postconviction counsel who was neither his trial nor appellate counsel, perfected a timely appeal from the order of the district court denying postconviction relief. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Marshall assigns that the district court erred in denying him an evidentiary hearing on his motion for postconviction relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

ANALYSIS

We begin by addressing Marshall's argument that *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003), eliminates any procedural bar resulting from the failure of appellate counsel to raise claims of ineffective assistance of trial counsel on direct appeal. *Massaro* was a federal postconviction proceeding brought pursuant to 28 U.S.C. § 2255 (1994) in which the prisoner alleged ineffective assistance of trial counsel. A federal appeals court had affirmed the dismissal of the action on the ground of procedural default, due to the fact that Massaro was represented on direct appeal by new counsel who did not raise the issue of ineffective assistance of trial counsel. The Court acknowledged the general federal rule that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice," noting that this "procedural-default

rule is neither a statutory nor a constitutional requirement," but, rather, "a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." 538 U.S. at 504. Resolving a conflict among the federal courts of appeals, the U.S. Supreme Court held that "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." 538 U.S. at 509.

[3,4] The *Massaro* Court noted that a "growing majority" of state courts follow the rule adopted by its holding. 538 U.S. at 508. This court, however, has not adopted the rule. We do not interpret *Massaro* as requiring that we do so, inasmuch as the Court specifically acknowledged that procedural default rules are not constitutional requirements. The general procedural default rule we have long applied in postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995) holds 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. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). Thus, a motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). In this case, the district court correctly applied this principle in concluding that Marshall's claims of ineffective assistance of trial counsel were procedurally barred.

[5] However, a claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Williams, supra*. As in *Williams*, this postconviction proceeding is Marshall's first opportunity to assert that his appellate counsel was ineffective in failing to raise certain claims of ineffective assistance of trial counsel. Such claims directed at the performance of appellate counsel are not procedurally barred.

[6] The assignment of error in this appeal is very broad and nonspecific, asserting generally that the district court erred in denying Marshall an evidentiary hearing on his postconviction motion. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Perry, supra*; *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). Although Marshall alleged in his motion for postconviction relief that his appellate counsel was ineffective in failing to raise multiple claimed performance deficiencies on the part of his trial counsel, the only specific shortcoming argued in this appeal is the failure of appellate counsel to assign on direct appeal that trial counsel was ineffective in not perfecting a timely appeal from the denial of the pleas in bar. Based upon *State v. Al-Zubaidy, supra*, and *State v. Williams, supra*, we conclude that this specific postconviction claim is not procedurally barred. Therefore, we must consider whether Marshall was entitled to an evidentiary hearing on this issue.

[7,8] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002). Assessment of Marshall's postconviction claim regarding the performance of his appellate counsel necessarily

requires examination of the performance of his trial counsel, specifically, whether trial counsel rendered ineffective assistance in not appealing from the order denying the pleas in bar. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

In Marshall's direct appeal, we relied on our cases holding that "[a] ruling on a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995)." *State v. Marshall*, 253 Neb. 676, 681, 573 N.W.2d 406, 410 (1998), citing *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995). We subsequently held in *State v. Rubio*, 261 Neb. 475, 477, 623 N.W.2d 659, 661 (2001), that this rule applies only to the denial of a "true plea in bar," which we defined as one meeting the requirements of Neb. Rev. Stat. § 29-1817 (Reissue 1995). We need not consider whether the order denying Marshall's pleas in bar would be final under *Rubio*, because our holding on Marshall's direct appeal that the order was final for purposes of appeal constitutes the law of the case to which we adhere in this postconviction proceeding. See *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004). We therefore start from the premise that Marshall's trial counsel did not perfect a timely appeal from a final order denying his pleas in bar and that appellate counsel did not assert this as ineffective assistance of trial counsel on direct appeal.

Marshall argues that due to the failure to perfect an appeal, prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). We reject this argument based upon the reasoning of *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). That case involved a postconviction claim that trial counsel was ineffective in failing to appeal from a pretrial order denying the defendant's motion for absolute discharge on speedy trial grounds. We distinguished this circumstance from *Trotter*, which applied the presumption of prejudice under *Cronic* to counsel's failure to comply with a defendant's direction to perfect a direct appeal *after* trial, conviction, and sentence. We reasoned in *Meers* that failure to appeal from the denial of a potentially dispositive pretrial motion did not amount to the complete denial of assistance of counsel at either the

pretrial, trial, or appellate stages of the criminal prosecution, but, rather, was analogous to those postconviction cases in which a convicted defendant claimed that trial counsel was ineffective in failing to preserve a specific issue for appellate review. We concluded that the claim should be fully adjudicated within the postconviction action utilizing the two-pronged *Strickland* standard for determining the effectiveness of counsel, focusing on "whether a timely appeal from the pretrial order denying absolute discharge would have resulted in a reversal and prevented a subsequent trial and conviction." *State v. Meers*, 267 Neb. at 32, 671 N.W.2d at 238.

[9] We apply the same analytical approach to this case. The issue is whether a timely appeal from the order denying the pleas in bar would have resulted in a reversal which would have prevented Marshall's trial and conviction. Only if this question is resolved in the affirmative "could the failure to perfect the appeal be deemed prejudicial in the sense that it would have altered the result of the prosecution." *Id.* If there was no double jeopardy violation, Marshall could not have been prejudiced by the fact that his attorney did not file a timely appeal from the denial of the pleas in bar. See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Because denial of a plea in bar involves a question of law, we are required to reach an independent conclusion on this issue. See, *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003); *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

[10-13] Marshall's pleas in bar asserted that continued prosecution after the mistrials subjected him to double jeopardy. The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001); *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Winkler, supra*; *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001). Under Neb. Const. art. I, § 12, in a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn. *State v. Rhea, supra*; *State v. Bottolfson, supra*. However, the constitutional protection against double

jeopardy " 'does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.' " *State v. Bostwick*, 222 Neb. 631, 642, 385 N.W.2d 906, 914 (1986), quoting *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949). Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy. See *State v. Bostwick, supra.*

[14,15] Jeopardy attached in this case when the first jury was impaneled and sworn on January 30, 1996, but that proceeding did not result in a final judgment because a mistrial was granted over Marshall's objection. "[I]n cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). The issue in such cases is whether the mistrial terminated jeopardy and thus triggered the constitutional protection against double jeopardy as a bar to subsequent prosecution. See *State v. Bostwick, supra.* Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant. *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Bostwick, supra.*

This court has held that the test of manifest necessity is met when a mistrial is declared after discovery of potential juror bias during trial. *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979). See, also, *Quinton v. State*, 112 Neb. 684, 200 N.W. 881 (1924). Marshall argues, however, that the first mistrial was unnecessary because Neb. Rev. Stat. § 29-2004 (Reissue 1995) provides that "[i]f, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box." The statute further provides that if there are two alternate jurors, "the court shall select one by lot" to replace the deceased or discharged regular juror. In support of his argument that such action is mandated, Marshall draws our attention to a footnote in

Arizona v. Washington, 434 U.S. at 512 n.31, which states that "if there is a suggestion of individual juror bias, it may be possible to replace that juror with an alternate." We read this footnote in the context of the Court's observation that a prosecutor's improper opening statement creates "a risk, often not present in the individual juror bias situation, that the entire panel may be tainted." *Arizona v. Washington*, 434 U.S. at 512. This statement followed the Court's discussion of its "consistent course of decision" that, in the case of possible juror bias, mistrial was justified even if not strictly necessary. *Id.*

[16] While acknowledging that the record does not reflect why the trial court did not replace C.B. with an alternate, the State argues that the first mistrial could not have terminated jeopardy in any event because the jury selection process deprived Marshall of his right under Neb. Rev. Stat. § 29-2005 (Reissue 1995) to exercise 12 peremptory challenges and was, therefore, fundamentally flawed. The State's argument is based on the holding of *Illinois v. Somerville*, 410 U.S. at 460, that a mistrial is required by manifest necessity where a criminal trial is flawed by a defect which "could not be waived by the defendant's failure to object, and could be asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction." Based upon *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), and *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled, Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the State argues that the failure to afford Marshall the 12 peremptory challenges to which he was entitled under § 29-2005 constituted structural error affecting the framework within which the trial would have proceeded. See, *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004). We agree.

[17,18] Although peremptory challenges play a recognized role "in reinforcing a defendant's right to trial by an impartial jury," they are "not of federal constitutional dimension." *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). With respect to a state criminal prosecution, "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of

their exercise." *Ross v. Oklahoma*, 487 U.S. at 89. "As such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Id.*

Nebraska law provides that "[e]very person arraigned for any crime punishable with death, or imprisonment for life, shall be admitted on his or her trial to a peremptory challenge of twelve jurors . . . ." § 29-2005. Marshall was charged, inter alia, with murder in the second degree, a Class IB felony carrying a maximum penalty of life imprisonment. Neb. Rev. Stat. §§ 28-105 (Reissue 1989) and 28-304 (Reissue 1995). Thus, under Nebraska law, Marshall was entitled to 12 peremptory challenges. The record reflects that during the jury selection that preceded the first mistrial, he received only six.

[19] We recently held that the State's discriminatory exercise of its peremptory challenges in violation of *Batson v. Kentucky, supra*, constituted structural error. *State v. Lowe, supra.* It logically and necessarily follows that depriving Marshall of half of the peremptory challenges to which he is entitled under state law is likewise structural error. In this case, the trial judge did not articulate this error as a basis for granting the first mistrial. However, under *Arizona v. Washington*, 434 U.S. 497, 516-17, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978), if "the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective." Because the record at the time of the first mistrial reflected structural error which would have warranted reversal of any guilty verdict which may have resulted from continuation of the proceedings, the granting of the mistrial did not terminate jeopardy so as to bar retrial on the same charges.

Nor was jeopardy terminated by the second mistrial. Marshall's trial counsel did not object to the second mistrial and, in fact, argued that it was necessary. The record does not suggest, nor does Marshall argue on appeal, that he was goaded into agreement by any bad faith conduct on the part of the prosecution. Absent such bad faith, double jeopardy does not attach. *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

CONCLUSION

[20] Accordingly, we conclude as a matter of law that because neither of the mistrials terminated jeopardy, Marshall's pleas in bar were without merit. Thus, trial counsel's failure to perfect a timely appeal did not subject Marshall to prejudice under the second prong of the *Strickland* test. Likewise, appellate counsel's failure to raise the issue of trial counsel's performance in this regard on direct appeal was not prejudicial. As these legal conclusions are apparent from the files and records of the case, the district court did not err in dismissing Marshall's motion for postconviction relief without conducting an evidentiary hearing. We acknowledge that our reasoning differs from that of the district court. However, where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
FREDERICK ALLEN, APPELLANT.
690 N.W.2d 582

Filed January 7, 2005. No. S-04-379.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **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.

3. **Constitutional Law: Investigative Stops: Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Acting without a warrant, police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. An investigative stop of this nature is the least intrusive type of police-citizen encounter subjected to Fourth Amendment protection.
4. **Police Officers and Sheriffs: Investigative Stops.** When further questions are created in an officer's mind, an investigative stop may be prolonged and the scope enlarged as circumstances require.
5. **Constitutional Law: Search and Seizure: Evidence.** The wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search or seizure itself. Inasmuch as the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
6. ____: ____: ____. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. This prohibition applies as well to the fruits of the illegally seized evidence.
7. **Constitutional Law: Criminal Law.** Where the exclusionary rule does not result in appreciable deterrence, its use is unwarranted.
8. **Constitutional Law: Police Officers and Sheriffs.** Whether the exclusionary rule's remedy is appropriate in a particular context is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.
9. **Warrantless Searches: Search and Seizure: Proof.** If police have acted without a search warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. It follows that the State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search.
10. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Negligence.** The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.
11. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

STEPHAN, J.

The issue presented in this appeal is whether evidence obtained as a result of a warrantless investigative traffic stop, conducted solely on the basis of inaccurate vehicle registration information transmitted to police by their dispatcher, should have been suppressed as the fruit of an unreasonable seizure which violated the Fourth Amendment.

BACKGROUND

During the early morning hours of May 23, 2003, Omaha police officers Jodi Sautter and Aaron Von Behren were patrolling the area of 33d Street and Creighton Boulevard in Omaha, Nebraska, in a marked cruiser. Sautter decided to request a registration check on a maroon minivan she was following. Using her radio, she contacted the dispatcher and "called out the numerics on the plate," stating "Nora, Henry, Nora 861" to designate Nebraska license plate No. NHN 861 displayed on the rear of the minivan. The dispatcher did not repeat the number to Sautter before responding that the plates were registered to a white Honda Accord. Upon hearing the dispatcher's report, the source of which is described in the record as a "computer system at the dispatcher station," Sautter stopped the minivan for the sole reason that "the plates didn't match the vehicle."

Approaching the minivan on foot, Sautter observed two occupants, a male driver later identified as Frederick Allen and a female passenger. Sautter informed Allen that she stopped him because the license plates did not match the vehicle he was operating and requested that he produce his operator's license, registration, and proof of insurance. Allen replied that the vehicle was owned by his girl friend and that he was unable to find the registration certificate in the vehicle. At that point, Sautter observed a beer container on the console of the minivan and detected the odor of alcohol. The officers asked Allen to exit the vehicle, and Von Behren administered field sobriety tests. Based upon the test results, the officers decided to transport Allen to police headquarters for processing on a driving under the influence charge. They conducted a pat-down search before placing Allen in the

police vehicle and found a 4-inch blade in his trouser pocket. A backup officer who had arrived on the scene during the detention remained with the minivan to await the tow vehicle.

When Sautter arrived at police headquarters, she received a call from the backup officer advising her that the minivan's vehicle identification number matched the license plate numbers displayed on the vehicle. Sautter then contacted the dispatcher and advised her of the information received from the backup officer. The dispatcher determined that she had mistakenly run a check on plate No. NHN 864 instead of NHN 861, as Sautter had requested. Sautter reported the dispatcher's error to a police sergeant and noted it on her official report. While at the police station, Sautter ran an additional check on Allen's identification which disclosed that his operator's license was under suspension.

Allen was charged by information with operating a motor vehicle while his operator's license had been suspended or revoked in violation of Neb. Rev. Stat. § 60-6,196(6) (Cum. Supp. 2002), a Class IV felony. He filed a motion to suppress all evidence obtained as a result of the traffic stop on grounds that police "lacked sufficient probable cause to stop [his] vehicle and such detention was improper." The district court conducted a hearing on the motion, at which hearing Sautter testified to the facts summarized above.

In an order overruling the motion to suppress, the district court found that the traffic stop "was premised only upon the information provided by the dispatcher, which if true, constituted a traffic violation." The court determined that the actions of Sautter in stopping Allen's vehicle were "objectively reasonable and in good faith" and specifically declined to impute the dispatcher's error to Sautter because "[t]here was no evidence that the dispatcher had the powers of a law enforcement officer." The court reasoned that the purpose of the exclusionary rule would not be served by exclusion of the evidence obtained because there was no indication that Sautter was not acting reasonably in relying upon the information which she initially received from the dispatcher. In addition, the court found that after the vehicle had been stopped, Allen's failure to produce a registration and the evidence of alcohol use justified the officers' decision in detaining Allen further for field sobriety testing. The court found that

Allen's performance on the field sobriety test and the discovery of the knife during the pat-down search furnished probable cause for his arrest.

At a stipulated bench trial, Allen preserved his objection to evidence obtained as a result of the traffic stop and renewed his motion to suppress, both of which were overruled. The district court found Allen guilty beyond a reasonable doubt and sentenced him to intensive supervised probation for a period of 2 years. Allen perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Allen assigns that the district court erred in overruling his motion to suppress.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigative stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

ANALYSIS

We begin by noting that Sautter's radio request for a registration check does not present a constitutional issue. The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures. *State v. Burdette, supra.* If there is no detention or seizure, these constitutional safeguards do not arise. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). No reasonable suspicion or probable cause was necessary for Sautter to request the registration check because the check itself did not require or involve a detention or seizure. See *id.*

[2-4] However, a seizure occurred when Sautter stopped the vehicle operated by Allen and requested that he produce the registration. See *State v. Burdette, supra.* Sautter acted without a search warrant. 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. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). Acting without a warrant, police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. *State v. Burdette, supra*; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). An investigative stop of this nature is the least intrusive type of police-citizen encounter subjected to Fourth Amendment protection. *Id.* When further questions are created in an officer's mind, an investigative stop may be prolonged and the scope enlarged as circumstances require. *State v. Soukharith, supra.*

In this case, Allen argues that the investigative stop violated his Fourth Amendment rights because it was based entirely upon inaccurate information regarding the registration of the vehicle he was operating and that all evidence derived from the stop should therefore have been suppressed under the Fourth Amendment exclusionary rule. The State concedes that Sautter relied upon inaccurate information in stopping Allen, but argues that there was no police misconduct which would trigger application of the exclusionary rule. The State also argues that Sautter's actions were objectively reasonable and therefore within the good faith exception to the exclusionary rule first recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Neither party disputes that had it been accurate, the information transmitted to Sautter by the dispatcher would have justified an investigative stop. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996) (police officer's observation of vehicle without license plates or in-transit tags is legitimate basis for reasonable, articulable suspicion justifying brief investigative stop).

[5-7] The U.S. Supreme Court has held that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by

the unlawful search or seizure itself." *United States v. Leon*, 468 U.S. at 906, quoting *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Inasmuch as "the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," the exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. at 347. "This prohibition applies as well to the fruits of the illegally seized evidence." *Id.* However, "[w]here 'the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.' " *Arizona v. Evans*, 514 U.S. at 11, quoting *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976).

In *Arizona v. Evans*, the Court held that the exclusionary rule did not require suppression of evidence seized incident to an arrest conducted pursuant to what the officer believed to be an outstanding arrest warrant. It was subsequently determined that the warrant had been quashed prior to the arrest but that apparently due to a clerical error by court employees, the information had not been transmitted to law enforcement personnel. The Court reasoned that if court employees were responsible for the error,

> there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime . . . they have no stake in the outcome of particular criminal prosecutions. . . . The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.

(Citations omitted.) *Arizona v. Evans*, 514 U.S. at 15. Thus, the Court concluded that "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical

errors of court employees." 514 U.S. at 16. However, the Court specifically declined to address the question of whether a similar analysis would be applied "in order to determine whether the evidence should be suppressed if police personnel were responsible for the error." 514 U.S. at 16 n.5.

In the present case, the State argues that the reasoning of *Arizona v. Evans* should be applied because the dispatcher was neither a law enforcement officer nor an agent of law enforcement. Allen, however, contends that "[t]he failure of either the officer or the dispatcher to take the few seconds to check that the license plate number had been if [sic] fact heard correctly was careless police work, the kind that the exclusionary rule should strive to prevent." Brief for appellant at 5. The district court specifically declined "to impute the dispatcher's mistake to Sautter to invalidate a suspicion that was objectively reasonable" because "[t]here was no evidence that the dispatcher had the powers of a law enforcement officer" and thus that application of the exclusionary rule would not serve its intended deterrent purpose.

The record does not reflect the name of the dispatcher or the identity of her employer. All we know about the dispatcher is derived from the following portion of Sautter's testimony at the suppression hearing:

> [Defense counsel]. And when you're talking about calling in to dispatch, this is the Omaha Police Department's dispatch?
>
> [Sautter]. Yes.
>
> Q. Okay. So this is part of the Omaha Police Department?
>
> A. They also do Douglas County and State Patrol, so I —
>
> Q. Law enforcement?
>
> A. Yes.
>
> Q. All right. It's not part of the court system —
>
> A. No.

We agree with the district court that the record does not establish that the dispatcher possessed all the powers of a law enforcement officer. However, the record does reflect that the dispatcher was "not part of the court system." We thus conclude that the facts in this case are distinguishable from *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), because the source of

the information on which Sautter relied in making the investigative stop was not a court employee. Rather, the dispatcher is a person who can fairly be characterized as an "adjunct[] to the law enforcement team." *Arizona v. Evans*, 514 U.S. at 15. Thus, Sautter stopped the vehicle operated by Allen on the basis of information which she received "via police channels." See 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 9.5(i) (4th ed. 2004).

We considered a similar circumstance in *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997), which involved a challenge to an investigative stop based upon the officer's receipt of a dispatch report indicating that there was a missing person associated with the vehicle and his observation that the driver of the vehicle did not match the description of the missing person. We stated that " '[a] reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle *without any proof of the factual foundation* for the relayed message.' " *State v. Soukharith*, 253 Neb. at 321, 570 N.W.2d at 354, quoting *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). However, relying on *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), we determined that the stop was justified because the officers who initiated the message relayed by the dispatcher had knowledge of facts creating a reasonable suspicion sufficient to justify stopping the vehicle and the stopping officer perceived that the driver did not match the description of the missing person. We noted that "[a]n investigative stop, like probable cause, is to be 'evaluated by the collective information of the police engaged in a common investigation.' " *State v. Soukharith*, 253 Neb. at 322, 570 N.W.2d at 354, quoting *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to Sautter, as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. Sautter had no other reason for initiating the stop. Thus, the record reflects that neither Sautter

nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

[8,9] However, " 'whether the exclusionary rule's remedy is appropriate in a particular context [is] an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See, also, *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). The State argues that the exclusionary rule should not be applied in this case because Sautter's actions in response to the information she initially received from the dispatcher were objectively reasonable and thus fall within the good faith exception to the exclusionary rule. We have held that if police have acted without a search warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001); *State v. Davidson, supra.* It follows that the State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search. See, *U.S. v. Santa*, 180 F.3d 20 (2d Cir. 1999); *Hoay v. State*, 348 Ark. 80, 71 S.W.3d 573 (2002).

In this case, the State did not establish the applicability of the "categorical exception to the exclusionary rule" recognized in *Arizona v. Evans*, 514 U.S. at 16, because it did not establish that the erroneous information upon which the stop was predicated was supplied by a court employee. As noted above, the source of the incorrect information was the dispatcher whose role, based on the limited record before us, was at least that of an adjunct to law enforcement. Thus, we are presented with the issue which the U.S. Supreme Court did not reach in *Arizona v. Evans*; namely, whether there is a good faith exception to the exclusionary rule when law enforcement personnel are responsible for erroneous information upon which other officers act in effecting a warrantless search or seizure. Perhaps foreshadowing this issue, a concurring opinion in *Arizona v. Evans*, 514 U.S. at 17, notes that "[s]urely it would *not* be reasonable for the police to rely, say, on

a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests . . . ." (O'Connor, J., concurring.)

The State relies upon *U.S. v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991), which involved an investigative stop based in part upon a dispatcher's report that the license plate numbers transmitted by a border patrol officer did not correspond to the vehicle which the officer was following. This information proved to be erroneous because the officer failed to utilize established code words in transmitting the license plate number and the dispatcher misunderstood the officer's recitation of the number. Reversing the trial court's suppression of evidence obtained during a search of the vehicle after it was stopped, a divided court of appeals reasoned that the incorrect license plate information the officer received from the dispatcher could be taken into account with the totality of the circumstances, "albeit discounted somewhat for lessened reliability." *Id.* at 402. Other circumstances included the officer's observation of materials known to be used for drug smuggling, the driver's unusual reaction to the officer, and the erratic movement of the vehicle.

Because there were circumstances in addition to the license plate check which formed the basis for the stop, *U.S. v. De Leon-Reyna* is distinguishable from the present case. Moreover, we question the concept of "discounting somewhat" incorrect information resulting from police negligence. Rather, we agree that "erroneous information created by the negligent conduct of a law enforcement officer cannot be used to support a finding that the officer acted reasonably." *Id.* at 402 (Thornberry, J., dissenting.)

Another case involving facts similar to those before us is *State v. White*, 660 So. 2d 664 (Fla. 1995). During a lawful traffic stop, a deputy sheriff was informed that there was an outstanding arrest warrant for the driver of the vehicle. The driver was arrested, and a search incident to the arrest produced contraband. It was later discovered that a computer in the sheriff's office incorrectly showed the arrest warrant as active when in fact it had previously been served and was no longer valid. The Florida Supreme Court concluded that the error

> boils down to one unmistakable fact—failure of the police to maintain up-to-date and accurate computer records resulted

> in an illegal arrest and search. This type of police negligence fits squarely within the class of governmental action that the exclusionary rule was designed to deter, i.e., police negligence or misconduct that is likely to be thwarted if the evidence seized is suppressed. Suppression of evidence seized pursuant to police computer error will encourage law enforcement agencies to diligently maintain accurate and current computer records.

Id. at 667. The court concluded that the good faith exception was inapplicable because it was within the collective knowledge of the sheriff's office that the warrant was void and the arresting officers were thus "charged with knowledge that they had no authority to arrest the defendant." *Id.* at 668.

[10] In considering whether the State has established a good faith exception to the exclusionary rule in this case, we apply the general analytical framework of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which the Court applied in the context of a warrantless search in *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). We begin with the basic concept that "'"[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . ."'" *United States v. Leon*, 468 U.S. at 919. Thus, the first step is to determine whether such conduct is involved in this case. There is no indication that Sautter or the dispatcher engaged in any willful misconduct, but there is evidence that one or both of them acted negligently. Negligence, by definition, includes the failure to do something that a reasonably careful person would do under the circumstances. See *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). It would have been reasonable for the dispatcher to repeat the license plate number supplied by Sautter before running the check in order to verify its accuracy. Sautter testified that some dispatchers follow this practice, but the dispatcher involved in this case did not. Likewise, it would have been reasonable for Sautter to repeat the license plate number to the dispatcher in order to confirm the basis for the stop, considering that Sautter had no other basis for suspecting unlawful activity. Had either Sautter or the dispatcher used this simple verification procedure,

the error which resulted in the unconstitutional seizure would in all probability have been avoided. Thus, we conclude that this case presents the type of conduct which the exclusionary rule was historically designed to deter.

Prior to the development of the good faith exception, the Fourth Amendment exclusionary rule was criticized because of its failure to differentiate between "honest mistakes" on the part of law enforcement and "deliberate and flagrant . . . violations of the Fourth Amendment." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 418, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (Burger, C.J., dissenting). See 1 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 1.2(d) (4th ed. 2004). In *Arizona v. Evans*, the Court considered the extent and severity of the error. In that case, it found no evidence that court employees were "inclined to ignore or subvert the Fourth Amendment" so as to require the "extreme sanction of exclusion." *Arizona v. Evans*, 514 U.S. at 14-15. The Court specifically noted testimony of a court employee that the type of error at issue "occurred once every three or four years." 514 U.S. at 15. In contrast, the State did not present any evidence in this case to show that the dispatcher's error was an isolated "honest mistake" which is unlikely to recur, and we therefore cannot find that to be so.

The most important consideration in deciding whether to apply a good faith exception in this case is whether there is a basis for believing that application of the exclusionary rule will have a significant effect on those responsible for seeking and transmitting vehicle registration information which can be used as a basis for an investigative stop. See *Arizona v. Evans, supra.* We conclude that the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care than was exercised in this case when obtaining and transmitting vehicle registration information which may be used to justify an investigative stop. As we have noted, simple verification procedures could have prevented the error which formed the sole basis for the unreasonable seizure in this case.

CONCLUSION

For the reasons discussed, we conclude that the purported investigative stop of the vehicle operated by Allen was an unreasonable seizure in violation of the Fourth Amendment, because

police had no true facts upon which to base a reasonable suspicion of unlawful conduct. We further conclude that the good faith exception to the exclusionary rule is inapplicable and that therefore the district court erred in overruling Allen's motion to suppress and in receiving evidence derived from the unlawful stop at trial.

[11] Having found reversible error, we must determine whether the evidence presented by the State was sufficient to sustain the conviction in order to determine whether to remand for a new trial. In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. See, *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Thus, although we have concluded that all evidence derived from the unlawful investigative stop was erroneously admitted, we consider it in our analysis of the sufficiency of the evidence. See, *Lockhart v. Nelson, supra*; *State v. Sheets, supra*. We conclude that the evidence so considered was sufficient to sustain Allen's conviction, and we therefore reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SPRING VALLEY IV JOINT VENTURE, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLANTS, V. NEBRASKA STATE BANK OF OMAHA, A NEBRASKA CORPORATION, APPELLEE.

690 N.W.2d 778

Filed January 14, 2005. No. S-03-965.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does

not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.

3. **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.
4. **Contracts: Parties: Intent.** Beneficiaries of a contract may recover thereon, though not named as parties, if it appears by express stipulation or by reasonable intendment that the rights and interests of the unnamed parties were contemplated and provision was being made for them.
5. ____: ____: ____. In determining whether a beneficiary of a contract may recover thereon, the test is whether the parties to the contract intended to confer a benefit directly upon the third party or whether the benefit to the third party was merely incidental.
6. **Contracts: Parties: Intent: Words and Phrases.** Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (1) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary or (2) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. An incidental beneficiary is a beneficiary who is not an intended beneficiary.
7. **Contracts: Parties.** An incidental beneficiary acquires no right against the promisor or promisee.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Edward D. Hotz and Patrick M. Flood, of Hotz, Weaver, Flood & Breitkreutz, for appellants.

James B. Cavanagh, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

GERRARD, J.

Leo Dahlke and R.C.S. & Sons, Inc. (R.C.S.), entered into several loan agreements with Nebraska State Bank of Omaha (Bank), the appellee, in the spring of 2001. The loan proceeds were distributed via cashier's checks to Dahlke and R.C.S. On the loan documents, Dahlke and R.C.S. indicated that the purpose of the loans was to fund interests in the appellants. The appellants (Partnerships) are seven Nebraska partnerships that collectively filed an action against the Bank, claiming they were entitled to the proceeds of the Dahlke and R.C.S. loans and that

the Bank converted the funds by distributing them to other entities. The district court dismissed the action for lack of standing, and the Partnerships appeal. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 8 and April 12, 2001, Dahlke and R.C.S. entered into several loan agreements with the Bank. Dahlke and R.C.S. executed separate promissory notes to the Bank and completed corresponding disbursement request and authorization forms, providing instructions for the disbursement of the loan proceeds. These forms indicated that the purpose of the loan proceeds was to fund interests in the Partnerships, but ordered the proceeds to be paid directly to the respective borrowers, Dahlke or R.C.S. Pursuant to those instructions, the proceeds of the loans were disbursed by cashier's checks, payable to Dahlke and R.C.S., individually. With the proceeds of the March 8 loans, Dahlke and R.C.S. purchased new cashier's checks, payable to Spring Valley IV Joint Venture, Spring Valley V Joint Venture, Spring Valley X Joint Venture, and Spring Valley XI Joint Venture. The proceeds of the April 12 loans were also used to purchase new cashier's checks, payable to the following parties: Prime Realty, Inc., remitted on behalf of Dahlke, R.C.S., and Brook Valley VI Joint Venture; Prime Realty, Inc., remitted on behalf of Dahlke, R.C.S., and Brook Valley XII Joint Venture; and Prime Realty, Inc., and Heartland Title Services, remitted on behalf of Dahlke, R.C.S., and Brook Valley XIII Joint Venture.

The Partnerships collectively filed an action against the Bank, claiming that the proceeds of the Dahlke and R.C.S. loans were meant to fund the Partnerships and alleging that the Bank engaged in conversion and conversion of instruments in distributing the proceeds to other entities. The Bank filed a motion to dismiss, asking the court to consider evidence outside the pleadings and convert the motion to a motion for summary judgment. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003). In its motion, the Bank asserted, inter alia, that the Partnerships had no rights or interest in the loan proceeds and, thus, could not maintain an action for conversion.

After a hearing on the motion, the district court entered an order granting the Bank's motion for summary judgment and

dismissing the case, finding that the Partnerships lack standing to bring the suit. The Partnerships appeal.

ASSIGNMENTS OF ERROR

The Partnerships assign, summarized and restated, that the district court erred in dismissing the case for lack of standing and failure to state a claim for conversion.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

ANALYSIS

The Partnerships assign that the district court erred in finding that the Partnerships lack standing to maintain a conversion action against the Bank. The Partnerships argue that under the terms of the loan documents, they are third-party beneficiaries of the loan agreements, have a legal or equitable interest in the loan proceeds, and, thus, have standing to sue the Bank.

The Bank counters, arguing that the Partnerships lack standing because they were not parties to the loan transactions and had no other agreement directly with the Bank. Accordingly, the Bank asserts that even if Dahlke and R.C.S. agreed to use the loan proceeds to fund interests in the Partnerships, such an understanding with the borrowers does not give the Partnerships standing to sue the Bank.

[3] 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. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). In the present case, the

Partnerships concede that they were not parties to the loan agreements entered into by the Bank and the borrowers, Dahlke and R.C.S., but claim rights to the proceeds as third-party beneficiaries of those agreements.

While the Partnerships are not suing for breach of contract, their conversion action rests upon alleged property rights that are, in turn, based on the loan agreements. In other words, while this is not a contract action, the Partnerships' argument requires us to consider principles of contract law to determine if the Partnerships did, indeed, acquire any rights under the loan agreements as intended beneficiaries.

[4,5] Beneficiaries of a contract may recover thereon, though not named as parties, if it appears by express stipulation or by reasonable intendment that the rights and interests of the unnamed parties were contemplated and provision was being made for them. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). As stated by the Court of Appeals of North Carolina, "[t]he test is whether the parties to the contract intended to confer a benefit directly upon the third party or whether the benefit to the third party was merely incidental." *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 33-34, 351 S.E.2d 786, 790 (1987).

[6,7] The Restatement (Second) of Contracts distinguishes between an intended beneficiary and an incidental beneficiary:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 at 439-40 (1981). In illustrating the distinction, the Restatement offers the following scenario:

> B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is interpreted as a promise that B will pay C, D and E, they are intended beneficiaries under Subsection (1)(a); *if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.*

(Emphasis supplied.) Restatement, *supra*, comment *b.*, illus. 3 at 441. An incidental beneficiary acquires no right against the promisor or promisee. *Century Bank v. Makkar*, 132 Md. App. 84, 751 A.2d 1 (2000).

In the present case, Dahlke and R.C.S. indicated that the purpose of the loans was to fund partnership interests. Although the March 8, 2001, distribution request and authorization forms referred specifically to funding partnership interests in Spring Valley Partnerships, the April 12, 2001, forms referred generally to funding interests in partnerships. On the same forms, Dahlke and R.C.S. provided instructions for the disbursement of the loan proceeds, instructing that the funds, minus any fees, be disbursed directly to the borrower, Dahlke or R.C.S. The forms made no instruction for the Bank to disburse funds to the Partnerships.

In *Scott v. Mamari Corp.*, 242 Ga. App. 455, 530 S.E.2d 208 (2000), Robert Scott constructed a dam on a real estate development but was not fully paid for his work by the resort with whom he contracted. Scott filed claims against the resort's creditors, claiming that he was a third-party beneficiary to certain financing agreements related to the development. One such agreement involved an extension of credit of $63,879, an amount based on Scott's estimated cost to complete the dam. The resort requested the full amount of the note, supported by a final invoice from Scott, and stated that the contractors had been paid and payment should be made directly to the resort. The Bank disbursed the funds as directed, but the resort failed to pay Scott on his final invoice. The Court of Appeals of Georgia determined that Scott was not an intended beneficiary of the loan agreement. Specifically, the court stated that the notes represented promises by the resort to repay the Bank and not promises by the Bank to do anything for Scott. The court stated that "[i]t is commonplace to base a loan request on anticipated need. This fact alone does

not create an obligation on the [part of the] lender to disburse the loan to the party to whom the borrower intends to pay with the borrowed funds." *Id.* at 457, 530 S.E.2d at 211.

We agree with the court's reasoning. Likewise, in the instant case, the evidence indicates that the Bank was under no obligation to disburse funds directly to the Partnerships, but, rather, was obligated to disburse the funds to the individual borrower, who would then be able to invest the sums in the Partnerships. Thus, we conclude that the Partnerships were at most incidental beneficiaries of the loan agreements and, therefore, lack any enforceable property rights to the loan proceeds. Accordingly, the Partnerships lack standing to maintain an action against the Bank for the loan proceeds and the district court did not err in dismissing the case on those grounds.

Because we have determined that the district court was correct in dismissing the instant case for lack of standing, we do not reach the Partnerships' remaining arguments. Further, because we have concluded that the Partnerships were not intended beneficiaries under the loan agreements, we do not have occasion to decide whether a party deemed to be an intended beneficiary of a contract would, as the Partnerships argued, have standing to bring an action for conversion of the property from which that beneficiary is intended to benefit under the contract.

CONCLUSION

The district court did not err in dismissing the Partnerships' operative complaint for lack of standing. The Partnerships did not show that they had a legal or equitable right, title, or interest in the loan proceeds. The judgment of the district court is therefore affirmed.

AFFIRMED.

McCORMACK, J., not participating.

STEPHANIE ZOUCHA, APPELLANT, V. TOUCH OF CLASS LOUNGE, APPELLEE.

690 N.W.2d 610

Filed January 14, 2005. No. S-03-971.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), 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. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 2004) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
4. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
5. ____: ____. The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 2004) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
6. ____: ____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
7. **Workers' Compensation.** Injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the cause of the injury.
8. ____. An employee injured on the premises of the employer where he or she works while coming to work or leaving after work is within the course of his or her employment under Neb. Rev. Stat. § 48-101 (Reissue 2004).
9. ____. Parking lots owned or maintained by an employer are generally considered part of the employer's premises for workers' compensation purposes.
10. ____. For workers' compensation purposes, a shopping center parking lot provided for the convenience of, and used by, employees of the businesses located in the center is considered part of the premises of an employer located in the center.
11. ____. An employee leaving the premises of his or her employer in the usual and customary way after his or her work is ended is within the course of his or her employment within the meaning of workers' compensation law.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Michael M. O'Brien, P.C., for appellant.

Matthew J. Buckley and William D. Gilner, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

During the early morning hours of June 5, 2001, Stephanie Zoucha was assaulted as she left work at the Touch of Class Lounge (the Lounge) in Omaha, Nebraska. Zoucha was severely injured. She filed a claim for workers' compensation benefits, but the single judge of the Workers' Compensation Court dismissed her petition based upon his finding that the assault did not take place on the premises of Zoucha's employer, was not causally related to Zoucha's employment, and thus did not occur in the course of Zoucha's employment. The single judge's order was affirmed by the review panel of the Workers' Compensation Court, and the judgment was affirmed by the Nebraska Court of Appeals; we granted Zoucha's petition for further review. The question presented in this appeal is whether, for workers' compensation purposes, a shopping center parking lot, used by employees of the businesses located in the center, is considered part of the premises of an employer located in the center.

FACTUAL BACKGROUND

Zoucha was employed at the Lounge as a bartender and waitress starting in early 2001. Patricia Bauer, the owner of the Lounge, testified that Zoucha's duties ended when she closed and locked the door of the Lounge after closing. Zoucha was not required, for instance, to make night deposits of the Lounge's revenue.

On June 4, 2001, Zoucha started her shift at approximately 4:30 or 5 p.m. and was the only bartender working that evening. During the evening, a group of people came in, including William

Nunez. At one point during the evening, Zoucha took a drink away from Nunez. Nunez also approached Zoucha and asked if she was interested in smoking marijuana with him after her shift. Zoucha admitted to smoking marijuana on occasion, but testified that she had not smoked marijuana with Nunez before, or socialized with him, and that she told him she would not smoke with him.

Zoucha stopped serving drinks at 1 a.m. and collected drinks from the patrons of the Lounge at 1:15 a.m. See Neb. Rev. Stat. § 53-179 (Reissue 1998). She cleaned up the Lounge, locked up, and left at about 2:15 a.m. Zoucha testified that she went to her car in the parking lot, unlocked the door, put her bags in, and was struck with "[l]ike a tire iron on the back of my head." Zoucha sustained an open skull fracture and other severe injuries. Zoucha has no memory of any events from the time of the assault on June 5, 2001, until June 16. At the time of trial, Zoucha still suffered from significant cognitive impairment, including difficulty with speech and thought formation. Zoucha's purse, containing her tip money from her shift, was stolen and not recovered.

Zoucha testified that she had seen her attacker before being struck and that he resembled Nunez. Nunez was arrested and, at the time of trial, had been charged with the assault. The Omaha police officer who investigated the assault, in an affidavit seeking an arrest warrant for Nunez, averred that Nunez had admitted being at the scene, and a denim jacket had been found in Nunez' apartment with Zoucha's blood on it.

Bauer testified that she did not own the building in which the Lounge was located but simply leased space in the building. There were two businesses in the building, including the Lounge, and approximately seven or eight other businesses in another, adjacent building. Characterized generally, the Lounge is located in a suburban shopping plaza, or "strip mall." Bauer testified that she did not own or have control or authority over the parking lot, which was provided for the common use of all the businesses located in the plaza. Bauer estimated that Zoucha's car had been located about 50 to 60 feet from the door of the Lounge. Bauer stated that she did not require her employees to park in the plaza parking lot, but would expect them to do so as a matter of convenience.

Zoucha filed a petition in the Workers' Compensation Court seeking disability benefits and medical expenses. After trial, the single judge made findings of fact generally accepting Zoucha's description of the events prior to the assault. However, the single judge concluded that at the time of the assault, Zoucha had left the premises of the Lounge. The single judge applied the "going to and from work" rule, which will be explained in greater detail below, and found that Zoucha "was not in the course of her employment at the time that she suffered her severe injuries." Consequently, the single judge dismissed Zoucha's petition. The review panel of the Workers' Compensation Court, and the Court of Appeals, affirmed the judgment of the single judge for substantially the same reasons articulated by the single judge. See *Zoucha v. Touch of Class Lounge*, No. A-03-971, 2004 WL 943218 (Neb. App. May 4, 2004) (not designated for permanent publication). Zoucha filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

Zoucha assigns that the Court of Appeals erred in (1) concluding that Zoucha's injuries did not arise out of and in the course of her employment with the Lounge, (2) concluding that Zoucha's injuries did not occur on the premises of the Lounge, and (3) failing to find a direct causal connection between Zoucha's employment and her injuries.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), 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. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

ANALYSIS

[3,4] Prior to discussing the particular circumstances of this case, we review some of the basic principles of workers' compensation law that will be relevant to our analysis. 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. Neb. Rev. Stat. § 48-101 (Reissue 2004). The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Logsdon, supra*. We note, although it is not contested by the parties, that the assault was an "accident" within the meaning of § 48-101. See *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986).

[5,6] The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. *Id.*

[7] In this case, the single judge concluded that Zoucha's injuries did not occur in the course of employment because she failed to satisfy the requirements of the "going to and coming from work" rule. That rule, as currently applied in Nebraska, is that injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment

unless it is determined that a distinct causal connection exists between an employer-created condition and the cause of the injury. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001). Prior to our adoption of this rule, we adhered to a "bright-line" rule, pursuant to which an employee could recover for an injury sustained while going to and from work only if that injury occurred on premises owned by the employer. See *id.* But we abandoned that rule in *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), and adopted the current rule set forth above.

[8] Our current formulation of the "going to and coming from work" rule, however, "allows an employee to recover for injuries sustained *off the employer's premises* when there is a distinct causal connection between an employer-created condition and the occurrence of the injury." (Emphasis supplied.) *Torres*, 261 Neb. at 1022, 628 N.W.2d at 218. The initial inquiry—and the issue presented by Zoucha's argument in this appeal—is whether or not the employee was on the employer's premises when the injury was sustained. See *La Croix, supra*. The requirement of a distinct causal connection between an employer-created condition and the occurrence of the injury for an employee to recover for an injury sustained *off* the employer's premises, see *id.*, does not alter our prior rule that an employee injured *on* the premises of the employer where he or she works while coming to work or leaving after work is within the course of his or her employment under § 48-101, see *P.A.M., supra*.

[9] Consequently, we first address Zoucha's argument that she was on the Lounge's premises when she was assaulted. Parking lots owned or maintained by an employer are generally considered part of the employer's premises for workers' compensation purposes. See, *La Croix, supra*; 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.04[2][a] (2004). But as Zoucha correctly notes, the general rule is that "if the owner of the building in which the employee works provides a parking lot for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the [parking lot] rule is applicable." See *id.* at 13-41. Accord, *May Dept. Stores Co. v. Harryman*, 307 Md. 692, 517 A.2d 71 (1986); *Lovato v. Maxim's Beauty Salon, Inc.*, 109 N.M. 138, 782 P.2d

391 (N.M. App. 1989); *P.B. Bell & Associates v. Ind. Com'n of Ariz.*, 142 Ariz. 501, 690 P.2d 802 (Ariz. App. 1984).

It would be "impractical and illogical" to require actual ownership or control of a parking lot by a tenant in a shopping plaza consisting of multiple independent businesses, each of which would have to be an owner in common with all the other tenants in order to share a nebulous control over its geographical confines. *Frishkorn v. Flowers*, 26 Ohio App. 2d 165, 167, 270 N.E.2d 366, 368 (1971), *abrogated in part on other grounds, Brown v. B.P. Am., Inc.*, 85 Ohio App. 3d 194, 619 N.E.2d 479 (1993). Accord, *May Dept. Stores Co., supra*; *Merrill v. J. C. Penney*, 256 N.W.2d 518 (Minn. 1977). As the *Frishkorn* court explained under the circumstances of that case,

> [i]n reality, the employer and the other tenants of the . . . Shopping Center, having reciprocal rental rights and privileges, were also accorded the common use and access of the parking area. Logically, to that extent, this was tantamount to an essential expansion of their respective premises for the purpose of adequately serving and furthering their business interests. It follows that the appellant-employee, as well as the employees of the other tenants, derived their similar rights and privileges from the shopping center by virtue of a vested privity in the objectives of their employers.

26 Ohio App. 2d at 168-69, 270 N.E.2d at 369. Accord, *May Dept. Stores Co., supra*; *Merrill, supra*. Based on that reasoning, the majority of courts to have addressed the question have concluded that parking lots in shopping malls are part of the premises of employers whose main premises are located within the mall. See, e.g., *Turner v. B Sew Inn*, 18 P.3d 1070 (Okla. 2000); *Livingstone v. Abraham & Straus, Inc.*, 111 N.J. 89, 543 A.2d 45 (1988); *Barnes v. Stokes*, 233 Va. 249, 355 S.E.2d 330 (1987); *May Dept. Stores Co., supra*; *Merrill, supra*; *Adams v. Lemuria, Inc.*, 738 So. 2d 295 (Miss. App. 1999); *Lovato, supra*; *P.B. Bell & Associates, supra*; *Montgomery Ward v. Cutter*, 64 Or. App. 759, 669 P.2d 1181 (1983); *Frishkorn, supra*; *Rose v. Cadillac Fairview Shopping Center*, 668 A.2d 782 (Del. Super. 1995), *affirmed* 676 A.2d 906 (Del. 1996). See, generally, 1 Larson & Larson, *supra*.

[10] We find the reasoning of these courts to be persuasive and consistent with established principles of Nebraska workers'

compensation law. Therefore, we hold that for workers' compensation purposes, a shopping center parking lot provided for the convenience of, and used by, employees of the businesses located in the center is considered part of the premises of an employer located in the center. Given that holding, the record in this case establishes beyond dispute that Zoucha was on the premises of her employer when she was assaulted, and the single judge erred in concluding otherwise. Consequently, the review panel and Court of Appeals erred in affirming the order of the single judge.

[11] Likewise, the single judge erred in concluding that Zoucha's injuries did not arise out of and in the course of her employment. The single judge's factual findings conclusively establish that Zoucha was injured while on the premises of her employer and while leaving her employment. " '"As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work . . . are compensable . . . ."' " *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 648, 380 N.W.2d 243, 247 (1986). Accord 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.00 (2004). " 'An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the [workers'] compensation law.' " *P.A.M.*, 221 Neb. at 648, 380 N.W.2d at 247-48, quoting *McDonald v. Richardson County*, 135 Neb. 150, 280 N.W. 456 (1938).

In *P.A.M., supra*, two female restaurant employees were leaving the restaurant late at night, after cleaning the restaurant and locking the doors. One of the employees, P.A.M., was required to go to the bank to make the night deposit, but the other employee, S.K., was simply getting a ride home from P.A.M. and had no remaining duties to perform. As they were getting into P.A.M.'s automobile, they were assaulted and robbed. We concluded that P.A.M.'s injuries arose out of and in the course of her employment, because she was on her employer's premises and on her way to the bank to make the night deposit, a duty for which she received compensation. But we also concluded that S.K.'s injuries arose out of and in the course of her employment.

> While the situation with regard to S.K. may at first blush seem somewhat different, the result must, nevertheless, be

> the same. Although it is true that at the time the injury occurred to S.K. she was not then carrying out a specific task for the employer for which she received compensation, as was P.A.M., the evidence conclusively establishes that she was injured while on the premises of her employer and while leaving her employment. This has traditionally and consistently been held by this court to be an injury arising out of and in the course of one's employment.

Id. at 647, 380 N.W.2d at 247.

The circumstances of *P.A.M., supra*, are substantially indistinguishable from the facts of this case as found by the single judge. The evidence in the instant case reveals that Zoucha, while leaving her employment, walked directly from the Lounge to her car, which was parked on the premises of her employer, where she was assaulted. Pursuant to *P.A.M.*, the record establishes that Zoucha's injuries arose out of and in the course of her employment and are compensable under § 48-101. Zoucha's first and second assignments of error have merit, and given our conclusion on those issues, we need not consider her remaining assignment of error.

CONCLUSION

The Workers' Compensation Court erred in concluding that Zoucha was not on the Lounge's premises when she was assaulted and that her injuries did not arise out of and in the course of her employment. The Court of Appeals erred in affirming the judgment of the Workers' Compensation Court review panel. The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the Workers' Compensation Court review panel and remand the cause to the review panel for further remand to the single judge for a determination of the benefits to which Zoucha is entitled, including any attorney fees allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004).

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH R. SKLENAR, APPELLANT.
690 N.W.2d 631

Filed January 14, 2005. No. S-03-1082.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that 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.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. ____: ____. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. **Criminal Law: Statutes.** Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding.

Appeal from the District Court for Douglas County, THOMAS A. OTEPKA, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Order of District Court vacated, and cause remanded with directions.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The appellant, Joseph R. Sklenar, argues in this case that he is entitled to a discharge from the probation violation proceeding initiated against him because he did not receive "prompt consideration" of the charge under Neb. Rev. Stat. § 29-2267 (Reissue 1995). He also contends that the presiding judge in the county court proceeding should have recused herself. We conclude that Sklenar appealed from an interlocutory order.

BACKGROUND

In 2001, Sklenar pled no contest to a charge of theft by unlawful taking. On October 25, he was sentenced to probation for a period of 1 year.

On August 15, 2002, the Omaha City Attorney filed a motion to revoke Sklenar's probation. On March 19, 2003, Sklenar filed a motion to discharge the violation of probation, alleging that he had not been afforded "prompt consideration" of the matter under § 29-2267. At a hearing held the next day, the county court denied Sklenar's motion to discharge, as well as his motion to recuse.

On March 28, 2003, Sklenar filed an appeal to the district court, assigning as error the county court's decisions to deny his motion to discharge and motion to recuse. The district court affirmed. Sklenar appeals.

ASSIGNMENT OF ERROR

Sklenar contends the district court erred in affirming the county court's decisions to deny his motion to discharge and motion to recuse.

STANDARD OF REVIEW

[1] A jurisdictional question that 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. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Id.* The State argues that the county court order denying Sklenar's motion to discharge was not a final order, rendering the district court without jurisdiction, see Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2002), as well as this court, see *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997) (if court from which appeal was taken lacked jurisdiction, appellate court acquires no jurisdiction).

[4] In relevant part, § 29-2267 provides that "[w]henever a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court." Notably, neither § 29-2267 nor any other statute provides for a procedure by which to enforce its provisions prior to final disposition. Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d

917 (1999). That omission is even more evident when comparing § 29-2267 to the various speedy trial statutes, which Sklenar cites in support of his position.

We have held that orders denying a defendant's motion to discharge on speedy trial grounds under various statutes are final, appealable orders. See, *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000) (citing Neb. Rev. Stat. § 29-3805 (Reissue 1995)); *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997) (citing Neb. Rev. Stat. § 29-759 (Reissue 1995)); *State v. Jacques, supra* (citing Neb. Rev. Stat. § 29-1208 (Reissue 1995)). Unlike § 29-2267, each of the three statutes at issue in those cases expressly allows for an absolute discharge upon violation of the right contained therein. Thus, a motion to discharge under those statutes, but not § 29-2267, is a "legally conferred right that authorizes a special application to a court for enforcement." *State v. Jacques*, 253 Neb. at 254, 570 N.W.2d at 336.

The facts of *State v. Windels*, 244 Neb. 30, 503 N.W.2d 834 (1993), illustrate the proper procedure to follow. In that case, a motion to revoke the defendant's probation was filed in October 1990 and a warrant was issued at the same time. However, the State was not diligent in serving the warrant, so a hearing was not held on the revocation until 9 months later. Only *after* the county court found that the defendant violated his probation did the defendant appeal, arguing that he did not get "prompt consideration" under § 29-2267. Sklenar's attempt to raise the same argument in an appeal in this case, before the court rendered a decision on his alleged violation of probation, was premature.

CONCLUSION

The county court order denying Sklenar's motion to discharge and motion to recuse was not a final, appealable order. Therefore, both this court and the district court are without jurisdiction. We therefore vacate the district court's order affirming the county court's denial of Sklenar's motion to discharge, and remand the cause to the district court with directions to remand to the county court for further proceedings.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

GERRARD, J., concurs in the result.

RAY D. NUSS AND SANDRA FOX, SPECIAL ADMINISTRATORS FOR AND ON BEHALF OF THE ESTATE OF CURTIS M. NUSS, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. ANNABELLE D. ALEXANDER, PERSONAL REPRESENTATIVE OF THE ESTATE OF EUGENE M. ALEXANDER, DECEASED, APPELLEE AND CROSS-APPELLANT.

691 N.W.2d 94

Filed January 14, 2005. No. S-03-1084.

1. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
2. **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.
3. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
4. **Malpractice: Limitations of Actions.** 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.
5. **Negligence: Limitations of Actions: Pleadings.** A plaintiff cannot separate a cause of action which arises primarily out of the professional's alleged negligence and label it something else in hopes of creating a different theory of recovery in order to receive the benefit of a longer statute of limitations.
6. **Limitations of Actions.** A limitations period begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
7. ____. For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists.
8. **Limitations of Actions: Pleadings.** A plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.

Appeal from the District Court for Adams County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Kent A. Schroeder and Vikki S. Stamm, of Ross, Schroeder & Romatzke, for appellants.

Jeffrey L. Stoehr, of Law Offices of Jeffrey L. Stoehr, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

Ray D. Nuss and Sandra Fox, the special administrators and personal representatives for the estate of Curtis M. Nuss (appellants), appeal the district court's order dismissing part of their lawsuit against Eugene M. Alexander's estate as time barred. The remainder of the suit was tried, and the court found for the appellants. Annabelle D. Alexander, the personal representative of Eugene Alexander's estate (appellee), cross-appeals, arguing that the entire action was time barred. We conclude that the entire action was time barred and affirm in part, and in part reverse and remand with directions to dismiss.

BACKGROUND

The appellants filed a fifth amended petition alleging that Nuss had employed Alexander for various legal services based on an oral contract. Nuss died on March 14, 1993, and the current action was initially filed on March 13, 1996.

The appellants alleged that from 1972 until the time of his death, Nuss paid Alexander $236,697.69 in attorney fees. The petition does not describe what legal services were provided, nor does it allege that Nuss was incompetent to make decisions or control his finances.

The appellants also allege that on June 19, 1992, Nuss entered into a contract with a real estate broker, which contract provided that Alexander was to receive 3½ percent of the gross selling price of $319,200—an $11,172 fee. The real estate agreement did not require Alexander to perform any work on the sale. It did, however, provide that he would receive a portion of the sale proceeds. The appellants allege that the fee was excessive.

The appellants alleged four theories of recovery. First, they alleged assumpsit, stating that Alexander retained money paid to him that exceeded reasonable compensation for services rendered and had not accounted for the services through time records, hourly rates, or a description of services performed. Second, the appellants alleged a breach of fiduciary duty, stating that Alexander had a duty to disclose the actual costs, time, and preparation required to provide services to Nuss. They further

alleged that Alexander was negligent in failing to disclose excessive charges to Nuss. Third, the appellants alleged that Alexander converted Nuss' property. Finally, they alleged a breach of implied covenant of good faith and fair dealing by charging an excessive fee. Each theory of recovery sought damages in the amount of $236,697.69.

The appellants also alleged that they filed their action "as soon as the acts and omissions alleged . . . were discovered," that the causes of action could not have been discovered within any applicable statute of limitations, that they could not discover Alexander's acts and omissions until they were appointed as personal representatives, that Alexander concealed facts from Nuss that prevented him from discovering the facts, and that Nuss could not reasonably discover the facts within any applicable statute of limitations.

Opportunity to Discover Facts

After Nuss' death, Alexander met with the appellants to discuss the probate proceeding. The record shows the appellants were suspicious of Alexander and questioned the fees he proposed to charge for the probate proceedings. Alexander did not provide documents or disclose information to the appellants, stating that he would do so when he was named personal representative of the estate.

On March 22, 1993, Alexander filed formal probate proceedings and requested that he be appointed personal representative, which was denied. On April 12, the appellants filed objections based in part on the allegation that Nuss had paid excessive fees. In December, depositions were taken and the appellants were provided with information about the real estate contract and Alexander's customary fees. The appellants, however, testified that they had difficulty getting information about the relationship between Nuss and Alexander because they were not yet appointed special administrators or personal representatives of the estate. But the record also shows that by December 21, they had information about the real estate sale and financial transactions between Alexander and Nuss. At trial, appellant Ray Nuss admitted that he did not pursue being named special administrator earlier because the appellants did not believe there was a

need for it. At the December depositions, information about the contract and the fees was disclosed.

Ruling on Demurrer

The appellee filed a demurrer alleging that the petition failed to state a cause of action and was time barred on its face. On ruling on the demurrer, the court considered the $11,172 fee under the real estate contract separately from the remaining fees. Regarding the fees not pertaining to the real estate contract, the court found that the petition failed to state a cause of action. The court also found that there was no factual allegation that Nuss could not have discovered the issues during his lifetime and determined that all theories of recovery were time barred except the $11,172 fee for the real estate contract. Thus, the court sustained the demurrer with the exception that it allowed the case to proceed on the real estate agreement fee. The court refused to allow the appellants to amend their petition because it had been amended on multiple occasions restating the same issues.

The action on the real estate fee was tried to the district court, which determined that the 2-year professional malpractice statute of limitations was tolled when Alexander sought appointment as personal representative. The court then found the real estate fee to be excessive and entered judgment for $10,672. Nuss appeals, and Alexander cross-appeals.

ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred by sustaining the demurrer without leave to amend and finding that (1) the statute of limitations had run, (2) the statute of limitations had not been tolled, (3) the petition failed to state a cause of action, and (4) they could not amend to state a cause of action.

On cross-appeal, the appellee assigns, rephrased, that the court erred when it (1) failed to find that the entire action was time barred, (2) determined that the statute of limitations had been tolled, and (3) determined that the real estate fee was excessive without hearing expert testimony or considering Alexander as a third-party beneficiary to the real estate contract.

STANDARD OF REVIEW

[1] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion

reached by the trial court. *Parks v. Merill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004).

[2] 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. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[3] Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004).

ANALYSIS

The appellants argue that the district court erred when it determined that the petition failed to state a cause of action. They argue that the statute of limitations had not run or had been tolled. The appellee argues that the limitation period ran on all claims, and she cross-appeals concerning the claim of excessive fees under the real estate agreement. We determine that all claims were barred by the statute of limitations.

Appropriate Statute of Limitations

We first address which statute of limitations applies. Although the petition attempted to assert causes of action under several theories, the underlying claim in all cases was for excess attorney fees. Neb. Rev. Stat. § 25-222 (Reissue 1995) provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action

> be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

[4,5] 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. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). Thus, we have stated in a professional negligence action that a plaintiff cannot separate a cause of action which arises primarily out of the professional's alleged negligence and label it something else in hopes of creating a different theory of recovery in order to receive the benefit of a longer statute of limitations. Merely because a cause of action is couched in terms of a cause of action other than negligence does not make it so. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995).

Here, the causes of action or theories of recovery are premised on excessive fees. The petition concerns professional misconduct, and thus, the 2-year limitations period under § 25-222 applies.

When § 25-222 Began to Run and Whether It Was Tolled

The appellants contend that the statute of limitations did not begin to run until the county court denied Alexander's appointment as personal representative of the estate, and the appeal was dismissed. They argue that they could not discover Alexander's wrongful acts until that time.

[6-8] A limitations period begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Sodoro, Daly v. Kramer*, 267 Neb. 970, 679 N.W.2d 213 (2004). For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered

during the limitations period. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

Here, the record shows that the limitations period had run on all allegations in the petition. The latest allegation focused on excessive fees or wrongdoing concerning the real estate agreement of June 19, 1992. But the action was not filed until March 13, 1996, well outside the 2-year statute of limitations. We disagree that the appellants could not have discovered the alleged cause of action within the 2-year period. Although the appellants contend that they lacked some specifics about the relationship between Nuss and Alexander, the record is clear that they had concerns about excessive fees by April 1993, when they objected to Alexander's appointment as personal representative. Further, by December 21, 1993, the appellants had deposed Alexander and had all necessary information about Alexander's alleged wrongdoing. Thus, the limitation period was in effect and not tolled. Accordingly, the petition was filed out of time.

The district court held, however, that the limitations period was tolled by Neb. Rev. Stat. § 25-214 (Reissue 1995), because Alexander's actions in attempting to be named personal representative concealed the facts and prevented the appellants from acting. We disagree.

Section 25-214, entitled "Actions against absconding or absent debtor," states:

> If, when a cause of action accrues against a person, he is out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

Assuming without deciding that § 25-214 applies to a professional malpractice action, we determine that it does not apply to the facts alleged in the petition. It was not alleged that Alexander was absent from the state or concealed himself. The appellants argue, however, that Alexander concealed facts by attempting to be named personal representative, thus preventing them from

taking any action. But any concealment of the facts was discovered before the 2-year limitations period ran and did not prevent the appellants from filing suit. Although from December 1993, the appellants were aware of any excessive fees, they did not seek to be appointed special administrators. A special administrator has the power of a personal representative except as limited in the appointment and duties as prescribed in the order—including the ability to file a lawsuit. Neb. Rev. Stat. § 30-2460 (Reissue 1995). Although the appellants could have moved to be appointed as special administrators, they admit that they did not believe there was a need to do so before May 1995, which was after the statute of limitations had run. Thus, § 25-214 does not act to toll the statute of limitations.

Amendment of Pleadings

The appellants contend that they should be allowed to amend their pleadings to plead the inability to discover the facts underlying their allegations. The district court noted that the petition had been amended five times without pleading such facts. The record makes clear that the facts were known and that suit could have been filed before the statute of limitations ran. Accordingly, the court did not abuse its discretion when it denied leave to amend.

CONCLUSION

We conclude that the court did not err when it sustained the demurrer and dismissed part of the petition with prejudice because the petition was barred by the statute of limitations. On cross-appeal, we conclude that the district court erred when it failed to dismiss the remainder of the petition, because the petition was also barred by the statute of limitations. Accordingly, we affirm on appeal, and reverse, and remand with directions to dismiss on cross-appeal.

Affirmed in part, and in part reversed and remanded with directions to dismiss.

KELVIN LEIN, APPELLANT, V. TOM NESBITT, SUPERINTENDENT, NEBRASKA STATE PATROL, APPELLEE.
JAMES D. OLSON, APPELLANT, V. TOM NESBITT, SUPERINTENDENT, NEBRASKA STATE PATROL, APPELLEE.

690 N.W.2d 799

Filed January 14, 2005. Nos. S-03-1169, S-03-1170.

1. **Administrative Law: Judgments: 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. ____: ____: ____. 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 not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** 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.
4. ____: ____. 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.

Appeals from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dean S. Forney, of Forney Law Office, for appellants.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

STEPHAN, J.

In these consolidated appeals, Kelvin Lein and James D. Olson challenge their classification as Level 3 sex offenders under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2004). The district court for Lancaster County affirmed orders of Tom Nesbitt, the superintendent of the Nebraska State Patrol, upholding each classification.

BACKGROUND

LEIN

In 1994, Lein pled guilty to two counts of sexual assault on a child. The victims were his two minor daughters. Lein had no

previous criminal history. In a letter dated March 27, 2000, the Nebraska State Patrol informed Lein that he had been assigned a Level 3 classification under SORA. The classification was based on answers to the 14 questions composing the Nebraska State Patrol's sex offender risk assessment instrument. Lein requested a hearing to contest his classification level, taking specific exception to items 9, 12, and 13 of the risk assessment instrument. On July 2 and December 27, 2002, a hearing regarding Lein's classification was held before a hearing officer. Lein offered the expert testimony of Dr. Laura Gaudet, and the State offered the expert testimony of Drs. Shannon Black and Mario Scalora. The substance of the testimony is detailed in relevant part below.

On January 28, 2003, the hearing officer recommended that Lein's classification as a Level 3 sex offender be upheld, based upon a determination that his overall score of 165 points on the risk assessment instrument was correct and exceeded the 130-point cutoff for Level 3 classification. The Nebraska State Patrol adopted this recommendation in full. Lein timely petitioned to the district court for Lancaster County for judicial review under the Administrative Procedure Act (APA). On September 9, the district court issued an order upholding the Level 3 classification. Lein filed this timely appeal.

OLSON

In 1998, Olson pled guilty to one count of sexual assault on a child. The victim was Olson's minor sister-in-law. Olson's prior criminal history included one charge of larceny and one charge of disturbing the peace. He had no prior history of sex-related convictions.

In a letter dated July 14, 2000, the Nebraska State Patrol informed Olson that based upon answers to the 14 questions composing the risk assessment instrument, he had been assigned a Level 3 sex offender classification under SORA. Olson requested a hearing to contest his classification level, taking specific exception to items 9 through 14 of the risk assessment instrument.

On July 2 and December 27, 2002, a hearing regarding Olson's classification was held before a hearing officer. Olson presented the expert testimony of Gaudet, and the State presented the expert testimony of Black and Scalora. The substance of the testimony

is identical to that offered by Lein and is detailed in relevant part below.

On February 2, 2003, the hearing officer recommended that Olson's classification remain at Level 3. The hearing officer determined that while Olson's score of 190 points on the risk assessment instrument should be reduced to 160, it remained in excess of the score of 130 which is the cutoff point for a Level 3 classification. The Nebraska State Patrol adopted this recommendation in full. Olson timely filed a petition for judicial review with the district court for Lancaster County under the APA. The district court affirmed the Level 3 classification on September 9, and Olson filed this timely appeal.

The parties' stipulation to consolidate the appeals for briefing and oral argument was allowed. We then moved the consolidated appeals to our docket on our own motion pursuant to our statutory authority under Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the appellate courts in this state.

ASSIGNMENT OF ERROR

Lein and Olson each assign that the district court erred in upholding his classification as a Level 3 sex offender under SORA.

STANDARD OF REVIEW

[1-4] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Slansky, supra.* 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.* 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.*

ANALYSIS

These appeals represent the fourth recent challenge to SORA. See, *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky, supra*; *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). In *Slansky* and *Worm*, we discussed at length the pertinent features of SORA and the rules and regulations that implement SORA. In *Slansky*, we also discussed the risk assessment instrument that was developed to classify sex offenders under SORA and is again challenged in these appeals. We therefore direct the reader to *Slansky* and *Worm* for background information regarding SORA.

In the instant appeals, Lein and Olson allege that the risk assessment instrument is invalid because "a stakeholder group . . . consisting of representatives from law enforcement, victim advocacy and defense attorneys, was brought in to determine the scoring cut-offs used to determine risk level." Brief for appellants at 8. They contend that the use of this group was unscientific and not supported by " 'fair or substantial reason.' " *Id.* at 10.

In *Slansky*, we addressed whether the risk assessment instrument was invalid because of a statistical error rate of 12 percent. In finding that it was not, we recognized that "no instrument will perfectly predict future conduct." *Slansky*, 268 Neb. at 374, 685 N.W.2d at 348. We further stated:

> "[T]he non-existence of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals." *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997). In this regard, [expert] testimony concerning the instrument establishes that it was carefully and rationally crafted. While acknowledging some of the instrument's shortcomings, [an expert] testified that the instrument (1) is based on a significant amount of empirical data, (2) utilizes factors that correlate with a registrant's risk of recidivism, (3) is valid and appropriate for its purpose, and (4) is consistent with other instruments that have been developed. Consequently, we conclude that the instrument is a rationally based risk assessment tool and that the grounds [the defendant] asserted to challenge the instrument are without merit.

Slansky v. Nebraska State Patrol, 268 Neb. 360, 374-75, 685 N.W.2d 335, 348-49 (2004).

The expert testimony adduced by the Nebraska State Patrol in the instant cases is substantially similar to that adduced in *Slansky*. Black holds a doctorate in clinical psychology and has served as the clinical director of the Nebraska State Patrol Sex Offender Registry since 1999. She testified that the risk assessment instrument is consistent with other instruments that have been developed and is an appropriate and valid instrument for determining a sex offender's risk of recidivism. Scalora, who is associated with the Department of Psychology at the University of Nebraska-Lincoln, testified regarding the development of the risk assessment instrument. This process included a review of relevant scientific literature and risk assessment protocols from other states and a study of recidivism statistics for 1,300 sex offenders who had been discharged from Nebraska correctional institutions. The study identified and weighted statistically significant factors which had a predictive value as to the likelihood that a sex offender would reoffend. Scalora testified that Nebraska's risk assessment instrument had a predictive rate which compared favorably with other instruments designed for the same purpose.

Scalora further testified that the stakeholder group had no involvement in developing the risk assessment instrument or in determining which factors indicated a risk of recidivism. The stakeholder group was involved only in the policy decision to determine the cutoff points for the three risk categories that determine the level of notification required under SORA. This determination was based on considerations of the number of offenders that would be impacted by SORA and the potential risk for the public. The risk assessment instrument classifies offenders scoring 70 points or fewer as Level 1, considered at a low risk to reoffend. Offenders who score 75 to 125 points are considered at moderate risk to reoffend and are classified as Level 2. Those who score 130 points or above are considered at high risk to reoffend and are classified as Level 3 offenders. According to Scalora, the stakeholder group decided that 90 percent of recidivists would fall within the Level 3 risk classification. He testified that if there was bias in doing so, it was a bias in favor of public safety.

Lein and Olson contend that the use of the stakeholder group renders the risk assessment invalid. Gaudet testified that "whenever you have a stakeholder group [research] becomes more subjective as opposed to objective." However, the evidence is clear that the stakeholder group in this case was not involved in the research that formed the basis of the creation of the risk assessment instrument. Instead, the group was involved only in determining the risk level cutoff scores, a decision which by its nature requires some level of subjectivity. Moreover, there is no constitutional requirement that sex offenders be divided into risk-level categories; if the State of Nebraska chose to, it could conclude that every conviction for a sex offense provide evidence of a substantial risk of recidivism. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Lein and Olson's argument with respect to the stakeholder group is therefore without merit.

The testimony of Black and Scalora constitutes competent evidence which supports the decisions of the district court upholding the Level 3 classifications of Lein and Olson. Both decisions conform to the law and are not arbitrary, capricious, or unreasonable.

CONCLUSION

For the reasons discussed, we affirm the judgments of the district court.

AFFIRMED.

WRIGHT, J., not participating.

BODIE J. WEEDER, APPELLANT, V. CENTRAL COMMUNITY COLLEGE, A POLITICAL SUBDIVISION, AND MIKE SWANSON, INDIVIDUALLY AND AS AN EMPLOYEE OF CENTRAL COMMUNITY COLLEGE, APPELLEES.

691 N.W.2d 508

Filed January 14, 2005. No. S-03-1174.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.

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. **New Trial: Words and Phrases.** A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court.
4. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought and not based on its title.
5. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
6. **Political Subdivisions: Torts: Jurisdiction.** The filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision.
7. **Political Subdivisions Tort Claims Act: Rules of the Supreme Court: Pleadings.** The case law of the Nebraska Supreme Court requiring a defendant to raise a plaintiff's noncompliance with a condition precedent under the Political Subdivisions Tort Claims Act as an affirmative defense in either a demurrer or answer has been partially abrogated by the adoption of the Nebraska Rules of Pleading in Civil Actions, because the demurrer has been abolished.
8. **Pleadings.** Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules.
9. **Rules of the Supreme Court: Pleadings.** A motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003) can properly be entitled a motion to dismiss.
10. ____: ____. Prior Nebraska case law holding that a pretrial motion to dismiss was not a permissible pleading is abrogated pursuant to the adoption of the Nebraska Rules of Pleading in Civil Actions.
11. ____: ____. An affirmative defense may be asserted in a motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) when the defense appears on the face of the complaint.
12. ____: ____. A defendant's failure to specifically reference Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is not fatal because a trial court must rule on the basis of the motion's substance, rather than on its form.
13. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
14. **Rules of the Supreme Court: Motions to Dismiss.** A defendant's right to assert an affirmative defense in a motion to dismiss instead of a responsive pleading is governed by Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003), and not Neb. Ct. R. of Pldg. in Civ. Actions 8(c) (rev. 2003).

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

Dean J. Sitzmann and Nichole S. Bogen, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Lucy Higgins Sinkular and David C. Huston, of Huston & Higgins, for appellees.

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

HENDRY, C.J.

I. INTRODUCTION

Bodie J. Weeder brought an action against Central Community College and its employee Mike Swanson (collectively CCC) pursuant to the Political Subdivisions Tort Claims Act (the Act). CCC filed a motion to dismiss Weeder's petition. The district court for Buffalo County granted CCC's motion. Weeder appeals. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. FACTUAL BACKGROUND

The pleadings indicate that on April 11, 2002, Weeder sent by certified mail a letter to the board of governors of the college. In that letter, which Weeder stated was to serve as notice of the filing of a tort claim against CCC pursuant to the Act, Weeder alleged that on April 18, 2001, he was injured while demonstrating welding techniques at an off-campus recruitment project. Weeder's letter contended that at the time he suffered his injury, he was being supervised by Swanson, who was a welding instructor at the college. Thereafter, on July 18, 2002, Weeder sent a second letter to CCC withdrawing the claim and notifying CCC that his attorney was authorized to commence a lawsuit against CCC on Weeder's behalf. On April 18, 2003, Weeder filed suit against CCC.

In response to Weeder's "petition," CCC filed a motion entitled "Motion to Dismiss for Failure to Comply With the Political Subdivisions Tort Claims Act Filing Requirements," which motion we will refer to as a "motion to dismiss." In that motion to dismiss, CCC, "pursuant to the Nebraska Rules of Pleading in

Civil Action, Rule Nos. 8(c) and 12(b)," moved the district court as follows:

> 1. To dismiss the action against the Defendant Mike Swanson on the grounds that no claim was filed against him with the governing body of the political subdivision. Neb. Rev. Stat. §13-920 [(Reissue 1997)].
>
> 2. To dismiss the action on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement that he withdraw his claim before commencing suit. Neb. Rev. Stat. §13-906 [(Reissue 1997)].
>
> 3. To dismiss the action on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement that he file his petition against these defendants within two years after his claim accrued. Neb. Rev. Stat. §13-919 [(Reissue 1997)].

The district court granted CCC's motion to dismiss in a detailed journal entry. In that journal entry, the court initially addressed paragraph 1 of CCC's motion regarding defendant Swanson and Swanson's specific argument that "it [the claim] fails to specifically request a recovery against the employee [Swanson]." Finding that the claim sufficiently requested a recovery against Swanson, the district court denied the motion to dismiss, based on paragraph 1. Neither the college nor Swanson cross-appealed from this ruling.

The court next addressed paragraph 2 of CCC's motion, which asserted that Weeder failed to comply with the Act by withdrawing his claim before commencing suit. Finding in favor of CCC, the court reasoned:

> The record as presented by the parties and noted before indicates that [Weeder] filed his claim with the political subdivision on April 11, 2002 and withdrew the claim on July 18, 2002 prior to the expiration of the 6 month period that the subdivision is allowed pursuant to the statutes to consider a claim. The petition was then filed with the Court on April 18, 2003. . . .
>
> Political subdivisions as well as the State itself are immune from tort claims except to the extent the State allows itself to be sued. Sections 13-901 et seq of the Nebraska

> Statute creates the substantive and procedural rules by which the State allows itself to be sued. Both sections 13-906 and 13-920 are specific in directing that "no suit shall be permitted on a claim" unless the political subdivision has denied the claim or has had a 6 month opportunity to consider the claim. The clear and precise meaning of the statutes of this State prohibit the filing of a claim that has not been denied prior to the running of the 6 month period. This Court therefore finds that the premature filing of this litigation is in fact a nullity and this Court is without jurisdiction to consider the claim as presented. [CCC's] motion to dismiss is therefore sustained.

In its ruling, the district court made no findings with respect to paragraph 3 of CCC's motion to dismiss, and neither party asserts any error in that regard.

Weeder filed a motion for new trial, asking the district court to "reexamine its decision to dismiss . . . and reinstate the action as previously filed." The district court denied Weeder's motion, and Weeder appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Weeder argues that the district court erred in (1) finding that it was without jurisdiction to consider Weeder's claim and (2) sustaining CCC's motion to dismiss.

IV. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005) (adopting federal standard of review for motions to dismiss and stating that this court will look to federal court decisions for guidance regarding pleading rules, as Nebraska's rules are now modeled after federal rules). See, also, *Chepstow Ltd. v. Hunt*, 381 F.3d 1077 (11th Cir. 2004) (specifically applying de novo standard of review to trial court's grant of rule 12(b)(6) motion); *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999) (same).

V. ANALYSIS

1. WEEDER'S MOTION FOR NEW TRIAL

[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. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). At issue is whether Weeder's notice of appeal was timely filed.

The district court sustained CCC's motion to dismiss and entered judgment on August 14, 2003. Thereafter, Weeder filed a pleading entitled "Motion for New Trial" on August 22. That motion was overruled on September 11, and Weeder filed his notice of appeal on October 8.

[3] A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). In this case, we are presented with a court granting a motion to dismiss. Such action is not a verdict by a jury or a trial and decision by the trial court. As a result, Weeder's motion for new trial was not a proper motion and would not toll the time for filing a notice of appeal.

[4] However, we have stated that a postjudgment motion must be reviewed based on the relief sought and not based on its title. See, *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). As a result, the issue is whether Weeder's August 22, 2003, motion could be viewed as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which would toll the time for filing a notice of appeal.

[5] In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. See, *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy, supra.* In this case, Weeder's August 22, 2003, motion for new trial was filed within 10 days of the district court's grant of the motion to dismiss on August 14. Furthermore, in his August 22 motion, Weeder asked the district court, inter alia, to

"reexamine its decision to dismiss . . . and reinstate the action as previously filed." We conclude that this language seeks substantive alteration of the judgment of the district court dismissing Weeder's action. As a result, Weeder's August 22 motion qualifies as one to alter or amend the judgment under § 25-1329, and tolled the time for filing a notice of appeal. Weeder's appeal was timely, and we have jurisdiction over this matter.

We pause briefly to note that since Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2002) was amended in 2000, see 2000 Neb. Laws, L.B. 921, this court or the Court of Appeals, on repeated occasions, has found it necessary to determine whether an improperly filed motion for new trial could be viewed as one to alter or amend a judgment. See, *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003); *State v. Bellamy, supra*; *Vesely v. National Travelers Life Co.*, 12 Neb. App. 622, 682 N.W.2d 713 (2004). In the future, we request the practicing bar to carefully consider the nature of the proceeding prior to filing any motion calling into question a court's judgment.

We now turn to Weeder's assignments of error.

2. District Court's Finding That It Lacked Jurisdiction

In Weeder's first assignment of error, he contends the district court erred in concluding that it was without subject matter jurisdiction to consider his action. The district court's determination that it lacked subject matter jurisdiction was premised upon its conclusion that Weeder's tort claim was not properly presented. In its brief, CCC appears to concede that the district court possessed subject matter jurisdiction.

[6] This court has held that the filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision. See, *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). See, also, *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) (applying rationale of *Keller* and *Millman* to State Tort Claims Act). Thus, we concur with Weeder that the district court erred in

determining that it lacked subject matter jurisdiction. However, this conclusion is not dispositive of this appeal, as we must now determine, given the grounds stated in paragraph 2 of CCC's motion, whether the court properly dismissed the action.

3. Effect of Nebraska Rules of Pleading in Civil Actions

[7] Having concluded that Weeder's alleged failure to comply with the Act is not jurisdictional but a condition precedent, our case law would require that such noncompliance be raised as an affirmative defense in either a demurrer or answer, or it is waived. See, *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *Cole v. Isherwood, supra* (decided under State Tort Claims Act); *Millman v. County of Butler, supra.* However, effective January 1, 2003, this court, pursuant to authorization granted by Neb. Rev. Stat. § 25-801.01 (Cum. Supp. 2002), promulgated the new Nebraska Rules of Pleading in Civil Actions. These rules were in effect at the time Weeder filed this action. Under the new rules, the demurrer has been abolished. See Neb. Ct. R. of Pldg. in Civ. Actions 7(c) (rev. 2004). See, also, § 25-801.01(2)(c). Thus, we must decide whether CCC's motion to dismiss was an appropriate method in which to raise this affirmative defense under our civil pleading rules.

As an initial matter, we note that CCC entitled its motion a "Motion to Dismiss for Failure to Comply With the Political Subdivisions Tort Claims Act Filing Requirements." Prior Nebraska case law has held that a pretrial motion to dismiss was generally not a permissible pleading. See, e.g., *Anderson v. Matthis*, 246 Neb. 215, 518 N.W.2d 94 (1994); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986). However, these opinions predate Nebraska's new civil pleading rules.

[8-10] Federal courts routinely refer to federal rule 12(b) motions as motions to dismiss, see, e.g., *Maki v. Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004); *Strand v. Diversified Collection*

Service, 380 F.3d 316 (8th Cir. 2004); and *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004), while treatises on federal civil procedure also use that term in reference to federal rule 12(b) motions. See, e.g., 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1349 to 1359 (2d ed. 1990 & Supp. 2002). See, also, *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003) (recognizing that Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska pleading rules); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000) (same). As such, we conclude that a rule 12(b) motion can properly be entitled as a motion to dismiss. To the extent our prior case law holds there is no pretrial motion to dismiss, that case law has been abrogated by the Nebraska Rules of Pleading in Civil Actions.

(a) Asserting Affirmative Defenses in Rule 12(b)(6) Motion to Dismiss

We now turn to whether a rule 12(b)(6) motion to dismiss is a proper method by which to raise the affirmative defense in question. As rule 12(b) is substantially identical to Fed. R. Civ. P. 12(b), we again look to federal cases interpreting similar federal rules for guidance. See, *Bailey v. Lund-Ross Constructors Co., supra*; *Gernstein v. Lake, supra.*

Nebraska's rule 12(b) states:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter;
>
> (2) lack of jurisdiction over the person;
>
> (3) [reserved]
>
> (4) insufficiency of process;
>
> (5) insufficiency of service of process;
>
> (6) that the pleading fails to state a claim upon which relief can be granted;
>
> (7) failure to join a necessary party.

It is common practice under the Federal Rules of Civil Procedure to allow an affirmative defense to be asserted in a rule 12(b)(6) motion when, on the face of the complaint, allegations are included which could be the subject of an affirmative defense. See, *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004); *Hafley v. Lohman*, 90 F.3d 264 (8th Cir. 1996); *Weaver v. Clarke*, 45 F.3d 1253 (8th Cir. 1995); 2 James Wm. Moore, Moore's Federal Practice § 12.34[4][b] (3d ed. 2004); 5A Wright & Miller, *supra*, § 1357. Such practice is similar to our prior demurrer jurisprudence. See, *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989); *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962); *In re Estate of McCleneghan*, 145 Neb. 707, 17 N.W.2d 923 (1945). Cf., *Houska v. City of Wahoo*, 227 Neb. 322, 417 N.W.2d 337 (1988); *Marsh-Burke Co. v. Yost*, 102 Neb. 814, 170 N.W. 172 (1918).

[11] A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer. *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993). See, also, 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1355 (2d ed. 1990 & Supp. 2002) (citing various cases stating relationship between demurrer and rule 12(b)(6) motion). Weeder's "petition" alleged that he submitted his claim to CCC on April 11, 2002, and that he gave notice he was withdrawing his claim on July 18. In our de novo review, we determine that the "petition," on its face, included allegations which could be the subject of an affirmative defense under Neb. Rev. Stat. § 13-906 (Reissue 1997). Thus, we conclude that CCC could properly assert an affirmative defense of failure to comply with the Act in its motion to dismiss.

(b) CCC's Failure to Specifically Refer to Rule 12(b)(6) in Its Motion to Dismiss

[12] In its motion to dismiss, CCC raised three affirmative defenses without specifically referring to subsection (6) of rule 12(b). Instead, CCC's motion to dismiss referred only to Neb. Ct. R. of Pldg. in Civ. Actions 8(c) (rev. 2003) and rule 12(b). We conclude, however, that CCC's failure to specifically reference subsection (6) of rule 12(b) is not fatal. See, generally, *State of Louisiana v. United States*, 656 F. Supp. 1310 (W.D. La.

1986) (court treated motion under rule 12(b)(2) as one under rule 12(b)(6), reasoning that substance of 12(b) motion controls over its form); *Hankins v. Fansteel Metals, Inc.*, 452 F. Supp. 509, 511 (E.D. Okla. 1978) (court treated motion for summary judgment as motion to dismiss under rule 12(b)(1), since " 'label attached to a motion is unimportant' "); 5A Wright & Miller, *supra*, § 1347 at 186 ("technical accuracy in the designation of the specific rule under which the defense, motion, or objection is asserted, is [not] critical to its presentation and determination"). We now turn to the issue of whether CCC's motion to dismiss properly presented the affirmative defense upon which the district court dismissed Weeder's action.

Weeder argues that paragraph 2 of CCC's motion to dismiss did not assert the affirmative defense upon which the district court based its ruling. Paragraph 2 of CCC's motion asserts that Weeder's complaint should be dismissed "on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement *that he withdraw his claim before commencing suit.* Neb. Rev. Stat. §13-906 [(Reissue 1997)]." (Emphasis supplied.)

A review of the district court's journal entry supports Weeder's argument. It is clear from this review that the district court's basis for dismissing the action was not that Weeder failed to withdraw his claim before commencing suit, but that Weeder failed to allow CCC 6 months to consider the claim before withdrawing it and commencing this action. CCC does not specifically contend otherwise, but argues its affirmative defense was sufficiently raised by its citation generally to § 13-906 in paragraph 2 of its motion to dismiss. In response, Weeder states:

> Surely [CCC is] not allowed to argue one way in their Motion to Dismiss that [Weeder] failed to withdraw his claim, and then for the first time on appeal argue that [Weeder] was aware of their affirmative defense that he withdrew his claim too early. It would be manifestly unfair to [Weeder] for this Court to affirm the decision of the District Court because [Weeder] was never given adequate notice of the affirmative defense nor an opportunity to present evidence to rebut it.

Reply brief for appellant at 4-5.

With the adoption of our new civil pleading rules, we must determine the appropriate standard to utilize when deciding whether an affirmative defense has been adequately asserted. We again look to federal cases interpreting those federal rules for guidance. See *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

The federal rules were designed to liberalize pleading requirements. See, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). This liberalization extends to the pleading of affirmative defenses. See, *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988) ("liberal pleading rules established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses"); *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254, 256 (8th Cir. 1977) (noting that federal rules were intended to liberalize pleading requirements and that failure to use term "waiver" in answer "impose[d] a requirement of undue formalism . . . inconsistent with that liberal purpose"); *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24 (5th Cir. 1948) (liberal rules of pleading not premised on extensive factual allegations and thus simply pleading contributory negligence was sufficient to preserve defense).

In considering liberalization of our pleading rules ushered in by this court's adoption of its new rules of civil pleading, the inquiry is whether Weeder was afforded fair notice of the nature of the defense. See, *Perez v. U.S.*, 830 F.2d 54 (5th Cir. 1987) (purpose of federal rules requiring pleading of affirmative defense is to prevent unfair surprise; instead, pleading of affirmative defenses should provide fair notice of defense to plaintiff); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1274 at 455-56 (2d ed. 1990) ("[a]n affirmative defense may be pleaded in general terms and will be held to be sufficient . . . as long as it gives plaintiff fair notice of the nature of the defense"). Cf. *Conley v. Gibson*, 355 U.S. at 47 ("all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").

[13] Thus, while the Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement

for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided. Based on our de novo review, we conclude that Weeder was not given fair notice of the nature of CCC's defense.

Although it is true that CCC cited generally to § 13-906, paragraph 2 of its motion to dismiss specifically asserted that Weeder had failed to "comply with the . . . requirement that he *withdraw his claim*." (Emphasis supplied.) The language chosen by CCC did more than, in CCC's words, "[refer] to the provisions for withdrawing a claim [in § 13-906]." Brief for appellees at 3. Indeed, the language it chose specifically referred to only that portion of § 13-906 requiring any claim to be withdrawn before suit is instituted. The chosen language did not make any reference to the 6-month period to which CCC was entitled to consider Weeder's claim before Weeder could have withdrawn it from CCC's consideration and filed suit.

Had the district court ruled on the affirmative defense asserted by CCC in paragraph 2 of its motion to dismiss, the district court would have had no option but to deny CCC's motion. The face of Weeder's "petition" alleged in part that "[o]n July 18, 2002 . . . notice of withdrawal of the Claim was mailed . . . withdrawing the Claim from further consideration . . . ."

Under these circumstances, the language chosen by CCC provided Weeder with notice only of CCC's claim that Weeder had failed to withdraw his claim. Such did not provide Weeder with notice of CCC's claimed affirmative defense that Weeder had, in fact, withdrawn that claim prematurely. In reaching this determination, we note that no record was made of the proceedings held on June 26, 2003, the date the district court heard CCC's motion to dismiss. We therefore have no means of knowing whether CCC's argument at the hearing was more expansive than that which we have determined was set forth in paragraph 2.

[15] Finally, although CCC relied on both rules 8(c) and 12(b), rule 8(c) does not govern a defendant's right to assert an affirmative defense in a motion to dismiss. Rather, rule 8(c) provides that a defendant has the burden of pleading an affirmative defense in a responsive pleading. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1270 and 1277 (2d ed. 1990 & Supp. 2002). As discussed, whether an

affirmative defense may be raised in a motion to dismiss is governed by rule 12(b). Therefore, we need not further discuss the relevance of rule 8(c) to this appeal.

Upon our de novo review, we conclude that the district court erred in granting CCC's motion to dismiss.

VII. CONCLUSION

The district court's order granting CCC's motion to dismiss is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE,
V. LINH BAO, APPELLANT.
690 N.W.2d 618

Filed January 14, 2005. No. S-03-1333.

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.
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. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Pleadings: Judgments: Time.** To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
6. **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 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. The defendant must also show that counsel's deficient

performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

7. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
9. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
10. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.
11. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the court.
12. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
13. **Appeal and Error.** Absent plain error, an issue not raised to the trial court will not be considered by the Nebraska Supreme Court on appeal.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Linh Bao, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Linh Bao was convicted in the district court for Lancaster County of first degree murder and use of a weapon to commit a felony. Bao's convictions and sentences were affirmed on appeal to this court. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). On July 16, 2003, the district court denied Bao's motion for postconviction relief in which he claimed ineffective assistance of trial counsel. Bao appeals the denial of postconviction relief. We affirm.

STATEMENT OF FACTS

The facts of the underlying case were described in our decision in Bao's direct appeal. See *id.* A jury found Bao guilty of first degree murder and use of a weapon to commit a felony. On February 6, 2001, Bao was sentenced to life imprisonment on the murder conviction and a consecutive sentence of 2 to 6 years' imprisonment on the weapon conviction. Bao's convictions were affirmed on appeal. Bao was represented by public defenders at trial and on direct appeal.

Bao filed a pro se motion for postconviction relief on June 5, 2002. Counsel other than those representing Bao at trial and on appeal was subsequently appointed and filed an amended motion in which it was alleged that trial counsel was ineffective for (1) failing to have Bao evaluated by a qualified mental health professional and failing to pursue a defense based on mental health, (2) relying solely on a defense that Bao was justified in using deadly force, and (3) failing to defend on the theory that Bao was guilty of sudden quarrel manslaughter rather than first degree murder. In subsequent briefing, Bao also asserted that the performance of one of his trial attorneys was affected by the attorney's problem with alcohol. Bao requested an evidentiary hearing for the purpose of obtaining an order vacating and setting aside his convictions and sentences.

Following an evidentiary hearing, the court on July 16, 2003, overruled Bao's motion and denied the requested relief. The court concluded that as to each claim, Bao failed to show either deficient performance or prejudice which could support a finding of ineffective assistance of counsel. In so concluding, the court determined that (1) the testimony of a mental health expert presented by Bao in the postconviction hearing showed "only that Bao was more prone to violent behavior, not that he did not know what he was doing at the time of the act itself" and that therefore, Bao did not establish prejudice from trial counsel's purported failure to pursue such testimony and a defense based on mental health; (2) although it was "not at all clear that the only defense raised by Bao [at trial] was that the shooting was justified," even if the only defense was justifiable shooting, Bao did not establish that trial counsel's performance was deficient for making the reasonable strategic decision to rely on a theory of self-defense; (3)

the trial record contradicted Bao's postconviction assertion that trial counsel failed to suggest or argue that the jury could find Bao guilty of sudden quarrel manslaughter rather than first degree murder; and (4) Bao failed to establish that the alcohol problem of one of his attorneys manifested itself at trial or prejudiced his defense in any way.

On July 25, 2003, Bao filed a pro se motion for reconsideration of the order denying postconviction relief. Bao asserted that the court erred in various determinations, and he asserted that postconviction counsel was ineffective for failing to pursue certain claims that he had raised in his original pro se motion. Such claims related to trial counsel's purported failure to secure jury instructions relative to Bao's intoxication on the night the crimes were committed. Prior to a ruling on the motion for reconsideration, Bao filed a notice of appeal. This court, without opinion, dismissed the appeal for lack of jurisdiction on September 10.

On October 16, 2003, the motion for reconsideration was withdrawn by postconviction counsel, and the court entered an order dismissing the motion. On the same day, the court denied Bao's request for substitute counsel. On October 21, Bao filed a pro se request to reinstate the motion for reconsideration, asserting that court-appointed counsel had withdrawn the motion without Bao's permission. The next day, the court denied the request to reinstate. On November 14, Bao filed a notice of appeal in which he stated that he was appealing the July 16 order overruling his motion for postconviction relief and the October 16 order dismissing his motion for reconsideration. The State moved to dismiss the appeal as untimely. We denied the motion without prejudice.

ASSIGNMENTS OF ERROR

Bao makes several assignments of error which he argues in three general categories. In summary, Bao first asserts that the district court erred in failing to grant postconviction relief and failing to find that Bao had received ineffective assistance of counsel. Second, Bao asserts that the court erred in failing to consider claims relating to jury instructions that he had made in his original pro se motion but were abandoned by postconviction counsel. Bao claims that the court should have reinstated and granted his motion for reconsideration in which he urged the

court to consider the jury instruction claims and that counsel provided ineffective assistance by failing to pursue such claims. Finally, Bao claims that the court abused its discretion by failing to appoint substitute postconviction counsel, by failing to appoint an interpreter, and by failing to allow an "inmate legal aide" to assist him at a hearing on the motion for reconsideration.

STANDARDS OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

[2] 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. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

ANALYSIS

Jurisdiction.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004). The State previously moved for summary dismissal of this appeal on the basis that Bao failed to timely file a notice of appeal. We overruled the State's motion without prejudice. We now determine that given the record and the statutes, Bao timely filed his notice of appeal, and that we have jurisdiction to determine this appeal.

The following statutes are at issue in our jurisdictional analysis: Neb. Rev. Stat. §§ 25-1329 (Cum. Supp. 2002) and 25-1912(3) (Cum. Supp. 2004). Section 25-1912(3) provides in relevant part:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, (b) by a timely motion to alter or amend a judgment under section 25-1329, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection.

Section 25-1329 provides that "[a] motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment."

The State argues that Bao's motion for reconsideration filed on July 25, 2003, was functionally a motion to alter or amend a judgment which was timely filed within 10 days of the July 16 order denying postconviction relief. See § 25-1329. The State notes that § 25-1912(3) provides in part that "[t]he running of the time for filing a notice of appeal shall be terminated . . . by a timely motion to alter or amend a judgment . . . ." The State acknowledges that the full 30 days for appeal commences to run from the entry of an order "ruling" upon the motion to alter or amend a judgment. See, § 25-1912(3); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

In support of its argument that Bao's notice of appeal was untimely, the State asserts that the withdrawal of a motion to alter or amend is not a "ruling upon the motion" under § 25-1912(3). The State asserts that although the motion to alter or amend stopped the running of the time to appeal, in the absence of a "ruling" on the substance of the motion, the withdrawal of the motion causes the 30-day time period to resume but does not start a new and separate 30-day time period. The State claims that because 9 days had elapsed between the July 16 order and the date Bao filed the motion for reconsideration, Bao had 21 days left of his 30-day appeal time to file his notice of appeal after he withdrew his motion on October 16. Bao filed his notice of appeal on November 14, and the State argues that the notice was not timely filed because, although it was filed within 30 days of the withdrawal of the motion, it was not filed within the 21 days that the State argued were all that remained.

Relying on statutory language, Bao argues in response that § 25-1912(3) provides that the 30-day time period for filing the notice of appeal is "terminated" by the timely filing of a motion to alter or amend a judgment and that therefore the act of filing his motion to alter or amend ended the initial 30-day time period to file for appeal. Bao argues that the 9 days between the July 16, 2003, order and his filing the motion should not be counted against the 30-day time for filing a notice of appeal because he obtained a new 30-day time period upon the withdrawal and dismissal of his motion to alter or amend.

[5] Regarding the characterization of Bao's pleadings, we agree with the State that Bao's "motion for reconsideration" should be treated as a motion to alter or amend the judgment. To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Bao's "motion for reconsideration" was filed within 10 days after the July 16, 2003, order denying postconviction relief, and the motion sought substantive alteration of the judgment, because Bao asserted that the court erred in various conclusions and in failing to address certain claims and requested that the July 16 order be vacated and leave be granted to amend the motion for postconviction relief.

Regarding the timeliness of Bao's notice of appeal, we agree with Bao that his notice of appeal was timely. Our review of the law and the record shows that the time for filing Bao's notice of appeal was "terminated" when he filed the motion for reconsideration on July 25, 2003, and that a new full period of 30 days commenced to run on October 16 when the motion was withdrawn and the court ruled that the matter was dismissed. See § 25-1912(3). In reaching our determination, we note that § 25-1912(3) provides in relevant part that "[t]he running of the time for filing a notice of appeal shall be *terminated* . . . by a timely motion to alter or amend a judgment" and "the *full time* for appeal fixed in subsection (1) of this section [30 days] *commences* to run *from* the entry of the order *ruling* upon the motion filed pursuant to subdivision (a) [new trial], (b) [alter or amend

judgment], or (c) [set aside verdict or judgment]." (Emphasis supplied.) Upon being advised by postconviction counsel on October 16 that Bao's motion for reconsideration was withdrawn, the court entered an order dismissing the motion. For purposes of § 25-1912(3), the filing of the motion "terminated" rather than merely suspended or tolled the initial 30-day period, and the court's dismissal of the motion was a "ruling." Therefore, a new and separate period of 30 days to file a notice of appeal commenced to run on October 16, the date of the entry of the order dismissing the motion to alter or amend. See *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). Bao had 30 days from October 16 to file his notice of appeal, and therefore the notice of appeal filed November 14 was timely.

In reaching our conclusion regarding the timeliness of Bao's notice of appeal, we note that § 25-1912(3) is substantially similar to federal appellate rules of procedure governing time for appeal. We have stated that it is appropriate to look to cases interpreting substantially similar federal procedural rules for guidance in interpreting Nebraska's statutes. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). Our conclusion that Bao's notice of appeal was timely appears to be consistent with decisions of federal courts applying federal rules of appellate procedure that are similar to § 25-1912(3). See, *Rutledge v. U.S.*, 230 F.3d 1041 (7th Cir. 2000) (stating that under Fed. R. App. P. 4(a)(1)(B), time for filing notice of appeal began to run on day defendant withdrew motion to alter or amend); *U.S. v. Rodriguez*, 892 F.2d 233 (2d Cir. 1989) (stating that full time for filing appeal under Fed. R. App. P. 4(b) began to run after motion for reconsideration was withdrawn). We note that the U.S. Court of Appeals for the Second Circuit stated in *Rodriguez* that its conclusion which endorsed a new period of 30 days after withdrawal of the motion for reconsideration was considered sound, at least in the absence of evidence that the motion was filed and then withdrawn "in bad faith, as part of some sort of hardball litigation strategy," or as a result of neglect. 892 F.2d at 236.

We see no indication that Bao's motion to alter or amend was filed and withdrawn in bad faith, and we therefore conclude that the filing of such motion terminated the time for filing a notice

of appeal under § 25-1912(3) and that a new period of 30 days for filing a notice of appeal commenced on October 16, 2003, when the motion was withdrawn and ordered dismissed. Bao's notice of appeal filed November 14 was therefore timely, and this court has jurisdiction over the appeal.

Denial of Postconviction Relief and Purported Failure to Find Ineffective Assistance of Trial Counsel.

Bao asserts that the district court erred in rejecting his various claims of ineffective assistance of trial counsel and in therefore denying postconviction relief. We conclude that the court did not err in rejecting Bao's claims of ineffective assistance of counsel.

In its July 16, 2003, order dismissing Bao's motion for postconviction relief, the district court rejected Bao's four claims of ineffective assistance of counsel outlined above. For his first claim, Bao asserted that trial counsel failed to have Bao evaluated and to pursue a defense based on mental health. With respect to the first claim, the court noted that the testimony of a mental health expert presented by Bao in the postconviction hearing showed "only that Bao was more prone to violent behavior, not that he did not know what he was doing at the time of the act itself." The court concluded that such testimony would not have caused the jury to find that Bao did not have the required intent and that therefore Bao did not establish prejudice from trial counsel's purported failure to pursue such testimony.

For his second claim, Bao asserted that trial counsel improperly based the defense solely on the theory that Bao was justified in using deadly force. With respect to the second claim, the court noted that the record of the trial was "not at all clear that the only defense raised by Bao [at trial] was that the shooting was justified" and concluded that even if it were the only defense presented, Bao did not establish that trial counsel's performance was deficient for making the reasonable strategic decision to rely on a theory of self-defense.

For his third claim, Bao asserted that trial counsel failed to urge that Bao was guilty of sudden quarrel manslaughter rather than murder. With respect to the third claim, the court found that Bao failed to establish his claim of deficient performance because the trial record contradicted Bao's assertion that trial counsel failed to

suggest or argue that the jury could find Bao guilty of sudden quarrel manslaughter rather than first degree murder. The court specifically noted that Bao could not establish prejudice resulting from any purported failure with respect to the sudden quarrel manslaughter theory because under the step instruction given to the jury, the jury would not have considered manslaughter after it found Bao guilty of first degree murder.

For his fourth claim, Bao asserted that the performance of one of his attorneys was affected by alcohol use. With respect to the fourth claim, the court concluded that Bao failed to show prejudice because he failed to establish that the attorney's alcohol problem manifested itself at trial or affected the outcome of the trial in any way.

[6-9] In reviewing the district court's order rejecting Bao's claims of ineffective assistance of counsel, we are guided by the following standards. In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.* In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id.* When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

After reviewing the law and the record, we find no error in the district court's conclusions that Bao failed to establish either deficient performance or prejudice with respect to each of his claims of ineffective assistance of counsel. We therefore conclude that the court did not err in denying Bao's motion for postconviction relief on the bases asserted above.

Purported Failure to Consider Jury Instruction Claims.

Bao generally asserts that the district court erred in failing to consider claims relating to jury instructions which he raised in his original pro se motion for postconviction relief and which postconviction counsel had failed to pursue. Bao argues that the court should have reinstated and granted his motion for reconsideration in which he urged the court to consider the claims despite the fact that postconviction counsel had left the claims out of the operative second amended motion for postconviction relief. In the alternative, Bao argues that in light of counsel's purported deficient performance, this cause should be remanded to the postconviction court to consider the claims relating to jury instructions. We do not find Bao's arguments persuasive.

In his original pro se postconviction motion, Bao made claims that trial counsel provided ineffective assistance by failing to secure jury instructions to the effect that Bao's intoxication could be considered in determining whether premeditation and the appropriate intent were present. After Bao filed his pro se motion, postconviction counsel was appointed and a second amended postconviction motion, which became the operative motion in this case, was filed on February 4, 2003. The second amended motion did not contain the claims relating to jury instructions, and the court therefore did not address the claims in its July 16 order denying postconviction relief. On July 25, Bao filed a pro se motion for reconsideration in which he argued, inter alia, that he was entitled to leave to amend his motion to again include the jury instruction claims. Bao asserted ineffective postconviction counsel as cause to excuse any procedural default in failing to preserve the claims. On October 16, the court dismissed the motion for reconsideration after counsel informed the court that the motion was withdrawn. On October 21, Bao filed a pro se "Request to Reinstate Motion for Reconsideration Proceedings" in which he asserted that counsel withdrew the motion without his consent. The court overruled the request on October 22.

[10] We read Bao's arguments to be founded on an assertion that he was denied constitutionally mandated effective counsel. However, we have held that there is no constitutional guarantee of effective assistance of counsel in a postconviction action and

therefore no claim for ineffective assistance of postconviction counsel. *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002); *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002); *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001). Therefore, Bao's arguments with respect to consideration of the jury instructions claims depending on constitutional allegations of ineffective assistance of postconviction counsel are without merit.

[11] Bao's motion for reconsideration and his request to reinstate the motion for reconsideration after it had been withdrawn were in part requests to amend his motion for postconviction relief to include the jury instruction claims. Pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1995), "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by . . . inserting other allegations material to the case. . . ." See, also, *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000). The decision to grant or deny an amendment to a pleading rests in the discretion of the court. See *id.* We note that § 25-852 was repealed effective January 1, 2003, and its counterpart is now found in the rules of pleading, Neb. Ct. R. of Pldg. in Civ. Actions 15 (rev. 2003). However, Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003." Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). See *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). Because the petition in this case was filed prior to January 1, 2003, we continue to refer to § 25-852.

The operative second amended motion for postconviction relief, which did not contain the jury instruction claims, was a verified motion signed by Bao. This fact compromises Bao's argument that postconviction counsel's purported failure to include the jury instruction claims was without Bao's permission or awareness. We further note that the jury in Bao's trial was given an intoxication instruction which stated, inter alia, "You may consider evidence of alcohol use along with all the other evidence in deciding whether Linh Bao had the required intent." Considering these facts, we conclude that the district court did not abuse its discretion in denying Bao's requests to analyze the jury instruction claims after the court had ruled on the second amended motion. We therefore reject

Bao's assignments of error relating to the purported failure to consider such claims.

Purported Failure to Appoint Substitute Postconviction Counsel, Interpreter, and "Inmate Legal Aide."

Bao finally contends that the district court erred in refusing his requests for substitute postconviction counsel, for an interpreter, and for an "inmate legal aide" to accompany him at the hearing on his motion for reconsideration.

After the district court denied Bao's motion for postconviction relief, Bao filed a motion on July 25, 2003, for appointment of substitute counsel. At an October 16 hearing, the court denied Bao's motion for substitute counsel. The court noted that Bao was filing pro se pleadings and attempting to act as his own attorney. The court then gave Bao the option of continuing pro se or being represented by his then-existing court-appointed attorney. Bao chose to continue being represented by the court-appointed attorney. The attorney then withdrew the motion for reconsideration. On October 21, Bao filed a pro se request to reinstate the motion for reconsideration, and the request was denied on October 22. On October 29, the court granted the court-appointed attorney's motion to withdraw as counsel, and Bao elected to proceed with the present appeal pro se.

[12] Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). We have stated that when the assigned errors in a postconviction petition before the district court contain no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In the present case, Bao requested substitute counsel after the court had overruled his postconviction petition and he therefore was seeking counsel to represent him with respect to his motion for reconsideration.

We regard Bao's situation at the time he requested substitute counsel to be similar to a situation where a postconviction petition contains no justiciable issue of law or fact. Because we have

concluded above that the court did not err in its rejection of Bao's postconviction claims, we determine that there was no justiciable issue of law or fact with respect to Bao's motion for reconsideration and that, therefore, appointment of counsel was not indicated. Furthermore, we note that at the October 16 hearing, Bao agreed to continue being represented by his existing court-appointed counsel. We therefore conclude that the court did not abuse its discretion when it did not appoint substitute counsel.

[13] Bao also argues on appeal that the court erred in failing to appoint an interpreter and an "inmate legal aide" to assist him in the hearing on his motion for reconsideration. The record reflects that Bao made no request to the court for either an interpreter or an "inmate legal aide," and therefore the court made no rulings denying such requests. Absent plain error, an issue not raised to the trial court will not be considered by this court on appeal. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). We see no plain error.

With respect to an interpreter, the record reflects that at the October 16, 2003, hearing, and in earlier proceedings, Bao spoke with the court in English and appeared to understand the proceedings. See *State v. Topete*, 221 Neb. 771, 380 N.W.2d 635 (1986) (where record satisfactorily demonstrates that defendant had sufficient command of English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint interpreter). With respect to the "inmate legal aide," Bao cites no authority to the effect that he was entitled to the presence of an "inmate legal aide" at the hearing on the motion for reconsideration, and we see no basis to declare the existence of plain error. We conclude that the district court did not err in relation to the appointment of counsel issues.

CONCLUSION

We conclude that Bao timely filed a notice of appeal and that therefore this court has jurisdiction. However, we determine that Bao's assignments of error on appeal are without merit. We therefore affirm the district court's denial of Bao's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY DELGADO, APPELLANT.

690 N.W.2d 787

Filed January 14, 2005. No. S-03-1401.

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. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
3. **Constitutional Law: Right to Counsel: Waiver.** Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense.
4. ____: ____: ____. In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.
5. ____: ____: ____. Under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), it is not a requirement that formal warnings be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel.
6. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.
7. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
8. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.
9. **Kidnapping: Words and Phrases.** A person commits kidnapping if he or she abducts another or, having abducted another, continues to restrain him or her with intent to terrorize him or her or a third person.
10. ____: ____. Neb. Rev. Stat. § 28-312(2)(a) and (b) (Reissue 1995) defines "abduction" as restraining a person with intent to prevent his or her liberation by (1) secreting or holding him or her in a place where he or she is not likely to be found or (2) endangering or threatening to endanger the safety of any human being.
11. **False Imprisonment: Words and Phrases.** Neb. Rev. Stat. § 28-312(1)(a) and (b) (Reissue 1995) defines "restrain" in relevant part as restricting a person's movement in such a manner as to interfere substantially with his or her liberty (1) by means of force, threat, or deception or (2) where the person is under the age of 18, without the consent of the relative or person having lawful custody of him or her.

12. **Sexual Assault: Words and Phrases.** Neb. Rev. Stat. § 28-318(6) (Reissue 1995) defines "sexual penetration" in relevant part as any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.
13. **Criminal Law: Kidnapping.** Neb. Rev. Stat. § 28-313 (Reissue 1995) provides that a defendant will be guilty of a Class II felony, rather than a Class IA felony, if the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Following a jury trial, Henry Delgado, appearing pro se, was found guilty of kidnapping, first degree sexual assault on a child, and felon in possession of a firearm. Delgado was sentenced to life imprisonment without parole for kidnapping, 40 to 50 years' imprisonment for first degree sexual assault on a child, and 10 to 20 years' imprisonment for felon in possession of a firearm. All sentences were ordered to run consecutively, and Delgado was given credit of 235 days for time served with respect to his felon in possession of a firearm conviction. Delgado, through counsel, appealed his convictions. We affirm.

II. BACKGROUND

In the early hours of April 19, 2003, an AMBER Alert, which is a child abduction alert system, was issued for 8-year-old K.B., who had last been seen getting into a white car with Delgado on the afternoon of April 18. On April 18, K.B. and her mother attended a gathering at K.B.'s grandmother's apartment. Also present at the gathering was Delgado. K.B.'s mother testified that at

approximately 4 p.m., she left the apartment to obtain additional items for dinner. Upon returning, she discovered that both Delgado and K.B. were missing. K.B.'s mother was informed that K.B. had left the premises with Delgado, although K.B. did not have permission to do so.

There was evidence that K.B. left voluntarily with Delgado after he offered to take her out to dinner. However, instead of taking K.B. out to eat, Delgado went to a liquor store where he purchased liquor for himself and candy for K.B. Delgado then drove to Wildcat Hills, a wooded recreational area. By the time they arrived at Wildcat Hills, it was beginning to get dark. K.B. testified that after parking near a picnic area surrounded by trees, Delgado told K.B. it was time "to party," and he and K.B. moved to the back seat of his vehicle where Delgado consumed some of the alcohol. K.B., upon Delgado's request, tasted some of the liquor. K.B. also testified that later on, Delgado lit a lighter under a piece of tinfoil and sucked up a white substance through a rolled-up $20 bill.

K.B. testified that at some point in the evening, Delgado suggested that he and K.B. remove their clothing. At that time, K.B. removed all her clothing except her underwear, and Delgado removed all his clothing including his underwear. K.B. claimed Delgado then told her to lie down and asked if she wanted to be his girl friend. K.B. answered affirmatively, and Delgado kissed her. Despite K.B.'s attempts to keep her underwear on, she claimed Delgado "pushed them off" and attempted to penetrate her vaginally. K.B. testified that she resisted Delgado's attempts by tightening her stomach muscles and crossing her legs. K.B. further testified that Delgado attempted to penetrate her anally, which she also resisted.

According to K.B., when Delgado had difficulty fully penetrating her with his penis, he yelled at her and hit her on the face. K.B. testified that Delgado also put his fingers in K.B.'s vagina in a further attempt to penetrate her vaginally. K.B. further testified that during the assault, Delgado advised her that if she would let him penetrate her with his penis, they could return home. According to K.B., Delgado also retrieved a gun from the trunk of the vehicle and threatened to take her out in the woods and shoot her if she did not quit crying and let him penetrate her.

K.B. stated that when it began to get light outside, K.B. was allowed to put her clothes back on. Delgado and she then cleaned out the vehicle, and she went to sleep in the back seat of the car. K.B. testified that some time later, she was awakened by Delgado, who directed her to put her shoes and jacket on, and that they then ran from the car. Eventually, Delgado picked up K.B. and carried her halfway down a hill where he placed her under a tree and told her to stay where she was while he tried to start the car. K.B. remained in the trees as instructed. While she waited for Delgado to return, K.B. heard a helicopter, saw people moving around on the hill to her right, and heard someone calling her name. After K.B. began to cry, she was found by a police officer and placed in a helicopter that transported her to a hospital for an examination.

The record reflects that when law enforcement officers arrived at Wildcat Hills, Delgado was not wearing any underwear, shorts, or pants. Instead, he was using a T-shirt as a makeshift covering —he had his legs through each of the T-shirt armholes and had secured the shirt with a belt. The record also shows that following a search of Delgado's vehicle and the surrounding area, law enforcement officers located a pair of men's underwear, a .30/30 Winchester rifle, rifle shells, aluminum foil with burn marks, a pair of white children's underwear, a bottle of blue-colored "Pucker," and a bottle of red-colored "Watermelon Pucker." The liquor and men's underwear were located in a trash can in the shelter area near Delgado's vehicle. Delgado was arrested and later charged with kidnapping, first degree sexual assault on a child, felon in possession of a firearm, and habitual criminal.

On October 1, 2003, Delgado filed a motion to discharge counsel and gave notice of his intent to proceed pro se. The motion was set for hearing, at which time the trial court spoke with Delgado regarding self-representation. The judge's questioning revealed that Delgado felt that he had a fairly good understanding of the State's evidence, that he knew what defenses he might have and would be able to present at trial, that he felt he could adequately cross-examine experts called by the State, that he had represented himself in federal court in habeas corpus proceedings, that he had sat through an entire jury trial where he was the defendant, and

that he had reviewed the Nebraska rules of evidence and felt that he had enough experience to make objections on the proper grounds as needed. At that hearing, the trial court determined that Delgado had waived his right to counsel voluntarily, intelligently, and knowingly and appointed Delgado's trial counsel to serve as standby counsel to assist Delgado if he so wished. Delgado was advised by the court that his trial would commence on November 3, 2003.

On October 24, 2003, Delgado wrote a letter to the court requesting medical records of K.B. under the rape shield statute to establish that she had suffered injuries from being sexually abused by individuals other than Delgado. The trial court ruled that other than questioning the examining physician and other medical personnel regarding their opinions or conclusions as to the age of K.B.'s injuries, no other evidence would be allowed regarding K.B.'s prior sexual history.

At Delgado's trial, he appeared pro se and continued to represent himself throughout the proceeding. During his cross-examination of K.B.'s mother, Delgado attempted to question her regarding her deposition testimony which indicated that K.B. had previously made a false accusation of sexual assault. However, following the State's objection, the trial court excluded such evidence as inadmissible hearsay. Delgado does not appeal the court's hearsay ruling.

Testimony was elicited from Dr. Richard Rojas, the physician who examined K.B. following her abduction. Rojas testified that injuries to K.B.'s vaginal area and anal area were consistent with trauma but were not consistent with vaginal penetration. However, he did feel that there had been penetration of her labia. As to whether K.B. had been anally penetrated, Rojas testified that there could possibly have been some penetration due to the gaping nature of the opening. He indicated the gaping opening could also have been attributable to a need to have a bowel movement. Rojas also testified that a notch on K.B.'s hymen appeared to be an old injury.

At the conclusion of the trial, the jury returned a verdict finding Delgado guilty of all charges. Following his conviction, counsel was appointed to represent Delgado during all further proceedings.

III. ASSIGNMENTS OF ERROR

Delgado assigns, restated, that (1) the trial court erred by allowing Delgado to waive his right to counsel; (2) the trial court erred by denying Delgado the right to present evidence of K.B.'s prior sexual abuse; (3) the evidence was insufficient to convict Delgado of kidnapping, first degree sexual assault, and felon in possession of a firearm; and (4) the trial court erred by sentencing Delgado to life imprisonment.

IV. 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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[2] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review. *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991).

V. ANALYSIS

1. Delgado's Request to Proceed Pro Se During Trial

Delgado argues in his first assignment of error that the trial court erred in allowing him to proceed with his trial pro se. Delgado claims that the trial court did not offer enough warnings regarding the consequences of his decision to proceed pro se and did not sufficiently ensure that he understood the consequences of his decision. Delgado acknowledges that specific, verbatim warnings of the dangers and disadvantages of self-representation are not required, but claims that the advice and warnings offered by the trial court were woefully insufficient to render Delgado's waiver of counsel voluntary, knowing, and intelligent.

[3-5] Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense. *State v. Sack*, 239

Neb. 690, 477 N.W.2d 921 (1991). In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). However, this court has held, as have other courts, that *Faretta* does not require that formal warnings be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel. See, *Ferguson v. Bruton*, 217 F.3d 983 (8th Cir. 2000) (stating that specific warning of dangers and disadvantages of self-representation is not required in every case if record shows that defendant had such knowledge from other sources); *State v. Dunster, supra.*

Delgado asserts that in determining whether his waiver was given knowingly and intelligently, we should apply the four-part "[f]ederal test" used by the Seventh Circuit Court of Appeals in *U.S. v. Egwaoje*, 335 F.3d 579 (7th Cir. 2003). Brief for appellant at 18. However, the court stated that the four-part inquiry is not a formalistic, mechanical approach. *U.S. v. Egwaoje, supra.* Rather, the court's ultimate inquiry is whether the record supports a knowing and intelligent waiver, regardless of the consideration of the four factors. *Id.* If it does, the trial court's decision will be upheld. *Id.* We also have rejected the claim that a formalistic litany is required to show such a waiver was knowingly and intelligently made. *State v. Green, supra.* Thus, we reject Delgado's argument that we adhere to a strict four-part analysis and instead review the record to determine whether, under the totality of the circumstances, Delgado was sufficiently aware of his right to counsel and the possible consequences of his decision to forgo the aid of counsel. See *State v. Dunster, supra.*

In determining whether Delgado's waiver of counsel was knowingly and intelligently made, the cases of *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991), and *State v. Dunster, supra*, are instructive. In *Green*, we found that the defendant had made a knowing and intelligent waiver of his right to counsel. In reaching that conclusion, we noted that a knowing and intelligent waiver can be inferred from a defendant's conduct and that such a waiver could be made despite the trial court's failure to advise the defendant of the dangers and disadvantages of self-representation. We also emphasized that a defendant's decision

to represent himself need not be prudent, just knowing and intelligent. In *Green*, we also took note of the defendant's prior experience with the judicial system, in particular his prior self-representation during a criminal trial.

Similarly, in *State v. Dunster, supra*, we found that the defendant had made a knowing and intelligent waiver of his right to counsel. In that case, the defendant was aware of his right to legal representation, had discussed self-representation with two attorneys, was advised of the complexities of evidentiary objections and the preservation of those objections, and was informed he would be held to the same standard as a defendant represented by counsel. In addition, the defendant was advised by the trial court that it believed the defendant was making a mistake by electing to proceed pro se.

We conclude, upon a review of the record, that Delgado likewise knowingly, intelligently, and voluntarily waived his right to counsel. The record reflects, as recited above, that Delgado was well aware of his right to legal counsel and of the possible sentences he faced for the various charges against him. The record also reflects that Delgado was advised of his rights surrounding his trial and of the complexities of representing himself, including knowledge of the technical Nebraska rules of evidence. Moreover, Delgado was hardly a novice at dealing with the criminal justice system. The trial court appointed Delgado's trial counsel as standby counsel to assist Delgado if he needed help and to resume representation of Delgado if he later chose to relinquish his right to self-representation.

2. Evidence of K.B.'s Prior Sexual History

In his second assignment of error, Delgado argues that the trial court committed reversible error when it prohibited him from presenting evidence of K.B.'s alleged prior sexual abuse. By letter, which the court treated as a pretrial motion, Delgado requested permission to present such evidence under the rape shield statute, Neb. Rev. Stat. § 28-321(2) (Reissue 1995). The trial court overruled the motion and limited questions regarding K.B.'s prior sexual abuse to the opinions and conclusions of physicians based upon their examination of K.B. following her April 18 and 19, 2003, assault.

[6] Delgado also attempted to question K.B.'s mother regarding an alleged prior accusation of sexual abuse made by K.B., which Delgado claims was later determined to be unfounded. Delgado did not request permission to admit this evidence by pretrial motion, but, rather, attempted to elicit testimony regarding this prior accusation through Delgado's cross-examination of K.B.'s mother. Delgado, however, was not permitted to conduct this cross-examination because of a hearsay objection. In a closed proceeding after the mother's testimony, the trial court addressed in more detail the admissibility of evidence regarding K.B.'s previous accusation of sexual abuse. At that proceeding, Delgado stated his belief that such evidence was admissible under the Nebraska rules of evidence for impeachment purposes. This was the first time this theory was advanced. The trial court noted that it was treating Delgado's questioning as an offer of proof, which it overruled on the ground that the testimony of K.B.'s mother regarding what she had been told by the police officers who investigated K.B.'s previous allegation of sexual abuse was inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801 (Reissue 1995). The questions Delgado sought to ask meet the definition of hearsay and were properly excluded.

Delgado's assignment of error on this subject is without merit.

3. Sufficiency of Evidence

[7,8] Delgado claims the trial court erred in finding there was sufficient evidence to convict him of kidnapping, first degree sexual assault on a child, and felon in possession of a firearm. On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.* When considering the sufficiency of the evidence in determining

whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

(a) Kidnapping

[9-11] A person commits kidnapping if he or she abducts another or, having abducted another, continues to restrain him or her with intent to terrorize him or her or a third person. Neb. Rev. Stat. § 28-313 (Reissue 1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). "Abduction" is defined as restraining a person with intent to prevent his or her liberation by (1) secreting or holding him or her in a place where he or she is not likely to be found or (2) endangering or threatening to endanger the safety of any human being. Neb. Rev. Stat. § 28-312(2)(a) and (b) (Reissue 1995). "Restrain," in turn, is defined in relevant part as restricting a person's movement in such a manner as to interfere substantially with his or her liberty (1) by means of force, threat, or deception or (2) where the person is under the age of 18, without the consent of the relative or person having lawful custody of him. § 28-312(1)(a) and (b).

The evidence presented at trial, viewed in the light most favorable to the State, reveals that Delgado persuaded 8-year-old K.B. to accompany him by promising to take her out to dinner. Instead, Delgado took her to a liquor store and then drove her to a secluded area where he kept her for the remainder of the night. At no time did Delgado receive permission to have K.B. accompany him. While K.B. was confined in Delgado's vehicle, Delgado sexually and physically assaulted her and threatened to kill her with a gun he brandished in front of her. In the morning, when it became obvious that the police were in the vicinity of Wildcat Hills, Delgado hid K.B. among trees and brush and denied knowledge of her whereabouts when questioned by police.

Viewing the evidence regarding K.B.'s abduction and continued restraint in the light most favorable to the State, we determine it is clear that the evidence was sufficient to support Delgado's conviction of kidnapping.

(b) Sexual Assault

Delgado argues that the evidence was insufficient to support his conviction of first degree sexual assault. He contends that the possibility that K.B.'s physical injuries were attributable to causes other than sexual penetration or assault by him renders the evidence insufficient to support his conviction. Delgado also suggests that inconsistencies in what K.B. told the doctors and nurses at the hospital following her abduction, K.B.'s taped interview taken a few days after her abduction, and her testimony at trial imply that her accusations were false. Delgado contends, therefore, that there was insufficient evidence on which to convict him of first degree sexual assault.

[12] In order for Delgado to be convicted of first degree sexual assault, it was necessary for the State to prove that Delgado subjected K.B. to sexual penetration when K.B. was less than 16 years old and Delgado was 19 years old or older. Neb. Rev. Stat. § 28-319 (Reissue 1995). "Sexual penetration" is defined in relevant part as "any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes." Neb. Rev. Stat. § 28-318(6) (Reissue 1995).

The record reflects that on April 18 and 19, 2003, Delgado was 39 years old and K.B. was 8 years old. The record further reflects that K.B.'s treating physician, Rojas, opined that K.B. had been penetrated in the labia area into the labia minora and had possibly been penetrated anally. Consistent with Rojas' findings, K.B. testified that while in Delgado's car, he attempted to penetrate her with his penis vaginally and anally and that he successfully penetrated her vaginally by sticking his fingers in her vaginal opening. This evidence is sufficient for the trier of fact to determine that K.B. was penetrated by Delgado, however slightly, and that this penetration was within the meaning of § 28-318(6). Therefore, there was sufficient evidence to support Delgado's conviction of first degree sexual assault.

(c) Felon in Possession of Firearm

Finally, Delgado argues that there was insufficient evidence to support his felon in possession of a firearm conviction because

there was no documentary evidence adduced at trial that Delgado was a felon. Delgado claims that the only evidence adduced at trial regarding his prior criminal record was the testimony of a police officer who discussed Delgado's prior record as it related to the officer's decision to issue the AMBER Alert.

Contrary to Delgado's assertion on appeal, the record does contain documentary evidence of Delgado's prior felony convictions. The record reflects that on January 7, 1985, Delgado was sentenced in Michigan to 10 to 20 years' imprisonment for breaking and entering and 2 to 5 years' imprisonment for larceny in a building. The record also reflects that a weapon was found in his possession at the time of his arrest for the abduction of K.B. Therefore, Delgado's claim that the evidence was insufficient with respect to his weapons charge is without merit.

4. Excessiveness of Sentence

In his final assignment of error, Delgado claims that the trial court committed reversible error by sentencing him to life imprisonment for kidnapping, as opposed to sentencing him to a term of years. In support of this claim, Delgado relies on § 28-313(3), which permits a trial court to impose a Class II sentence when the court finds that the person kidnapped was voluntarily released or liberated alive by the abductor in a safe place without having suffered serious bodily harm. Delgado also argues in his reply brief that the U.S. Supreme Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), restricts the ability of "judicial power to infringe upon the province of the jury." Reply brief for appellant at 3. Delgado claims, therefore, that the jury, and not the trial judge, should have determined whether the mitigating factors of § 28-313(3) had been met. We determine that Delgado's reading of *Blakely* is misguided and that the trial court did not err in sentencing Delgado to life imprisonment for kidnapping.

Section 28-313 provides in pertinent part:

> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without

having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

In *Blakely v. Washington, supra*, the U.S. Supreme Court was applying the rules of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The rule is that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.

We have, in our prior cases, examined the statute prescribing the penalty for kidnapping in light of *Apprendi*. In *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), the defendant claimed that the jury should have been instructed to determine whether the victim was voluntarily released or liberated and alive by the abductor and in a safe place without having suffered serious bodily injury. We stated that we had rejected such an argument in *State v. Becerra*, 263 Neb. 753, 758-59, 642 N.W.2d 143, 148 (2002), where we stated:

> In *Apprendi v. New Jersey, supra*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court stressed that the fact must increase the penalty. The Court made a distinction between facts in aggravation of punishment and facts in mitigation of punishment. The Court stated that when the issue involves mitigating facts under which the defendant can escape the statutory maximum, core concerns involving the jury and burden of proof requirements are absent. See *id.*
>
> *Apprendi* is inapplicable to [the defendant's] case. We have held that § 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping. The factors are simply mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should properly be determined by the trial judge. *State v. Hand*, 244

Neb. 437, 507 N.W.2d 285 (1993); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

Section 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. *State v. Mata, supra*; *State v. Becerra, supra.* The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under this section, and their existence or nonexistence should properly be determined by the trial judge. *Id.*

We conclude, therefore, that Delgado's final assignment of error is without merit.

[13] Having established that the trial court had jurisdiction to impose Delgado's kidnapping sentence, we turn to his claim that the mitigating factors of § 28-313(3) had been satisfied. Section 28-313 provides that a defendant will be guilty of a Class II felony, rather than a Class IA felony, if the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury.

In refusing to find that the mitigating factors of § 28-313(3) had been met, the trial court stated the evidence reflected that K.B. had not been voluntarily released or liberated. The evidence supports the trial court's finding. It is apparent from the record that when Delgado became aware of the presence of law enforcement, he attempted to hide K.B. by placing her under a tree in a ravine where he told her to stay while he tried to start his car. Moreover, when questioned by law enforcement officials regarding K.B.'s whereabouts, Delgado denied having any such knowledge. Delgado's conduct was a far cry from voluntarily releasing and liberating the victim within the meaning of § 28-313. Rescue is not a voluntary release. Moreover, the evidence clearly reflects

that K.B. was both physically and sexually abused during her abduction. Therefore, we find the trial court did not err in determining the kidnapping charge should be classified as a IA felony for the purpose of sentencing.

VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JAMES Y. PATHOD, APPELLEE.
690 N.W.2d 784

Filed January 14, 2005. No. S-03-1410.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
4. **Criminal Law: Convicted Sex Offender.** The requirements of Neb. Rev. Stat. § 29-4007 (Cum. Supp. 2002) are mandatory.
5. **Criminal Law: Appeal and Error.** Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Exception sustained.

Gail E. Collins, Deputy Madison County Attorney, for appellant.

Tom D. Hockabout, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

CONNOLLY, J.

The State of Nebraska filed an application for leave to docket an appeal under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The issue is whether a district court, when sentencing a defendant, must advise and provide written notification of the requirements of Nebraska's Sex Offender Registration Act (the Act), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2002). We determine that the court must provide written notification at sentencing. It also must provide copies of the notification and journal entry to various parties. But we also conclude that the failure to do so was harmless because the defendant signed a notice the day after sentencing and had completed serving his sentence when this appeal was heard. The State's exception is sustained.

BACKGROUND

The State charged the appellee, James Y. Pathod, with one count of sexual assault in violation of Neb. Rev. Stat. § 28-320(1)(a) (Reissue 1995). At arraignment, the district court advised Pathod of the Act's requirements. Pathod pled no contest, and sentencing was set for a later date.

The record does not show that the district court informed Pathod of the Act's requirements at sentencing. The day after sentencing, however, Pathod signed a notification of registration responsibilities under the Act. That notification was also signed by the district court judge. The record shows—and the State's attorney confirmed at oral argument—that Pathod has completed serving his sentence.

The State timely filed an application for leave to docket an appeal under § 29-2315.01. The district court signed the application, and the application was filed in this court.

ASSIGNMENT OF ERROR

The State assigns that the district court erred when at sentencing it failed to advise and provide written notification to Pathod of his duty to register under the Act.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the

court below. *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

ANALYSIS

The State argues that the court had a duty to inform Pathod, in writing, at sentencing about his duty to register under the Act. The State further contends that because the court failed to inform Pathod about the Act that the cause should be remanded for resentencing.

Section 29-4007 provides:

> (1) When sentencing a person convicted of a registrable offense under section 29-4003, the court shall:
>
> (a) Provide written notification of the duty to register under the Sex Offender Registration Act at the time of sentencing to any defendant who has pleaded guilty or has been found guilty of a registrable offense under section 29-4003. . . .
>
> . . . .
>
> (b) Require the defendant to read and sign a form stating that the duty of the defendant to register under the Sex Offender Registration Act has been explained;
>
> (c) Retain a copy of the written notification signed by the defendant; and
>
> . . . .
>
> A copy of the signed, written notification and the journal entry of the court shall be provided to the county attorney, the defendant, the sex offender registration and community notification division of the Nebraska State Patrol, and the county sheriff of the county in which the defendant resides or is temporarily domiciled.
>
> . . . .
>
> (3)(a) The Department of Correctional Services or a city or county correctional or jail facility shall provide written notification of the duty to register pursuant to the Sex Offender Registration Act to any person committed to its custody for a registrable offense under section 29-4003 prior to the person's release from incarceration.

[2,3] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation

to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). See, also, *State v. Rodriguez*, 11 Neb. App. 819, 660 N.W.2d 901 (2003) (construing term "shall" in § 29-4005 of Act).

[4] Here, the Act's plain language states that when sentencing a person, the court "shall" provide written notification and copies of the notification and corresponding journal entry to various parties. Thus, we determine that the Act's requirements are mandatory.

Pathod argues, however, that because he was in county jail, the duty to inform him of the Act shifted to jail personnel under § 29-4007(3)(a). We disagree. The Act does not shift the burden to notify. Instead, it requires multiple entities to provide notification. Thus, the Act required the court to provide notification at sentencing and jail personnel to provide additional notification before Pathod was released from incarceration.

The record, however, does not contain a journal entry showing that written notification was given at sentencing. Because the court was required to provide written notification under the Act and provide a journal entry, we determine that the court erred. Compliance with the Act's technical procedures are important because if they are not properly followed, defendants may seek to use that failure to attack the validity of their conviction or sentence. See, e.g., *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Rodriguez, supra.*

Having determined that the court erred by failing to provide written notification and a journal entry, we address whether Pathod should be resentenced. The State argues that resentencing is appropriate and that double jeopardy does not apply. We do not reach the issue of double jeopardy because we determine that the court's failure to follow procedure was harmless.

[5] Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). Here, although the record does not contain a journal entry or evidence that notification was given at sentencing, it does contain a notice

signed by Pathod and the district court judge that was filed the day after sentencing. In addition, the record shows that Pathod has completed serving his sentence. Concerns about using the failure to provide notification in court to attack the conviction and sentence are lessened, if not eliminated, when the sentence has already been served. Accordingly, we determine that the error was harmless.

CONCLUSION

We conclude that the district court erred when it failed at sentencing to provide written notification in court and failed to provide a journal entry showing that the notification was given. However, the error was harmless because Pathod signed a written advisory form and has already served his sentence.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LEONARD W. SHEFREN, RESPONDENT.

690 N.W.2d 776

Filed January 14, 2005. No. S-04-457.

Original action. Judgment of public reprimand and suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Leonard W. Shefren, was admitted to the practice of law in the State of Nebraska on June 25, 1974, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On April 14, 2004, formal charges were filed against respondent. The formal charges set forth two counts that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice);

and Canon 5, DR 5-103(B) (improperly advancing or guaranteeing financial assistance to client), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

A referee was appointed and heard evidence. On November 24, 2004, the referee filed his report. With respect to the two counts in the formal charges, the referee found that respondent's conduct had violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney. The referee recommended that respondent be publicly reprimanded and suspended from the practice of law for 30 days.

On December 3, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the findings of fact and recommended sanction set forth in the referee's report and waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. Respondent asked that any suspension be imposed 30 days after the ruling by this court on the conditional admission. Upon due consideration, the court approves the conditional admission and imposes discipline as outlined *infra*.

FACTS

In summary, in his report, the referee found that respondent had guaranteed bank loans for 20 different clients who had sustained personal injuries, primarily in work-related accidents. The loans totaled approximately $550,000. Respondent was pursuing claims on behalf of these clients in an effort to recover damages or benefits as a result of their injuries. The referee found that respondent guaranteed these loans because banks would not otherwise loan money to the injured clients who needed the money for living expenses. The referee further found that respondent did not guarantee the loans to induce the clients to retain respondent's services and that no client had suffered any money damages as a result of respondent's loan guarantee practices. The referee found that respondent's conduct had violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the truth of the matters conditionally admitted and knowingly does not challenge or contest that he violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. We further order that respondent should be and hereby is suspended from the practice of law for a period of 30 days, effective 30 days after filing this opinion. Respondent shall 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. At the end of respondent's 30-day suspension period,

respondent shall be automatically reinstated to the practice of law, provided that respondent has demonstrated his compliance with rule 16, and further provided that the Counsel for Discipline has not notified this court that respondent has violated any disciplinary rule during his suspension. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND AND SUSPENSION.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM C. PETERS, JR., RESPONDENT.

690 N.W.2d 629

Filed January 14, 2005. No. S-04-529.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, William C. Peters, Jr., was admitted to the practice of law in the State of Nebraska on January 22, 1973, and at all times relevant hereto was engaged in the private practice of law in Gering, Nebraska. On May 3, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); and Canon 6, DR 6-101(A)(2) (handling legal matter without adequate preparation).

On December 7, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he

knowingly admitted the truth of the allegations that he violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2), and in effect waived all proceedings against him in connection therewith in exchange for a stated form of a consent judgment of a public reprimand and probation. Upon due consideration, the court approves the conditional admission and imposes discipline as outlined *infra*.

FACTS

In his conditional admission, respondent admits that he undertook the representation of two clients in a chapter 13 bankruptcy proceeding. Respondent further admits that during the course of his representation of those clients, respondent filed bankruptcy plans that did not comply with the bankruptcy rules and failed to object to a creditor's motion for relief from the provisions of the bankruptcy automatic stay. The bankruptcy case was dismissed by the bankruptcy court due to respondent's failure to timely file an amended bankruptcy plan and failure to send appropriate notices as required under the bankruptcy rules.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the truth of the matters conditionally admitted and knowingly admits that he violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2). We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2) and that respondent should be and hereby is publicly reprimanded. We further order that respondent be on probation for a period of 1 year, effective immediately, during which time respondent will not accept any bankruptcy engagements and will complete 15 hours of continuing legal education in the area of bankruptcy law, to be approved by the Counsel for Discipline. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

JERE D. DETTER, APPELLANT, V. MIRACLE HILLS ANIMAL HOSPITAL, P.C., A NEBRASKA CORPORATION, APPELLEE.

691 N.W.2d 107

Filed January 21, 2005. No. S-02-688.

1. **Actions: Equity: Corporations.** An action seeking corporate dissolution is an equitable action.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.

4. **Goodwill: Words and Phrases.** Goodwill is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
5. **Actions: Goodwill.** The existence of professional goodwill as a distributable asset in an action for the dissolution of a professional entity presents a question of fact.

Petition for further review from the Nebraska Court of Appeals, HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Duane M. Katz for appellant.

Robert E. O'Connor, Jr., for appellee.

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

HENDRY, C.J.

INTRODUCTION

Appellant Jere M. Detter seeks further review of the Nebraska Court of Appeals' affirmance of the district court's judgment in which the district court determined the value of Detter's shares in a closely held professional corporation. Detter had filed actions, which were consolidated at trial, to (1) enforce certain promissory notes executed by Jeffrey Schreiber in favor of Detter and (2) judicially dissolve the professional corporation that Detter formed with Schreiber, Miracle Hills Animal Hospital, P.C. (MHAH). After Detter filed his petition to dissolve MHAH, MHAH elected to purchase Detter's shares, but the parties could not agree on the value of the shares. MHAH then filed a motion to have the district court determine the value. See Neb. Rev. Stat. § 21-20,166(2) to (4) (Cum. Supp. 2004).

The district court entered judgment in favor of Detter on the promissory notes, and that judgment is not part of this appeal. Regarding the value of the shares, the district court ruled that

pursuant to this court's decision in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), professional corporations do not have a goodwill value when one of the members leaves. The district court therefore allowed "nothing by way of value for the good will of this corporation" and awarded Detter one-half of MHAH's working capital and tangible assets. The district court further found that Detter was not entitled to attorney fees pursuant to § 21-20,166(5)(b). The Court of Appeals affirmed. *Detter v. Miracle Hills Animal Hosp.*, 12 Neb. App. 480, 677 N.W.2d 512 (2004). This court granted Detter's petition for further review.

BACKGROUND

Detter and Schreiber are veterinarians. In 1991, they combined their practices to form MHAH. Detter and Schreiber each contributed $5,000 to the new corporation, and each owned 50 percent of the shares. They were the only members on the board of directors. At the same time the parties agreed to incorporate, Schreiber executed promissory notes in favor of Detter, which notes were in consideration of Detter's contribution of "greater assets" to the corporation.

In October 1997, Schreiber informed Detter that he would no longer make payments on the notes unless Detter agreed to compensate Schreiber for management services. Schreiber and Detter also disputed how much in support services and inventory MHAH should be providing to the pet grooming service Schreiber's wife operated out of MHAH on a commission basis. Settlement negotiations took place in the spring of 1998 but were unsuccessful. In May 1998, Detter commenced an action against Schreiber on the notes.

During 1998, the office environment generally deteriorated. Schreiber began to keep MHAH's business check book at home, making it difficult for Detter to know the status of the business or participate in its management. In September 1998, Detter offered to buy Schreiber's interest in MHAH for $60,000. The offer contained no restrictions on Schreiber's ability to contact his clients.

The $60,000 offer was based on Detter's belief that the business was worth $228,000, of which he attributed $120,000 to the corporation's equipment, furniture, fixtures, trade name, sign, and

location. Detter attributed an additional $108,000 to the annual net income for both veterinarians—salary and dividends—produced from their current client base. Because Detter did not intend to restrict Schreiber's ability to retain his own clients, Detter's $60,000 offer was based only on a 50-percent share of the $120,000 value Detter attributed to the corporation's tangible assets, trade name, sign, and location. When Schreiber did not respond to the offer, Detter filed an action for judicial dissolution on November 18, 1998.

In this action for dissolution, Detter alleged that Schreiber had personally interfered, and had permitted Schreiber's wife and staff to interfere, with Detter's ability to practice at the clinic and participate in management. Detter claimed that the shareholders were deadlocked, that Schreiber had misapplied corporate funds to benefit himself, and that Schreiber had acted in an illegal and oppressive manner.

In March 1999, MHAH filed an election to purchase Detter's outstanding shares pursuant to § 21-20,166 (allowing, under specified conditions, election to purchase shares of shareholder petitioning for dissolution under Neb. Rev. Stat. § 21-20,162(2) (Cum. Supp. 2002)). Because the parties were unable to agree upon the fair market value of the shares, MHAH filed a motion to have the court determine the value of the shares. See § 21-20,166(4) (providing that after 60 days and upon party's motion, court shall stay dissolution proceedings and determine fair market value of shares). Detter continued to practice at MHAH until he resigned on September 4, 1999.

District Court Proceedings

A bench trial was conducted in January 2002. Detter's valuation expert, Cynthia Wutchiett, is a certified public accountant who has specialized in veterinary business consulting, valuations, and acquisitions since 1985. Wutchiett testified that she had performed over 300 valuations of veterinary practices for buyers or sellers, including 3 or 4 in Nebraska since 1995. Wutchiett further testified, without objection, that on November 17, 1998, the day before the action for judicial dissolution was filed, MHAH had a fair market value of $182,082, which included goodwill value of $141,127. See § 21-20,166(4) (providing that parties may move

court to "determine the fair value of the petitioner's shares as of the day before the date on which the petition under subdivision (2) of section 21-20,162 was filed or as of such other date as the court deems appropriate under the circumstances").

Wutchiett also testified that her valuation of the practice was based on the excess earnings method and had two components: (1) working capital and tangible assets of the practice and (2) capitalization of excess earnings, defined as the practice's goodwill value. Wutchiett's valuation of the practice's goodwill was based on adjusted income and expenses for the 3 preceding fiscal years, 1995 to 1997. Wutchiett determined that revenues of the practice had increased 12 percent from 1995 to 1996, and 7 percent from 1996 to 1997, and that the practice serviced 1,300 clients and generated approximately 5,800 transactions annually. Wutchiett did not consider the corporate tax returns for 1998 to 2000, or whether any clients had left after the November 17, 1998, date of her valuation. Wutchiett derived excess earnings by deducting from the practice's annual income (1) normal operating expenses, adjusted to industry standards; (2) doctor compensation for veterinary services, calculated at 22 percent of doctor-generated revenue; and (3) doctor compensation for management services, calculated at 3 percent of doctor-generated revenue. Wutchiett did not assign a separate value to clients, but stated that their value was included in the goodwill valuation.

Wutchiett then weighted and averaged the net income for each of the 3 preceding years to produce the expected excess earnings of the practice, which she calculated at $33,419 per year. Wutchiett then testified that based on the history of the practice, there was a reasonable expectation the practice would continue to have the same amount in expected excess earnings. Wutchiett deducted the calculated expected return rate for the net assets of the practice, and characterized the balance, $28,801, as the practice's return on goodwill, or its income stream, that could be passed on to a willing buyer. The $28,801 was then multiplied by a capitalization factor of 4.9 to derive a total goodwill value of $141,127. The 4.9 factor represented a rate of return of 20.4 percent, which was Wutchiett's professional opinion of the rate of return a buyer would want to earn, as well as the risks associated with an investment in the practice. The goodwill value and net

assets value of the practice were combined for a total fair market value, as of November 17, 1998, of $182,082.

Wutchiett also testified that in her opinion, historical purchase transactions had shown goodwill value of a practice remains with the practice regardless of whether the associates or owners stay or go, and that neither she nor anyone else in the industry recognized goodwill attached to an individual veterinarian as opposed to the practice. Wutchiett further testified that it was very difficult for a veterinarian to retain clients when they leave or relocate a practice. Referring to a veterinary business valuation she was previously engaged in, Wutchiett testified that the particular veterinarian was able to retain only 30 to 40 percent of his clients despite aggressive advertisement, the closure of the old practice, and relocating only 5 to 6 miles from the prior practice. Schreiber did not object to Wutchiett's opinion as to the value of the practice.

Schreiber's valuation expert, Ronald Nebbia, took exception to Wutchiett's valuation because it included goodwill as an asset. Nebbia valued the practice at $35,912, based upon the practice's adjusted net tangible assets, accounts receivables, and par value of its 10,000 shares of stock, or $1 per share. Nebbia testified that "in a professional practice of this nature, goodwill primarily rests with the provider and not the practice."

The final issue presented at trial was whether Detter was entitled to expenses and attorney fees for Schreiber's alleged misapplication of corporate funds or Schreiber's alleged illegal and oppressive conduct. See § 21-20,166(5)(b) (providing for attorney fees and expenses when petitioning shareholder had probable grounds for relief because (1) directors acted in illegal, oppressive, or fraudulent manner or (2) corporate assets were being misapplied or wasted).

In finding generally in favor of Schreiber, the district court accepted Nebbia's $35,912 valuation of the practice, determining that pursuant to this court's decision in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), there is no goodwill value for a professional corporation when one of its members leaves. The court also rejected Wutchiett's valuation of the working capital and tangible assets of the practice because "she based that on an equipment evaluation made by a man who never saw the equipment."

The district court then awarded Detter half of Nebbia's $35,912 valuation, or $17,956, plus $3,050 for half the value of a corporate vehicle, for a total of $21,006. The district court further concluded that Detter was not entitled to attorney fees, finding that Schreiber's conduct of which Detter complained did not rise to the level of misconduct that would warrant attorney fees pursuant to § 21-20,166(5)(b).

COURT OF APPEALS' DECISION

Detter appealed to the Court of Appeals. Concluding that *Taylor, supra*, was a marital dissolution action and not directly on point, the Court of Appeals found support for the district court's judgment in two cases from other jurisdictions. See, *Detter v. Miracle Hills Animal Hosp.*, 12 Neb. App. 480, 677 N.W.2d 512 (2004), citing *Salinas v. Rafati*, 948 S.W.2d 286 (Tex. 1997), and *Smith, Keller & Assoc. v. Dorr & Assoc.*, 875 P.2d 1258 (Wyo. 1994). In determining that the district court did not err in its conclusion that "goodwill should not be included as an asset of a closely held corporation," the Court of Appeals stated:

> While the credentials of Wutchiett are certainly impressive, she determined the value of MHAH using a method giving the corporation credit for goodwill. As we mentioned previously, goodwill is not an asset with an assignable value in a professional corporation; it is not a marketable asset that stays with a corporation, but, rather, a nonmarketable one that leaves with a professional. Because Wutchiett's valuation of MHAH incorporated an asset that is not a marketable asset, we affirm the trial court's decision to reject her testimony. Based on our review of the record, we find that the trial court properly rejected Detter's method of valuation for MHAH.

Detter, 12 Neb. App. at 489, 677 N.W.2d at 519. Further agreeing with the district court's finding that Schreiber's conduct did not rise to the level of illegal, oppressive, or fraudulent conduct and that Detter did not show that Schreiber was misapplying or wasting corporate assets, the Court of Appeals also affirmed the district court's denial of attorney fees to Detter. *Id.*

ASSIGNMENTS OF ERROR

In his petition for further review, Detter assigns, restated and condensed, that the Court of Appeals erred in determining that

(1) goodwill is not part of the valuation in a dissolution proceeding of a professional corporation and (2) Schreiber's conduct was not illegal, oppressive, or fraudulent and did not waste or misapply corporate assets.

STANDARD OF REVIEW

[1,2] An action seeking corporate dissolution is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

[3,4] A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). The issue presented by this case is whether a professional corporation can have goodwill as a distributable asset in a corporate dissolution proceeding.

> " 'Good-will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' "

Taylor v. Taylor, 222 Neb. 721, 727-28, 386 N.W.2d 851, 856-57 (1986), quoting *Haverly v. Elliott*, 39 Neb. 201, 57 N.W. 1010 (1894).

Contrary to the Court of Appeals' decision, we conclude that our opinion in *Taylor, supra*, should not be applied solely to marital dissolutions. In *Taylor*, the husband was a physician and the sole practitioner and shareholder of a professional corporation, his medical practice. The issue was whether professional goodwill should be included as an asset in the marital estate. This court stated:

> Virtually any income-producing entity, regardless of the nature of the business organization, may have . . . an intangible asset [of] goodwill. To the extent that such intangible asset's value results from recurrent customer patronage, there is no question that goodwill is property which may be considered as a part of the marital estate . . . .

Taylor, 222 Neb. at 728-29, 386 N.W.2d at 857. See, also, *Tarry v. Johnston*, 114 Neb. 496, 503, 208 N.W. 615, 619 (1926) ("good will of a professional business may be legally sold in connection with other property rights to which it is attached").

Recognizing in *Taylor, supra*, a split of authority on the question of whether professional goodwill can be a divisible asset in a marital dissolution proceeding, we stated that courts affirmatively answering the question had adopted a capitalization of excess earnings method of valuation. We further stated that although this method represents the earning capacity of a professional practice, it "does not necessarily represent an asset which may be sold, transferred, or assigned." *Taylor*, 222 Neb. at 729, 386 N.W.2d at 858. We stated that professional practices raise special concerns "because goodwill is likely to depend on the professional reputation and continuing presence of a particular individual in that practice," *id.*, but concluded that whether a professional business has goodwill with a value distinct from the practitioner's presence is a question of fact:

> Consequently, where goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity . . . .
>
> Accordingly, to be [considered] as property divisible and distributable in a dissolution proceeding, we conclude that goodwill must be a business asset with value independent

> of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged. In so characterizing goodwill as marital property . . . *we neither state nor imply that goodwill, as a salable or marketable business asset, may never exist in a professional practice*. . . . If a party produces appropriate evidence establishing salability or marketability of goodwill as a business asset of a professional practice, professional goodwill may be considered in determining value of property in a marital estate to be divided in a dissolution proceeding. *Also, we do not reject in all cases capitalization of excess earnings as a method to determine earning capacity.*
>
> . . . [P]rofessional qualities of a practitioner are often critical to the existence and continuation of professional goodwill. Professional goodwill may be personal in nature and, therefore, not a readily salable or marketable item. Under such circumstances goodwill has no existence independent of the professional generating that goodwill. . . . *Whether goodwill exists and whether goodwill has any value are questions of fact.*

(Emphasis supplied.) *Taylor v. Taylor*, 222 Neb. 721, 731-32, 386 N.W.2d 851, 858-59 (1986).

It would be incongruent for this court to hold that, with appropriate evidence, goodwill of a professional corporation can be a divisible property asset in a marital dissolution proceeding but not a distributable asset if the same professional actually dissolves his or her practice subsequent to the divorce. The cases from other jurisdictions relied upon by the Court of Appeals do not persuade us that our reasoning in *Taylor* should not be applied equally to business dissolutions.

In *Salinas v. Rafati*, 948 S.W.2d 286, 290 (Tex. 1997), the Texas Supreme Court held that the trial court improperly considered intangibles in the valuation of a dissolved partnership of radiologists "[t]o the extent that the valuation of the dissolved partnership was based on the goodwill attributable to the personal skills and talents of the former partners . . . ." However, the court pointedly stated:

> There is no contention nor is there any evidence that the name of the former partnership had goodwill separate and

> apart from the personal talents and abilities of each of the partners or that any partner had the right or the desire to form a new partnership using the name of the dissolved partnership.

Id.

In a later case, the Texas Court of Appeals specifically rejected a party's contention that a professional partnership does not have goodwill value as a matter of law. *Welder v. Green*, 985 S.W.2d 170 (Tex. App. 1998). In *Welder*, the court clarified that under Texas law, a professional partnership can have goodwill value, the same as a mercantile partnership, if the business has a "generally recognized name, that would lead patrons to do business with any person or firm using that name," 985 S.W.2d at 179, or goodwill that is attached to a "location, such as the corner store" that will be patronized despite the dissolution, *id.* at 178.

In *Smith, Keller & Assoc. v. Dorr & Assoc.*, 875 P.2d 1258, 1265 n.5 (Wyo. 1994), the Wyoming Supreme Court stated in a footnote that "[t]he accepted rule has recognized that professional partnerships do not have a goodwill asset [unless] the facts and circumstances show an exception to the general rule is intended by the parties." (Emphasis omitted.) This statement, however, is merely dicta, as the court was not required to decide that issue in order to resolve the case. See *id.* (determining that plaintiffs were entitled to accounting and that because earlier arbitration decision had not been appealed, arbitrators' determination that firm's assets included client goodwill was controlling). See, also, *Pribil v. Koinzan*, 266 Neb. 222, 232, 665 N.W.2d 567, 576 (2003) ("case is not authority for any point not necessary to be passed on to decide the case").

While the dicta in *Smith, Keller & Assoc., supra*, is indicative of how Wyoming's Supreme Court might rule on the issue of professional goodwill as a distributable asset in a dissolution proceeding, it is not consistent with this court's reasoning in *Taylor, supra*, or our prior decisions involving the dissolution or sale of professional entities. See, *Thomas v. Marvin E. Jewell & Co.*, 232 Neb. 261, 440 N.W.2d 437 (1989) (concluding that there was no goodwill to split upon dissolution of accounting firm *when evidence showed* that departing partners in accounting firm had taken files of clients they wished to retain and that despite being

contacted by both new partnerships, clients remained with firm that had their files); *Bailey v. McCoy*, 187 Neb. 618, 193 N.W.2d 270 (1971) (determining goodwill value of accounting and tax services firm in dissolution proceeding where provision in partnership agreement valued partnership based on annual income); *Tarry v. Johnston*, 114 Neb. 496, 208 N.W. 615 (1926).

Further, while there is a split of authority on this issue, see *Snowberger v. Young*, 536 P.2d 1069 (Ariz. App. 1975) (not reaching issue in appeal from arbitration award but citing cases showing split of authority), cases from other jurisdictions, including those from Texas, support our determination that whether goodwill is a distributable asset in a professional entity presents a question of fact. See, *Stefanski v. Gonnella*, 15 Mass. App. 500, 446 N.E.2d 734 (1983) (relating history of Massachusetts case law deciding issue as question of fact); *Durio v. Johnson*, 68 N.M. 82, 85, 358 P.2d 703, 705 (1961) (concluding in action by veterinarian partner to recover agreed-upon price for his interest from former partner that better rule was "good will also exists in professional practice, or in business founded upon personal skill and reputation and is salable"); *Spaulding v. Benenati*, 57 N.Y.2d 418, 442 N.E.2d 1244, 456 N.Y.S.2d 733 (1982) (holding that goodwill of dental practice could be sold by deceased dentist's wife who was sole beneficiary of his estate when sale of goodwill included something other than personal attributes of professional, such as right to practice at same location); *Berg v. Settle*, 70 Wash. 2d 864, 425 P.2d 635 (1967) (evidence supported trial court's finding of professional goodwill in accounting firm based on offer made to prospective partner which included purchase of goodwill).

[5] Under our de novo review, we conclude that both the district court and Court of Appeals determined, as a matter of law, that a professional practice could not have goodwill value as a distributable asset upon dissolution. That determination is contrary to this court's conclusion in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), that the existence of professional goodwill as a distributable asset presents a question of fact. Accordingly, the Court of Appeals' opinion affirming the district court's determination that goodwill cannot be a distributable asset in the dissolution of a professional entity is reversed, and the cause remanded. See *Schuman v. Schuman*, 265 Neb. 459,

658 N.W.2d 30 (2003). Upon remand, the district court is to determine in the first instance whether, given the record made at trial, Detter has produced appropriate evidence establishing salability or marketability of goodwill as a business asset and, if so, to determine that value.

ATTORNEY FEES

In his second assignment of error, Detter argues that the Court of Appeals erred in concluding Schreiber's conduct was not illegal, oppressive, or fraudulent and that the corporation's assets were not being misapplied or wasted.

When a corporation makes an election to purchase a petitioning shareholder's shares, § 21-20,166(5)(b) allows the court to award the petitioning shareholder reasonable attorney fees and expenses if the shareholder had probable grounds for obtaining relief under either § 21-20,162(2)(a)(ii) or (iv). Those subsections delineate two of the four situations in which a shareholder may seek corporate dissolution. Under subsection (2)(a)(ii), a shareholder may seek dissolution because the directors or those in control have acted in a manner that is illegal, oppressive, or fraudulent. Under subsection (2)(a)(iv), a shareholder may seek dissolution when corporate assets are being misapplied or wasted.

Upon our de novo review of the record, we agree with the Court of Appeals that the district court did not err in determining that Detter failed to show Schreiber's actions rose to the level of being illegal, oppressive, or fraudulent or that Schreiber misapplied corporate funds.

CONCLUSION

We affirm the Court of Appeals' determination that Detter has failed to show probable grounds entitling him to reasonable expenses and attorney fees. We conclude, however, that the district court and Court of Appeals erred in determining, as a matter of law, that the value of a closely held, professional corporation could not include goodwill.

The judgment of the Court of Appeals is reversed in part, and the cause remanded with directions to the Court of Appeals to reverse the district court's judgment determining the value of

MHAH without consideration of Detter's evidence regarding MHAH's goodwill, and to remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SPEAR T RANCH, INC., APPELLANT, V.
MELVIN G. KNAUB ET AL., APPELLEES.
691 N.W.2d 116

Filed January 21, 2005. No. S-03-789.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.
3. **Pleadings.** A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery.
4. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
5. **Waters: Words and Phrases.** Ground water is defined as that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.
6. **Waters: Statutes.** Statutory surface water appropriation rules do not apply to conflicts between surface and ground water users.
7. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
8. **Waters: Property.** A right to appropriate surface water is not an ownership of property.
9. **Waters: Property: Conversion: Trespass.** Because a surface water user does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass.
10. **Waters.** Under the English rule of water law—also referred to as the absolute ownership rule—a landowner had absolute ownership of the waters under his or her land and could withdraw any quantity of water for any purpose without liability, even though the result was to drain water from beneath surrounding lands.
11. ____. Under what is termed the "American rule" of water law, the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others.

12. **Waters: Words and Phrases.** Under the American rule of water law, the term "reasonable use" relates to the manner in which water is used upon the appropriator's land. The adjacent landowners' interests are in issue only when the appropriator uses water in excess of the reasonable and beneficial use of it upon his or her land and that excess use is injurious to the adjacent landowner.
13. **Waters.** The correlative rights rule of water law provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal.
14. ____. The Restatement (Second) of Torts §§ 858 and 850A (1979) are adopted to govern conflicts between users of hydrologically connected surface water and ground water.
15. **Waters: Liability.** A proprietor of land or his or her grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
16. **Waters: Courts.** Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making a reasonableness determination, Restatement (Second) of Torts § 850A (1979) provides a valuable guide, but the test is flexible, and a trial court should consider any factors it deems relevant.
17. **Pleadings.** Leave to amend should be granted liberally when justice so requires.
18. **Legislature.** The Legislature is free to create and abolish rights as long as no vested right is disturbed.
19. **Statutes.** Statutes which change or take away a common-law right must be strictly construed.
20. ____. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result.
21. **Waters: Statutes.** The Nebraska Ground Water Management and Protection Act does not show either an express or implied abrogation of the common law.
22. **Administrative Law: Jurisdiction: Claims.** The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme.
23. **Administrative Law: Jurisdiction.** Under the primary jurisdiction doctrine, whether the purposes of an administrative act require that the administrative agency should first pass on a question depends on whether the question raises policy issues that should be considered by the administrative agency in the interests of uniformity and administrative expertise.
24. ____: ____. Application of the primary jurisdiction doctrine does not excuse the court from deciding the issue. Instead, it delays the process pending referral of the issues to the administrative body for its views.
25. ____: ____. Under the primary jurisdiction doctrine, the controverted question and the inquiry necessary for its solution are the determining factors.
26. ____: ____. The primary jurisdiction doctrine does not apply when a pure question of law is at issue.

27. **Administrative Law: Jurisdiction: Damages: Nuisances: Torts.** Exercise of the primary jurisdiction doctrine is inappropriate in actions seeking damages for nuisance or other common-law tort actions.
28. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
29. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
30. **Parties: Pleadings: Tort-feasors: Damages.** A plaintiff need not join all tort-feasors as defendants in an action for damages.
31. **Parties: Tort-feasors: Damages: Liability.** Every joint tort-feasor is liable for all damages to which his or her conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Thomas D. Oliver for appellant.

Harriet M. Hageman and Kara Brighton, of Hageman & Brighton, for appellees George A. Davis and Loretta L. Davis.

John F. Simmons, of Simmons & Olsen Law Firm, P.C., for appellees John Gifford and Roger Gifford.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees Max Olsen, Olsen Ranches, Inc., Melvin G. Knaub, Melvin G. Knaub Farms, Inc., Knaub, Inc., Melvin G. Knaub Grand Kids L.P., and Special K, Inc.

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee Olsen Ranches, Inc.

John H. Skavdahl, of Skavdahl & Edmund Law Office, for appellee Gifford Circle Diamond Ranch, Inc.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee XL Farms, L.L.C.

Philip M. Kelly, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellees Richard Van Pelt and Margaret Van Pelt.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellees Hoehn Farms, Mark Hoehn, Krista Hoehn, and Allison Hoehn.

James M. Mathis and Leland K. Kovarik, of Kovarik, Ellison, Mathis & Weimer, P.C., for appellees Leeray Edens and Beverly Edens.

Albert M. Engles and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee Donahue & Rutledge, Inc.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Darnall Ranch, Inc.

Jon Bruning, Attorney General, David D. Cookson, and Justin D. Lavene for amicus curiae State of Nebraska.

Dana W. Roper, Lincoln City Attorney, and Steven Huggenberger for amicus curiae City of Lincoln.

Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for amici curiae Pathfinder Irrigation District et al.

Donald G. Blankenau, of Fennemore & Craig, P.C., for amicus curiae Nebraska Groundwater Management Coalition.

Donald G. Blankenau, of Fennemore & Craig, P.C., for amicus curiae Nebraska Farm Bureau Federation.

Michael C. Klein, of Anderson, Klein, Swan & Brewster, for amicus curiae Central Nebraska Public Power and Irrigation District.

Robert J. McCormick for amicus curiae Reban Corporation.

LeRoy W. Sievers, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for amicus curiae Nebraska State Irrigation Association.

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

CONNOLLY, J.

This appeal presents the question whether a surface water appropriator has a claim against a ground water user for interference with a surface water users' appropriation.

Spear T Ranch, Inc. (Spear T), a surface water appropriator, appeals a district court order dismissing with prejudice its complaint seeking an injunction and damages for the loss of surface water from Pumpkin Creek. The appellees are ground water irrigators in the Pumpkin Creek basin.

On appeal, Spear T argues that it has stated a claim for conversion, injunction, or trespass. The appellees, however, argue that any common-law claims are abrogated by the Nebraska Ground Water Management and Protection Act (GWMPA), Neb. Rev. Stat. §§ 46-656.01 through 46-656.67 (Reissue 1998 & Cum. Supp. 2002) (now found at Neb. Rev. Stat. §§ 46-701 through 46-753 (Reissue 2004)). In the alternative, they argue that the issues should be determined by the North Platte Natural Resources District under the doctrine of primary jurisdiction.

I. BACKGROUND

Spear T filed a complaint alleging that it has surface water appropriations on Pumpkin Creek, which runs through Banner and Morrill Counties. The appellees own real property in the Pumpkin Creek basin and have irrigation wells within the boundaries of the basin. The complaint alleged that the ground water irrigation wells are hydrologically connected to Pumpkin Creek. According to Spear T, the appellees' pumping of ground water over the 4 years preceding the complaint drained water from Pumpkin Creek and deprived Spear T of its surface water appropriations; the complaint alleged that the appellees have continued to pump ground water and that Spear T has been unable to irrigate crops and provide water for livestock. Spear T alleged that the appellees converted its surface water rights to their own use without compensating Spear T and that it would be irreparably harmed if the appellees continued to use their ground water irrigation wells. The complaint sought compensation for the value of the surface water appropriations taken by the appellees or, in the alternative, special damages for the value of the water rights and other damages; it also sought an injunction.

The appellees moved under Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003) to dismiss, alleging that (1) the court lacked subject-matter jurisdiction, (2) the complaint failed to state a claim upon which relief could be granted, and (3) the complaint failed to join necessary parties. Without giving its reasoning, the court dismissed the complaint with prejudice on all three grounds. Spear T appealed.

We initially heard oral arguments in March 2004. After arguments, the appellees moved for additional briefing and reargument to address the primary jurisdiction issue. Also after arguments, 2004 Neb. Laws, L.B. 962, was passed, which changed provisions of the GWMPA. We granted the motion and ordered additional briefing and argument on the following issues: (1) primary jurisdiction; (2) primary jurisdiction because of L.B. 962; (3) the effect of L.B. 962, if any, on the appeal; and (4) whether the GWMPA or L.B. 962 has abrogated any common-law remedies that Spear T might have.

II. ASSIGNMENTS OF ERROR

Spear T assigns that the district court erred when it dismissed its complaint for lack of subject-matter jurisdiction, failure to state a claim, and failure to join necessary parties.

III. STANDARD OF REVIEW

This action involves a rule 12 motion to dismiss for failure to state a claim and a rule 12 motion to dismiss for failure to join indispensable parties. In 2003, the Nebraska rules of pleading were changed to reflect the federal rules. Thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005).

[3,4] The federal courts have made it clear that a complaint should not be dismissed merely because it does not state with

precision all elements that give rise to a legal basis for recovery. *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999). As a practical matter, dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. See *id.*

IV. ANALYSIS

[5] The term "surface water" encompasses all waters found on the earth's surface. Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 1.04 at 9-10 (Butterworth Legal Publishers 1984). Here, the surface water is the stream on which Spear T has water appropriations. In contrast, ground water is defined as " 'that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.' " *Id.* at 12. Accord Neb. Rev. Stat. § 46-635 (Reissue 2004).

Hydrologically, ground water and surface water are inextricably related. Ground water pumping can cause diminished streamflows. Streamflow can support the potential for subirrigation. Seepage from surface water supplies canals, and deep percolation of applied irrigation water from surface projects can recharge ground water aquifers. Harnsberger & Thorson, *supra*, § 5.30. Water law commentators have colorfully described this phenomenon: "[A]ll water is interrelated and interdependent. If groundwater were red, most streams would be various shades of pink; if groundwater were poisoned, the streams would also be poisoned." Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 183 (1973).

But Nebraska water law ignores the hydrological fact that ground water and surface water are inextricably linked. Instead of an integrated system, we have two separate systems, one allocating streamflows and the other allocating ground water. Under constitutional and statutory provisions, streamflows are allocated by priority in time. See Neb. Const. art. XV, § 6. Ground water, in contrast, is governed by a common-law rule of reasonableness and the GWMPA. Moreover, the lack of an integrated system is reinforced by the fact that different agencies regulate

ground water and surface water. The Department of Natural Resources regulates surface water appropriations. See Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004). In contrast, under the GWMPA, ground water is statutorily regulated by each Natural Resources District (NRD).

The tension between the two systems has long been recognized by commentators. See Harnsberger et al., *supra* at 182 ("[g]round and stream diverters in Nebraska are on a collision course which may occur sooner than most people think"). That day has arrived.

1. Does Spear T Have Common-Law Claim Against Appellees?

We begin by determining whether Spear T has stated a claim. Spear T argues that it has stated a claim based either on the statutory rule of prior appropriation of surface water or on the tort of conversion; we reject these arguments. But as we explain below, we determine that the common law does recognize a tort claim by a surface water appropriator against a ground water user and that Spear T's complaint could be amended to state a claim.

(a) Prior Appropriation

As noted, under constitutional and statutory provisions, streamflows are allocated by priority in time. In its first attempt to state a claim, Spear T relies on prior appropriation. Spear T argues that because the water is hydrologically connected and because it has a prior surface water appropriation, it has priority to the water. According to Spear T, the water is all one "stream" and, as such, Spear T's prior appropriation takes priority over other users of the water, including those who withdraw the water from under its lands. Thus, Spear T essentially asks this court to apply legislatively created surface water priorities to ground water use without considering existing common-law rules. We decline to adopt this approach for several reasons.

First, an application of surface water priorities to ground water requires this court to agree with a legal fiction that considers the ground water to be an "underground stream." We take as true that the water is hydrologically connected, but water rarely runs in a true underground stream. See Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 1.07 at

13-14 (Butterworth Legal Publishers 1984). Adherence to such a view ignores reality.

Second, no statutory or case law authority supports applying surface water appropriations to ground water. We recognize that most legislatures in western states have developed comprehensive appropriation systems overseen by administrative agencies. See Restatement (Second) of Torts, ch. 41, topic 4 (1979). But in Nebraska, the Legislature has not developed an appropriation system that addresses direct conflicts between users of surface and ground water that is hydrologically connected.

[6] Finally, the prior appropriation rule that Spear T advocates would give first-in-time surface water appropriators the right to use whatever water they want to the exclusion of later-in-time ground water users. This could have the effect of shutting down all wells in any area where surface water appropriations are hydrologically connected to ground water. Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 248 (1973) ("[i]f the doctrine of prior appropriation [was] carried to [its] logical conclusion, all Nebraska wells would be shut down"). This would unreasonably deprive many ground water users. Accordingly, we decline to apply the statutory surface water appropriation rules to conflicts between surface and ground water users.

(b) Conversion

[7] Next, Spear T contends that it has stated a claim for conversion. Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

[8,9] A right to appropriate surface water however, is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water. As one article has stated in reference to ground water: "Trespass is unavailable in a typical well interference case because a physical invasion of the plaintiff's property is lacking. Similarly, an action in conversion is unavailable, since the plaintiff has no private property interest in groundwater, at least not prior to capture." Harnsberger

& Thorson, *supra*, § 5.27 at 266-67, citing *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). Because Spear T does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass.

(c) Has Spear T Stated Claim Under Other Common-Law Doctrines or, Alternatively, Should It Be Given Leave to Amend?

Although Spear T cannot state a claim under the statutory surface water appropriation rules or for the tort of conversion, this does not end our analysis. The question remains whether it has stated a claim under other common-law principles or if it should be allowed leave to amend to state such a claim.

(i) Review of Common-Law Rules

We begin by reviewing common-law rules that courts have employed to adjudicate disputes between water users.

a. English Rule

[10] Under the English rule of water law—also referred to as the absolute ownership rule—a landowner had absolute ownership of the waters under his or her land. Therefore, the owner could withdraw any quantity of water for any purpose without liability, even though the result was to drain water from beneath surrounding lands. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978). See, also, *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984).

The English rule was predicated on protection for the property rights of landowners whose activities resulted in ground water diversion. See, *Cline v. American Aggregates, supra*; Restatement (Second) of Torts § 858 (1979) (describing English rule). The basis for the rule has also been described as a "feeling that the ways of underground water were too mysterious and unpredictable to allow the establishment of adequate and fair rules for regulation of competing rights to such water." *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 290-91, 217 N.W.2d 339, 344 (1974). Thus, the English courts adopted the position

that everyone was permitted to take and use all the ground water of which they could get possession. *Id.*

Most American courts, however, have criticized the English rule, recognizing that the rule protected landowners from liability even when water was diverted for malicious purposes. *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982), citing *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903). The rule has also been criticized because, although a landowner theoretically had a property right in waters beneath his or her land, the overlying owner with the deepest well or largest pump could control water that would otherwise be available to all. *Maerz v U S Steel Corp, supra.* See, also, *Cline v. American Aggregates, supra*; *Meeker v. East Orange*, 77 N.J.L. 623, 74 A. 379 (1909).

An extreme minority of jurisdictions still adheres to the English rule or a rule that has the same effect as the English rule. See, *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75 (Tex. 1999). These jurisdictions refuse to apply to ground water the rules applicable to surface water and treat ground water as an entirely separate and unconnected resource that may be used at will by the owner of the overlying land. In each case, the court recognized problems with the reasoning behind the English rule, but in *Maddocks*, the court deferred to the legislature, which was already taking some action. Likewise, in *Sipriano*, a constitutional amendment placed the regulation of water in the legislature's hands.

b. American Rule

[11] Because of disagreement with the English rule, American courts have modified it in different ways. Under what is termed the "American rule" of water law, the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others. *Prather v. Eisenmann, supra.*

[12] Under the American rule, the term "reasonable use" relates to the manner in which water is used upon the appropriator's land. The adjacent landowners' interests are in issue only when the appropriator uses water in excess of the reasonable and beneficial use of it upon his or her land and that excess use is

injurious to the adjacent landowner. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978). The American rule has at times also been referred to as a rule of "reasonable use," although it does not consider a balancing of the parties' interests. Thus, one court has stated:

> This [reasonable use] designation is unfortunate and in no small measure responsible for the confusion concerning the rule. If applied to this rule, the words *reasonable use* cannot be given their inherent broad meaning of a use reasonable under all the circumstances. Instead, the words must be given the contrived meaning of a use reasonably related to enjoyment of the land from which the waters are taken.

Maerz v U S Steel Corp, 116 Mich. App. at 715 n.2, 323 N.W.2d at 527 n.2.

Under the American rule, a person who is deprived of surface water because of the use of ground water by a nearby landowner will recover only when the water was not used for a beneficial purpose on the ground water user's land.

c. Correlative Rights

[13] The correlative rights rule of water law originated in California and provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal. *Prather v. Eisenmann, supra*. The rule first arose in *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902). Under the rule, the overlying landowners have no proprietary interest in the water under their ground and each owner over a common pool has a correlative right to make a beneficial use of the water on his or her land. Priority of use is irrelevant because in times of shortage, the common supply is apportioned among the landowners based on their reasonable needs. Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179 (1973) (describing correlative rights rule).

The principal difficulty with the correlative rights rule is how to allocate the water, and courts have approached the question in different ways. See *id.* For example, some courts interpret the

correlative rights rule as essentially the same as the Restatement view described below. See *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999). Others view the rule as providing apportionment in times only when there is an insufficient supply for all users. See *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

Some courts, however, have adopted a reasonable use rule that combines the American rule and correlative rights rule. Under such rules, reasonableness is determined by both the use of the water and the rights of other landowners. Such cases still refer to correlative rights, but differ from the California doctrine. See *id.*

d. Restatement

The Restatement (Second) of Torts § 858 (1979) essentially adopts a correlative rights rule that allows for a balancing of many factors to determine reasonableness. Although the rule is initially stated in terms of "reasonable use" similar to the American rule, it adds exceptions that draw on principles of correlative rights. The Restatement rule finds its support in principles of nuisance law and has been suggested as the basic framework for well interference cases. See Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 5.27 (Butterworth Legal Publishers 1984).

The Restatement, § 858 at 258, states in part as follows:

> (1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
>
> (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or
>
> (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

Although § 858 is under chapter 41, topic 4, entitled "Interference With the Use of Water," *id.* at 253, a note on that

topic's scope shows that it is intended to apply to water that is hydrologically connected to ground water. The note states in part: "This Topic covers the rights and liabilities of possessors of land and others withdrawing ground water. It also states the rules governing the rights and liabilities of persons using water where ground water is interconnected with the water of watercourses and lakes." *Id.* Several courts have adopted the Restatement approach. *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984); *State v. Michels Pipeline Construction, Inc.*, *supra*; *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982).

In addition, the Restatement keeps older definitions of ground water and surface water, but abandons any common-law distinctions between underground watercourses and percolating water. Ground water is defined as "water that naturally lies or flows under the surface of the earth." Restatement, *supra*, § 845 at 198. See, also, *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999). Comment *b.* of the Restatement, *supra*, recognizes that ground water may be connected to other forms of water. The comment states: "Most ground water is moving in the hydrologic cycle. It originates from infiltration of precipitation and inflow of streams; it discharges into springs, streams, lakes and oceans. Some ground water is sidetracked from the cycle in closed basins where geologic formations isolate it from recharge or discharge." *Id.* at 199.

Although the Restatement rule is derived from principles of reasonable use, the rule differs from the American rule because it balances the equities and hardships between competing users. *Maddocks v. Giles, supra*. The Restatement (Second) of Torts § 858, comment *b.* at 259 (1979), notes in part:

> The general rule is phrased in terms of nonliability in order to carry forward the policy of encouraging ground water use by permitting more or less unrestricted development of the resource by those who have access to it. The policy and the rule are justified by the fact that since most ground water basins are very large and contain vast quantities of water, it is usually impossible for a single water user to capture the entire supply and leave no water for others.

Comment *c.* at 259-60 provides:

Exceptions to the general rule are stated in Clauses (a), (b), and (c) of Subsection (1). They incorporate all grounds of liability for use of ground water recognized by the common law but remove some of the restrictions contained in those rules of liability. The majority "American rule of reasonable use" . . . was phrased in terms of the overlying landowner's right to capture ground water, limited by restrictions on the place of use of the water. In operation this protected small wells for domestic and agricultural uses from the harmful effects of large wells for municipal and industrial supply. The first exception to nonliability, contained in Clause (1)(a), continues this protection but follows a modern tendency to extend similar protection to cases of harm done by unreasonably large withdrawals for operations conducted on overlying lands.

The second exception, Clause (1)(b), imposes liability upon a landowner who withdraws more than his reasonable share of the common supply. This has always been a possible outcome of a controversy concerning ground water if the source could be classified as an underground stream or if the rule of correlative rights were applied. The concept of underground streams was unscientific and its application could be quite arbitrary and the applicability of the rule of correlative rights was in doubt in many states. This exception merges the two rules and makes it possible to apportion shares of the water in the source to the owners of overlying land whenever total withdrawals reach such magnitude that it is necessary to protect the share of an individual landowner from appropriation by others.

The last exception, Clause (1)(c), restates the conditions for recognizing that ground water and surface water are often closely interrelated and should be treated as a single source. In the past this took many forms. Withdrawals of ground water have been called unreasonable when they reduced the flow of springs. A variant of the underground stream concept has enabled the courts to regulate some ground water as the underground segment of a surface stream. The part of an aquifer in contact with the bed and banks of a stream has been called the underflow of the stream and treated as part of

> it. This Section substitutes a pragmatic test for determining the interconnection instead of employing these doubtful and unscientific categorizations.

Thus, under the Restatement, reasonableness of use is determined on a case-by-case basis and many factors can be considered; the test is flexible. The test for reasonableness is provided in the Restatement:

> The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:
>
> (a) The purpose of the use,
>
> (b) the suitability of the use to the watercourse or lake,
>
> (c) the economic value of the use,
>
> (d) the social value of the use,
>
> (e) the extent and amount of harm it causes,
>
> (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
>
> (g) the practicality of adjusting the quantity of water used by each proprietor,
>
> (h) the protection of existing values of water uses, land, investments and enterprises, and
>
> (i) the justice of requiring the user causing harm to bear the loss.

Restatement (Second) of Torts § 850A at 220 (1979).

e. Common-Law Claims in Disputes Between Ground Water Users in Nebraska

We have never been confronted with whether a surface water appropriator may bring a common-law claim against the user of hydrologically connected ground water. We have, however, recognized that a ground water user may bring a common-law claim against another ground water user. We generally have stated the common law in a manner consistent with the American rule blended with a rule of correlative rights. For example, we have stated:

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon

> the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is in our opinion, supported by the better reasoning.

Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). See, also, *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966); *Luchsinger v. Loup River Public Power District*, 140 Neb. 179, 299 N.W. 549 (1941); *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 268 N.W. 334 (1936), *overruled on other grounds, Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966). We have also discussed, but never applied, the Restatement, *supra*. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978).

(ii) Adoption of Restatement for Disputes Between Surface Water Users and Ground Water Users

Having reviewed the common-law rules, we now consider whether we will recognize a common-law claim for interference with surface water by the user of hydrologically connected ground water.

Initially, we reject a rule that would bar a surface water appropriator from recovering in all situations. Such a rule would ignore the hydrological fact that a ground water user's actions may have significant, negative consequences for surface water appropriators.

Instead, the common law should acknowledge and attempt to balance the competing equities of ground water users and surface water appropriators; the Restatement approach best accomplishes this. The Restatement recognizes that ground water and surface water are interconnected and that in determining the rights and liabilities of competing users, the fact finder needs broad discretion. Thus, when applying the Restatement, the fact finder has flexibility to consider many factors such as those listed in § 850A, along with other factors that could affect a determination of reasonable use.

Adoption of the Restatement is the modern trend. See, *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324

(1984); *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974); *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982). Further, commentators have recommended the adoption of the Restatement to both this court and the Legislature. See Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179 (1973).

[14-16] Accordingly, we adopt the Restatement to govern conflicts between users of hydrologically connected surface water and ground water. Specifically, we hold:

> A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

Restatement (Second) of Torts § 858(1)(c) at 258 (1979). Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, the Restatement, *supra*, § 850A, provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant.

We digress momentarily to offer a word of caution. Although the issue of available remedies is not yet before us, courts should be cautious when considering remedies for interference with surface water. For example, because the recharge of a stream that has dried up because of well pumping could take years, an injunction against pumping might only serve to deprive everyone in a water basin. Such a remedy would be unreasonable and inequitable. Likewise, a court can consider a surface water appropriator's ability to obtain an exception to stays on drilling new wells, or any additional programs that might provide relief.

(iii) Has Spear T Stated Claim Under Restatement?

Having adopted the Restatement approach, we next consider whether Spear T has stated a claim upon which relief can be granted. Our review of Spear T's complaint shows that it did allege—although not precisely—that the appellees' withdrawal of

ground water has directly and substantially affected Pumpkin Creek. However, although Spear T alleged that it has suffered harm, it did not allege that the appellees have unreasonably caused that harm. Thus, Spear T has failed to state a claim upon which relief can be granted.

[17] We determine, however, that Spear T should be allowed to amend its complaint. Leave to amend should be granted liberally when justice so requires. *Frey v. City of Herculaneum*, 44 F.3d 667 (8th Cir. 1995). Accordingly, we determine that the district court erred when it dismissed Spear T's complaint with prejudice for failure to state a claim.

2. Abrogation

Having concluded that a common-law claim exists and that Spear T could amend its claim, we turn to the appellees' contention that by passing the GWMPA, the Legislature has abrogated the common-law claim. We have also asked the parties to brief whether 2004 Neb. Laws, L.B. 962, has abrogated any common-law claim.

(a) GWMPA

[18-20] The Legislature is free to create and abolish rights as long as no vested right is disturbed. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). But statutes which change or take away a common-law right must be strictly construed. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

Nothing in the GWMPA expressly abrogates a common-law claim by a surface water user against a ground water user. Thus, any abrogation would have to be plainly compelled by the operation of the GWMPA.

We begin with the findings that the Legislature made in support of the GWMPA. The GWMPA initially states in part at § 46-656.02:

> The Legislature finds that ground water is one of the most valuable natural resources in the state and that an adequate supply of ground water is essential to the general welfare of

the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals.

Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient for all users. The Legislature determines that the goal shall be to extend ground water reservoir life to the greatest extent practicable consistent with beneficial use of the ground water and best management practices.

The Legislature further recognizes and declares that the management, protection, and conservation of ground water and the beneficial use thereof are essential to the economic prosperity and future well-being of the state and that the public interest demands procedures for the implementation of management practices to conserve and protect ground water supplies and to prevent the contamination or inefficient or improper use thereof. The Legislature recognizes the need to provide for orderly management systems in areas where management of ground water is necessary to achieve locally determined ground water management objectives and where available data, evidence, or other information indicates that present or potential ground water conditions, including subirrigation conditions, require the designation of areas with special regulation of development and use.

(Emphasis supplied.) The Legislature further provided at § 46-656.05:

(1) The management, conservation, and beneficial use of hydrologically connected ground water and surface water are essential to the continued economic prosperity and well-being of the state, including the present and future development of agriculture in the state;

(2) Hydrologically connected ground water and surface water may need to be managed differently from unconnected

ground water and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated ground water and surface water supplies;

(3) Natural resources districts already have significant legal authority to regulate activities which contribute to declines in ground water levels and to nonpoint source contamination of ground water and are the preferred entities to regulate, through ground water management areas, ground water related activities which are contributing to or are, in the reasonably foreseeable future, likely to contribute to conflicts between ground water users and surface water appropriators or which may be necessary in order to resolve disputes over interstate compacts or decrees, or to carry out the provisions of other formal state contracts or agreements;

(4) The Department of Natural Resources is responsible for regulation of water resources and local surface water project sponsors are responsible for much of the structured irrigation utilizing surface water supplies, and these entities should be responsible for regulation of surface water related activities which contribute to such conflicts or provide opportunities for such dispute resolution;

. . . .

(6) All involved natural resources districts, the department, and surface water project sponsors should cooperate and collaborate on the identification and implementation of management solutions to such conflicts or provide opportunities for mitigation or elimination of such disputes or difficulties.

These legislative findings do not indicate an intent to abrogate the common law. In fact, the language that we have italicized in § 46-656.02 indicates that, at least concerning disputes between multiple ground water users, the Legislature was aware of and meant to preserve the common law.

Further, if the Legislature wanted to preempt a common-law claim, then the GWMPA would contain adjudicative procedures and remedies designed to resolve individual disputes between water users. But that is not the case. Instead, a review of the GWMPA shows that it contains procedures meant to identify

areas where water issues exist and to create general regulations to address those issues.

To address issues involving the quantity and quality of ground water, the GWMPA requires the NRD's to prepare a ground water management plan. § 46-656.12. The plan's purpose is to set out each NRD's broad policy goals. In the plan, the NRD's are to set out their ground water supplies and needs. In addition, the NRD's are required to set out any proposals for conservation and or supply augmentation, as well as any proposed management areas. Once an NRD completes its management plan, the Department of Natural Resources (hereinafter Department) reviews it for approval. § 46-656.14. If the Department denies approval, then the NRD may either amend the plan or keep it the same. It must then submit the amended or original plan to the Department with explanations on how the changes, if any, have met the Department's concerns. § 46-656.15.

Once the Department has approved the management plan or the NRD has complied with § 46-656.15, the NRD may create a management area within the NRD, but it is not required to do so. The procedures for creating and modifying a management area are set out in §§ 46-656.19 through 46-656.21. After a public hearing on whether to create a management area, the NRD must determine whether to do so. If it decides to create the management area, then the GWMPA provides that it shall adopt a control from a list in § 46-656.25. This list, however, is not specifically tailored to adjudicate conflicts between ground water users and surface water appropriators. Instead, it contains a list of regulatory suggestions that can be used to meet an array of water issues.

In fact, the only provision of the GWMPA that might be construed as addressing individual conflicts between ground water users and surface water appropriators is § 46-656.28. But we do not read this as abrogating a common-law claim that a surface water user might have against a ground water user. Under § 46-656.28(1):

> If a district on its own motion or following a request by a *surface water appropriator*, surface water project sponsor, *ground water user*, the Department of Natural Resources, or another state agency has reason to believe that a management

> area should be designated for integrated management of hydrologically connected ground water and surface water or that controls in a management area should be adopted to include such integrated management, the district *may* utilize the procedures established in sections 46-656.19 to 46-656.21 or may request that the affected appropriators, the affected surface water project sponsors, and the Department of Natural Resources consult with the district and that studies and a hearing be held on the preparation of a joint action plan for the integrated management of hydrologically connected ground water and surface water.

Thus, under this section, surface water appropriators and ground water users can request that the NRD take action concerning disputes arising out of hydrologically connected ground water.

But § 46-656.28(1) is ambiguous as to what happens once a party requests that an NRD take action. The statute may be read in several ways. First, it could allow the NRD discretion to (1) use §§ 46-656.19 to 46-656.21 to either create a management area and adopt controls or modify controls in an existing management area, (2) begin the process for adopting a joint action plan under the remainder of § 46-656.28, or (3) do nothing. Alternatively, § 46-656.28(1) could be read to mean that if the NRD concludes there is a problem, then it must either (1) use §§ 46-656.19 to 46-656.21 to either create a management area and adopt controls or modify controls in an existing management area or (2) begin the process for adopting a joint action plan.

But regardless whether § 46-656.28 gives the NRD discretion or requires the implementation of a management area, the statute does not, as the appellees suggest, provide a surface water user with an administrative adjudication. Instead, it provides a method for the surface water user to commence administrative rulemaking. If, following a request by the surface water user, the NRD chooses to create a management plan, the goal is not to adjudicate a specific dispute with trial proceedings, but to develop controls to address the area's water problems by employing the traditional tools of rulemaking, i.e., studies and public meetings. The same is true if the NRD begins the process of creating a joint action plan, except that if the NRD chooses this route, the Department is also involved.

Moreover, regardless of which process is chosen, § 46-656.28 does not authorize the NRD or the Department to remedy any past harm done to a complaining party. The steps that the NRD and the Department can take are only prospective: This is consistent with rulemaking, not adjudication, and further demonstrates that § 46-656.28 does not abrogate the common law.

To the extent there is ambiguity regarding the GWMPA, the legislative history also shows that the Legislature did not intend for the GWMPA to abrogate a common-law claim. The GWMPA was significantly revised in 1996 to address the relationship between surface and ground water in response to concerns that the State of Kansas might file a lawsuit over issues arising from the Republican River Compact. A reading of the history as a whole shows that the concern was implementing a system that could reduce future conflicts. Nothing indicates an intent for the GWMPA to replace common-law tort actions or to provide a procedure to address disputes between individual parties. Instead, the intent was to allow the NRD greater flexibility to create plans in areas of conflict and create cooperation between the NRD's and the Department when necessary, but not to resolve specific existing conflicts. See, e.g., Floor Debate, 1996 Neb. Laws, L.B. 108, 94th Leg., 2d Sess. (Mar. 13, 1996). In the floor debate, it was recognized that "litigation . . . is out there, and the lawsuits are going to happen or not happen, separate and apart from the legislation . . . in 108." *Id.* at 12772. After a discussion recognizing that a person harmed by ground water use could sue, it was noted that the Legislature's goal was to mitigate litigation, but there was no discussion of abrogating claims. Instead, when asked about compensation for harm, the senator introducing the bill stated:

> [T]he question of compensation is something that is beyond this bill. The council approached it several times and was unable to address it. My position has been what we need to do now is to take care of the conjunctive use problem. If there are significant groups that are interested in talking about the whole question of compensation and who should be compensated when, that's certainly one I'd be willing to sit down and help organize and look at, but you have some very complicated questions there.

Id. at 12816.

[21] Thus, we determine that the GWMPA does not show either an express or implied abrogation of the common law. Although we believe the GWMPA is a step toward reducing future conflicts through general regulation and not an attempt to replace a common-law claim with a system of administrative adjudication, we do not intend to discourage the Legislature from acting in this area. Ideally, the Legislature would develop a comprehensive administrative appropriation system, including procedures and remedies, to adjudicate direct conflicts between ground water and surface water users in Nebraska. This would be consistent with how most legislatures in western states have addressed conflicts between water users. See Restatement (Second) of Torts, ch. 41, topic 4 (1979).

(b) L.B. 962

We asked the parties to also address 2004 Neb. Laws, L.B. 962, which allows further action by the NRD's and the Department to regulate ground water pumping and avoid overpumping in areas where depletion of surface water is a concern. Although we note that L.B. 962 takes further steps to help prevent conflicts, we do not address the application of L.B. 962 because the act does not operate retroactively and, thus, does not affect this appeal.

3. Primary Jurisdiction

Next, we consider the appellees' argument that the rule of primary jurisdiction requires this court to defer to the NRD before determining the issues presented in this appeal. The appellees' arguments on this issue are blurred. In their supplemental brief, the appellees contend that this court should defer deciding the issues presented and allow the NRD to decide them. The appellees, however, concede in their brief that the appeal involves questions of law that are not subject to the primary jurisdiction doctrine. Thus, the parties appear to agree that this court must decide what, if any, claim is available. But the appellees argue that issues of remedies for any given claim should be decided by the NRD, stating:

> Appellees' reliance upon the doctrine of primary jurisdiction relates more specifically to the second level of inquiry when evaluating the questions at hand. That level of inquiry relates to the nature of the remedies that are available to surface water users (or other ground water users) when the

> water supply in a particular basin . . . is inadequate for all of the demands. The primary jurisdiction doctrine requires that the resolution of the technical matters associated with the relative rights of surface water users and ground water users be made by the agencies that have the special competence, or administrative expertise, to make such decisions.

Consolidated supplemental brief for appellees at 23.

[22,23] The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. *In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000). Whether the purposes of the administrative act require that the administrative agency should first pass on a question depends on whether the question raises policy issues that should be considered by the administrative agency in the interests of uniformity and administrative expertise. *Id.*

[24-26] Application of the primary jurisdiction doctrine does not excuse the court from deciding the issue. Instead, it delays the process pending referral of the issues to the administrative body for its views. See, e.g., *People v. Fremont Energy Corp.*, 651 P.2d 802 (Wyo. 1982). The controverted question and the inquiry necessary for its solution are the determining factors. *In re Interest of Battiato, supra.* But of most importance, the doctrine does not apply when a pure question of law is at issue. *Id.*

[27] Moreover, courts commonly hold that actions seeking damages for nuisance or other common-law tort actions for impairment of water rights are traditionally cognizable by the courts without reference to agency expertise or discretion. Accordingly, exercise of the primary jurisdiction doctrine is inappropriate in those cases. See, e.g., *Freels v. Northrup*, 678 S.W.2d 55 (Tenn. 1984); *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379 (Alaska 1974).

Here, applying the primary jurisdiction doctrine is inappropriate for a number of reasons. First, as the appellees admit, the present appeal involves issues of law that are not subject to the primary jurisdiction doctrine. The primary issue in the action is

whether a common-law claim has been stated. Such a determination is appropriately made by the court.

Further, to the extent the appellees contend that the NRD should determine the remedy, the issue of appropriate remedy is not before this court. But, if it were, applying the primary jurisdiction doctrine would be inappropriate. The determination of facts and award of damages, an injunction, or other equitable remedy for a common-law tort or equity action is in the province of the judicial system. See *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003) (issue of available remedies is question of law). Moreover, as we discussed in the abrogation portion of our analysis, there is no statutory requirement that the NRD's provide a remedy to a surface water appropriator who has been denied water because of the use of ground water. In particular, there is no statutory authority for the NRD's to award damages. At most, the GWMPA appears to allow the NRD's the ability to take regulatory action to prevent future conflicts, and to issue cease and desist orders to enforce those regulations.

Moreover, policy considerations also make the application of the primary jurisdiction doctrine inappropriate. One of the principle considerations of the doctrine is to avoid inconsistent results. With 23 NRD's in Nebraska, all of which consist of elected officials, applying the primary jurisdiction doctrine would allow for the future possibility of up to 23 different rules and remedies in Nebraska for interference with surface water by a ground water user. See Nebraska Blue Book 2002-03 at 919-21. Instead of deferring jurisdiction to NRD's who might act inconsistently and apply differing rules, it is better to allow the courts, which are bound by legal precedent, to try the actions. Because of the questions of law involved and the lack of statutory authority to provide all forms of relief prayed for in the complaint, exercise of the primary jurisdiction doctrine is inappropriate.

4. Joinder of Parties

Spear T alleges that the district court erred when it dismissed for failure to join all necessary parties. The appellees argue that all well users in the Pumpkin Creek basin must be joined in the lawsuit.

[28,29] The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. See, Neb. Rev. Stat. § 25-323 (Cum. Supp. 2004); *Robertson v. School Dist. No. 17, supra*; *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[30-31] A plaintiff, however, need not join all tort-feasors as defendants in an action for damages. Every joint tort-feasor is liable for all damages to which his or her conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

We determine that all well users in the basin are not indispensable parties who would need to be joined to satisfy jurisdiction. Accordingly, the district court erred when it dismissed the complaint with prejudice for failure to join necessary parties.

V. CONCLUSION

We adopt Restatement (Second) of Torts §§ 858 and 850A (1979) for resolving disputes between users of hydrologically connected ground water and surface water. Because we adopt the Restatement, we determine that the district court erred when it dismissed the complaint with prejudice for failure to state a claim. Although Spear T did not precisely state a claim under the Restatement, it should be provided the opportunity to amend its complaint to state a claim. We further determine that the district court erred when it dismissed the complaint for lack of subject-matter jurisdiction and failure to join necessary parties. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT M. PETTY, APPELLANT.

691 N.W.2d 101

Filed January 21, 2005. No. S-03-1046.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** When a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995).
4. **Speedy Trial: Evidence.** In determining whether time is excludable for speedy trial purposes under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995), a trial date that is scheduled within 6 months after the defendant's reappearance will be presumed to be the next reasonably available trial date without the State being required to present further evidence to justify the setting.

Petition for further review from the Nebraska Court of Appeals, INBODY, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Judgment of Court of Appeals affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, and Richard A. Kubat for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert M. Petty was charged in Douglas County Court with driving under the influence (third offense), driving under suspension, and driving without lights. The county court denied Petty's motion to discharge on speedy trial grounds. The district court for Douglas County affirmed the denial, and Petty appealed to the

Nebraska Court of Appeals. The Court of Appeals affirmed. *State v. Petty*, No. A-03-1046, 2004 WL 1724900 (Neb. App. Aug. 3, 2004) (not designated for permanent publication). We granted the State's petition for further review. Although we disagree with the reasoning of the Court of Appeals with respect to time excludable due to Petty's failures to appear, we conclude that the Court of Appeals did not err in affirming the denial of Petty's motion to discharge. Accordingly, we affirm as modified.

STATEMENT OF FACTS

The State filed complaints in Douglas County Court on July 17, 2002, charging Petty with driving under the influence (third offense), driving under suspension, and driving without lights. Petty pled not guilty, and the case progressed, with the county court setting a trial date of September 10. Petty failed to appear on September 10. The court issued a capias for Petty's arrest. Petty was arrested on February 2, 2003, and posted bond on February 4. Petty appeared in court on February 24 and pled not guilty to an additional charge of failing to appear.

On March 6, 2003, the court scheduled Petty's trial for the jury term beginning April 1. The court also ordered Petty to appear for a pretrial hearing on March 14. Petty failed to appear at the March 14 pretrial hearing. Petty appeared at a hearing on March 20, where he waived his right to a jury trial and the court set a bench trial for July 14.

On July 2, 2003, Petty filed a motion to discharge, claiming he had been denied a speedy trial. On the same day, Petty filed a motion to suppress. Following a hearing on July 10, the county court denied Petty's motion to discharge. The county court noted Petty's failures to appear and, citing *State v. Letscher*, 234 Neb. 858, 452 N.W.2d 767 (1990), found that such absences tolled the time for speedy trial. Before the county court could consider the motion to suppress, Petty appealed the denial of the motion to discharge to the district court. On September 9, the district court affirmed the denial of Petty's motion to discharge.

Petty appealed to the Court of Appeals. Petty claimed he had been denied his 6-month statutory right to a speedy trial and argued that there were only two excludable time periods: (1) the period of 147 days from September 10, 2002, when he first

failed to appear for trial, until February 4, 2003, when he posted bond; and (2) the period of 6 days from March 14, when he failed to appear for the pretrial hearing, until March 20, when he next appeared in court. Petty asserted that by excluding these 153 days, the latest date he could have been brought to trial was June 19, 2003.

In analyzing Petty's appeal, the Court of Appeals cited to *State v. Rhoads*, 11 Neb. App. 731, 734, 660 N.W.2d 181, 184 (2003), for the proposition that "[w]hen a defendant is aware of the scheduled trial date and fails to appear on that date, the Nebraska speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court." (Emphasis omitted.) The Court of Appeals noted that there was no indication in the record that Petty appeared in court when he posted bond on February 4, 2003, and the Court of Appeals therefore determined that the period commencing September 10, 2002, when Petty failed to appear for trial, should be deemed to have ended not on February 4, 2003, but on February 24 when Petty in fact appeared in court. The Court of Appeals determined that these additional 20 days extended the time for trial until July 9 and that the time was tolled again when Petty filed his motion to discharge and his motion to suppress on July 2. The Court of Appeals therefore concluded that Petty had filed his motion to discharge prematurely.

Although this conclusion could have resolved the appeal as it was being assessed by the Court of Appeals, the Court of Appeals proceeded to address the State's argument that there was additional excludable time. As a general matter, the State urged that the time between Petty's reappearance and the next available trial date should be excluded, because this period resulted from Petty's absence or unavailability. See Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995). The State pointed to one such excludable period which ran from February 24, 2003, when Petty reappeared in court until April 1, the next available trial date. By excluding this period as urged by the State, the time for trial would have been extended until August 7. Although the State did not explicitly make the argument in its brief, the Court of Appeals noted that under the State's reasoning, a similar argument could be made for the period from March 20, when Petty

appeared in court after failing to appear at the March 14 hearing, until the July 14 date which was set for a bench trial.

In support of its position, the State relied on *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990), in which this court stated that "when a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable." The Court of Appeals rejected the State's argument.

Relying on its decision in *Rhoads, supra*, in which the Court of Appeals had stated that the State had the burden under § 29-1207(4)(f) to show good cause for delay in setting the trial date after a defendant reappears, the Court of Appeals concluded that the State had the burden in this case to establish that there was good cause for setting Petty's trial on April 1, 2003. More specifically, the Court of Appeals determined that the State had presented no evidence that April 1 was the next reasonably available trial date following Petty's reappearance on February 24. The Court of Appeals noted that in *Letscher*, the court bailiff had testified at the hearing on the motion to discharge regarding the next available date for jury trial following the defendant's reappearance. Although the Court of Appeals rejected the State's argument that the first excludable period should have extended until April 1, it affirmed the denial of the motion to discharge because of its earlier conclusion that the motion was filed prematurely.

The State petitioned for further review of the Court of Appeals' decision and assigned error to the Court of Appeals' reasoning that additional time was not excludable. We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

The State asserts that the Court of Appeals erred in (1) imposing a good cause burden on the State in order to exclude from the speedy trial calculation the time from the defendant's reappearance until the next reasonable trial date and (2) failing to hold that the speedy trial period was tolled from Petty's first failure to appear on September 10, 2002, until the rescheduled trial date of July 14, 2003.

STANDARDS OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

At issue in this appeal are the provisions of the statutory 6-month speedy trial act found at § 29-1207. Particularly relevant are the provisions of § 29-1207(4)(d) and (f) relating to certain excludable periods. The statute provides:

> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

On further review, the State claims that the Court of Appeals erred in imposing a burden on the State which required it to prove good cause in order to exclude time after Petty reappeared in court until the trial date set by the court following Petty's reappearance. In sum, the State asserts that the language of § 29-1207(4)(d) which excludes the "period of delay resulting from the absence or unavailability of the defendant" requires that the period of time from the defendant's reappearance until the next reasonably available trial date be excluded. The State further asserts that the Court of Appeals erred in relying on the "good cause" language found in § 29-1207(4)(f) which excludes "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause" when it required the State to prove that the time between Petty's reappearance and the trial date should have been excluded. We agree with the State's reading of § 29-1207(4)(d), and we conclude that under the plain language of § 29-1207(4)(d),

the period of time from the defendant's reappearance until the next reasonably available trial date is ordinarily excludable pursuant to § 29-1207(4)(d) as "delay resulting from the absence or unavailability of the defendant" and that, therefore, the Court of Appeals erred when it reasoned that the State had a burden to prove, but had failed to demonstrate, good cause for such delay. 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. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[3] This court has held that "when a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under § 29-1207." *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990). This court did not specify in *Letscher* whether such exclusion was pursuant to § 29-1207(4)(d) or (f). In announcing our holding in *Letscher*, this court cited to *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), and *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

In *Johnson*, this court stated that a defendant who has failed to appear for a trial set within the statutory time for trial "is not necessarily entitled to an immediate trial when he [or she] subsequently appears in court" but that "in many cases . . . a delay after the defendant's reappearance might be justified for good cause, such as a congested docket in the trial court, or scheduling difficulties on the part of the trial judge or the prosecutor." 201 Neb. at 329, 268 N.W.2d at 89. The court in *Johnson* further stated that in such cases, the court should "advise the defendant of his [or her] right to a speedy trial and ascertain whether the defendant wishes to waive that right; or otherwise set forth in the record the cause for the delay." *Id.* Although this court in *Johnson* used the expression "good cause" for delay after reappearance, we did not specifically state whether such delay was excludable under § 29-1207(4)(d) or (f). In *Kriegler*, this court quoted *Johnson* to the effect that delay after reappearance might be excludable if justified for good cause, and we then stated that such time period "should be excluded under the provisions of § 29-1207(4)(f)." 225 Neb. at 488, 406 N.W.2d at 138.

Despite our statement in *Kriegler* that delay after reappearance is excludable under § 29-1207(4)(f), we now determine that such time is more appropriately excludable under the language of § 29-1207(4)(d), which states that time is to be excluded from the speedy trial calculation for the "period of delay resulting from the absence or unavailability of the defendant." When a defendant fails to appear for a timely scheduled trial, the delay resulting from such absence or unavailability does not end immediately upon the defendant's reappearance. Instead, further delay inevitably results from the fact that the court, prosecutors, witnesses, and all others involved with the case must adjust their schedules and resume necessary preparations for trial after the defendant reappears. As noted in *Johnson*, a defendant is not entitled to an immediate trial upon his or her reappearance. Indeed, other criminal cases will invariably have been set for trial and will be required in some cases to proceed to trial to meet their own speedy trial constraints prior to the trial of the reappearing defendant. A defendant's failure to appear for trial has far-reaching effects on the schedules and preparations of all involved with the case and other cases, and such absence or unavailability results in delay. It is not required under § 29-1207(4)(d), nor would it be prudent, to permit an absconding defendant to set the calendar at the courthouse and expect a trial immediately upon his or her reappearance.

[4] Because we determine that the passage of time in setting a trial date which ensues after a defendant reappears is ordinarily excludable as resulting from the "absence or unavailability" provisions of § 29-1207(4)(d) rather than the "good cause" provisions of § 29-1207(4)(f), the State has no burden to show specific good cause to exclude such period. The cause of such period of delay is the defendant's absence or unavailability, which § 29-1207(4)(d) denotes as a valid reason to exclude time. As stated in *State v. Letscher*, 234 Neb. 858, 452 N.W.2d 767 (1990), the court must endeavor to schedule trial for the "next reasonably available trial date" after the defendant reappears. However, in determining whether time is excludable for speedy trial purposes under § 29-1207(4)(d), a trial date that is scheduled within 6 months after the defendant's reappearance will be presumed to be the next reasonably available trial date without the State being required to present further evidence to justify the setting.

In deciding this case, the Court of Appeals relied on its holding in *State v. Rhoads*, 11 Neb. App. 731, 660 N.W.2d 181 (2003). *Rhoads* involved facts similar to this case. The Court of Appeals stated in *Rhoads* that it was the State's burden to establish facts showing good cause to exclude any delay in setting a trial date following the defendant's reappearance. In *Rhoads*, the Court of Appeals noted that the State did not present evidence that the defendant's trial could not have been set sooner than it had been set after the defendant's reappearance and it, therefore, determined that the State had not proved "good cause" to exclude the delay under § 29-1207(4)(f). Contrary to the Court of Appeals' reasoning, we conclude that the time from a defendant's reappearance until the next reasonably available trial date is "a period of delay resulting from the absence or unavailability of the defendant" and that such period is excludable under § 29-1207(4)(d). Accordingly, we overrule *Rhoads* as well as *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), and *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978), to the extent these cases hold both that the period between a defendant's reappearance and the trial date is excludable only under § 29-1207(4)(f) and that the State has a burden to prove good cause to exclude such period in calculating time for speedy trial purposes.

In the present case, Petty failed to appear for trial on September 10, 2002. Petty next appeared in court on February 24, 2003, and trial was subsequently scheduled for the April 1 jury term. Petty again failed to appear for a pretrial hearing on March 14, and after Petty reappeared in court on March 20, a bench trial was scheduled for July 14. Because the period of delay in setting the trial date was a result of Petty's absence or unavailability under § 29-1207(4)(d), and because the July 14 trial date was within 6 months of both Petty's reappearance on February 24 and his reappearance on March 20, such trial date may be presumed to be the next reasonably available trial date, and Petty was not denied his statutory right to a speedy trial.

CONCLUSION

We conclude that, in analyzing Petty's speedy trial claim, the Court of Appeals erred in its reasoning when it stated that the

State was required but failed to prove good cause to exclude the period from Petty's reappearance until the next reasonably available trial date. We determine instead that the period from Petty's reappearances until the July 14, 2003, trial date, which is within 6 months of Petty's reappearances and may be presumed to be the next reasonably available trial date, is excludable pursuant to § 29-1207(4)(d). Although the Court of Appeals found less time than we find to be excludable, we agree with the Court of Appeals' ultimate conclusion that Petty's motion to discharge was filed prematurely on July 2, 2003. However, we find error in the Court of Appeals' calculation of remaining days, and we modify accordingly. We therefore affirm as modified the Court of Appeals' decision concluding that the district court did not err in affirming the county court's denial of Petty's motion to discharge.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JUSTIN JENSEN, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
EARLEEN JENSEN, APPELLANT.
691 N.W.2d 139

Filed January 21, 2005. Nos. S-04-314, S-04-315.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court.
4. **Domicile: Proof.** Domicile must be determined from all the circumstances taken together in a particular case, and in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there.
5. **Domicile: Words and Phrases.** No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole taken together, it must be determined in each particular case.
6. **Domicile.** A person may have two places of residence, but only one of them may be his domicile.

7. **Domicile: Proof: Intent.** For adults, domicile is established by a physical presence in a place in connection with a certain state of mind concerning one's intention to remain there.
8. **Domicile.** One acquires a "domicile of origin" at birth, and that domicile continues until a new one, a "domicile of choice," is acquired.
9. **Domicile: Intent.** It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile.
10. ____: ____. The question of what is residence is one of law to be determined by a consideration of the intention and overt acts of the person whose acts are being examined.
11. **Domicile.** A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.

Appeals from the District Court for Antelope County, PATRICK G. ROGERS, Judge, on appeal thereto from the County Court for Antelope County, KURT RAGER, Judge. Judgments of District Court reversed, and causes remanded with directions.

Amy A. Miller, of American Civil Liberties Union Foundation of Nebraska, for appellants.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

Danielle Nantkes for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

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

WRIGHT, J.

NATURE OF CASE

The Antelope County Court concluded that neither Earleen Jensen nor Justin Jensen was a resident of the village of Royal, Nebraska, for purposes of an election held there on November 5, 2002. The county court found them guilty of illegal voting, in violation of Neb. Rev. Stat. § 32-1528 (Reissue 2004). Earleen and Justin appeal from orders of the Antelope County District Court which affirmed the judgments of the county court.

SCOPE OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such,

its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992).

[2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.*

FACTS

Earleen married Marlowe Jensen in 1962, and they lived on a farm located 1 mile north and 1 mile west of Royal, which at the time of trial had a population of 70 to 75 residents. The farm is located in the Verdigre township voting precinct, which is separate from the Royal township voting precinct.

Justin, one of Earleen and Marlowe's children, grew up on the farm and developed diabetes at a young age. In 1986, he purchased a home located on Ryan Street in Royal. He lived there for 1½ years and then moved out of town. His health subsequently deteriorated, and he moved back to Royal in 1996. He registered to vote using the Ryan Street address, and he voted regularly in both primary and general elections prior to November 2002.

Justin testified that he split his time between the Ryan Street home and his parents' farm. Justin has "brittle diabetes," which has caused him to have periodic hypoglycemic attacks. During these attacks, he may become violent and need to be restrained. Because of this health condition, Justin often required care during the night and, therefore, spent most nights at the farm.

Marlowe retired in 1994 and moved with Earleen into a home located on Johnson Street in Royal. However, Marlowe moved back to the farm after approximately 2 months. Earleen registered to vote using the Johnson Street address and voted regularly in the primary and general elections before November 2002.

Earleen testified that when Justin's health condition worsened, she started spending nights with him and taking care of him on a daily basis. They would spend the night at the farm when Justin's blood sugar was low, and she might need help from Marlowe to administer Justin's insulin injections. She stated that due to Justin's present medical condition, it was impossible for her to stay at the Johnson Street home.

At the May 2002 primary election, election officials questioned whether Earleen and Justin resided in Royal or in the Verdigre

township voting precinct. Helen Mitteis, an election official, was familiar with the voting records of Earleen and Justin. She testified that she had not known Justin to vote outside Royal. Justin was questioned again during the November 2002 general election. Regardless, Earleen and Justin were each allowed to cast a ballot in the November 2002 general election in the race for Royal village trustee. Their voting in the village trustee contest formed the basis for the criminal charges at issue.

Earleen and Justin were charged in separate complaints with unlawfully voting in a school district, a village, or a precinct of a city in which they did not actually reside or into which they came for merely temporary purposes. See § 32-1528. The cases were consolidated for trial in the county court for Antelope County.

The county court found that Justin had lived at several locations between 1987 and 1996. He purchased the Ryan Street home in 1986. He lived at that location for about 1½ years and had moved several times since then. The court noted that Justin had the house moved to a central location on the Ryan Street lot and had installed new siding and windows. The court found that according to Earleen, she and Justin needed to live at the farm so that Marlowe would be available if Earleen needed help with Justin. It found that due to Justin's diabetes, he could not live alone but that his stated intent was to live independently at some point. From 1996 to November 2002, Justin averaged, on a monthly basis, 5 to 10 nights sleeping at the Ryan Street home and 20 to 26 nights sleeping at the family farm. It was not disputed that Justin cast a ballot in the Royal village trustee election on November 5, 2002.

The county court concluded that Justin's testimony concerning the extent of his stays at the family farm demonstrated a lack of "habitual habitation" at the Ryan Street home, which the court stated was necessary to render the same his residence for voting purposes, and that Justin was not an actual resident of Royal for purposes of the village trustee election on November 5, 2002. It found Justin guilty of illegal voting as charged in the complaint.

As to Earleen, the county court found that her "residential activity" on or before November 5, 2002, established beyond a reasonable doubt that she was not a resident of the village of Royal. The court concluded that Earleen's statements that it was

impossible for her to live at the Johnson Street home and that she planned to have her domicile there did not indicate a present intention to reside at that location. It found that Earleen, by her own admission, was not habitually present at the Johnson Street home and that, thus, she lacked the coexistence of fact and intention to establish the Johnson Street home in Royal as her residence for purposes of voting in the November 2002 general election. The court found Earleen guilty of illegal voting as charged in the complaint.

The county court's decisions were appealed to the district court for Antelope County, which affirmed the convictions and sentences. Earleen and Justin appeal.

ASSIGNMENTS OF ERROR

Earleen and Justin assign the following errors to the Antelope County District Court, which affirmed the judgments of the Antelope County Court: (1) The court erred in finding that Earleen and Justin were not residents of the village of Royal, (2) the court erred in its application of the law, (3) the court erred in not considering Justin's disability, and (4) the court erred in finding Earleen and Justin guilty of illegal voting.

ANALYSIS

Earleen and Justin were convicted of violating § 32-1528, which states: "Any person who votes a ballot in any school district, village, or precinct of a city in this state in which he or she does not actually reside or into which he or she has come for merely temporary purposes shall be guilty of a Class III misdemeanor." The issue is whether Earleen and Justin resided in the Royal township voting precinct for purposes of the November 2002 village trustee election.

[3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law

independently of the conclusions reached by the trial court. See *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000).

Pursuant to Neb. Rev. Stat. § 32-116(1) (Reissue 2004), the term "residence" means

> that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning.

[4-6] In *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004), we stated that domicile must be determined from all the circumstances taken together in a particular case and that in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there. No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole taken together, it must be determined in each particular case. *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979). A person may have two places of residence, but only one of them may be his domicile. *Id.*

[7,8] "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). Accord *Texas v. Florida*, 306 U.S. 398, 59 S. Ct. 563, 83 L. Ed. 817 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one, a "domicile of choice," is acquired. See *In re Estate of Jones*, 192 Iowa 78, 81, 182 N.W. 227, 228 (1921).

[9] One fact of particular significance in ascertaining a person's domicile is the act of registering and voting. See *In re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35 (1939).

> "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the

> voter. [S]uch act is a distinct, unequivocal and public assertion by the voter of his legal domicile."

Id. at 66, 288 N.W. at 38 (quoting *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917)). " 'It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile.' " *In re Estate of Meyers*, 137 Neb. at 67, 288 N.W. at 38 (quoting *Reed's Will*, 48 Or. 500, 87 P. 763 (1906)).

Justin testified that when he returned to Royal in 1996, he moved his belongings to the Ryan Street home and registered to vote using the Ryan Street address. He stated that he intended to live there full time once his medical condition improved. His driver's license, which was issued prior to the 2002 general election, listed the Ryan Street home as his address. He testified as to improvements that he had made to the house, including a new foundation and basement. The house had been moved to a different location on the lot. He had installed siding on the exterior of the house. These improvements were made before the general election in November 2002.

The State showed that prior to the 2002 general election, Justin split his time between the Ryan Street home and the farm. He spent most of the days at the Ryan Street home but spent only 5 to 10 nights per month there due to his diabetic condition. The remaining nights were spent at the farm.

Earleen testified that her belongings had been at the Johnson Street home since she moved there in 1994. She intended for the Johnson Street residence to be her home even though it was impossible for her to stay there due to the daily care she was required to administer to Justin. She intended to return to the Johnson Street home once Justin's medical condition improved.

Earleen had been registered to vote in Royal since 1994 and had been a diligent voter. She had a newspaper delivered to the Johnson Street home, and her driver's license listed the home as her address. A number of her vehicles were registered using the Johnson Street address. She had made improvements to the Johnson Street home prior to the general election in November 2002.

[10] " 'The question of what is residence is one of law to be determined by the consideration of the intention and overt acts of

the person whose acts are being examined.' " *State, ex rel. Brazda, v. Marsh*, 141 Neb. 817, 828, 5 N.W.2d 206, 213 (1942). In *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), we recognized that a person may have two residences but that only one of them is his domicile. Domicile must be determined from all the circumstances taken together in a particular case. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

The county court concluded that Justin's testimony concerning the extent of his stays at the family farm demonstrated a lack of "habitual habitation" at the Ryan Street home, which the court felt was necessary to render the home his residence for voting purposes. We conclude that the county court erred in concluding that "habitual habitation" was necessary to establish residence for voting purposes, because whether a voter is habitually present at a particular residence is not dispositive of the issue of domicile for purposes of § 32-1528.

Although § 32-1528 includes the phrase "actually reside," it does not require habitual presence. Prior to amendment, Neb. Rev. Stat. § 32-107 (Reissue 1993) provided: "Residence shall mean that place at which a person has established his home, where he is habitually present, and to which when he departs he intends to return." However, § 32-107 was amended in 1994, see 1994 Neb. Laws, L.B. 76, and the definition of residence for purposes of the Election Act is now found in § 32-116(1), which states that a residence is "that place . . . with which a person has a settled connection for the determination of his or her civil status or other legal purposes."

There were only two places where Justin had any type of "settled connection"—the family farm and the Ryan Street home. As noted in *In re Estate of Craven*, 265 Neb. 41, 654 N.W.2d 196 (2002), the term "domicile" is difficult to accurately define, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used. See, also, *In re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35 (1939).

[11] Considering all the circumstances taken together, see *Krajicek v. Gale, supra*, we conclude that the county court erred in its determination that Justin did not reside in the village of Royal. Justin had bodily presence at the Ryan Street home and

expressed his intention to remain there by making improvements to the house and spending 5 to 10 nights per month there. Although Justin split his time between the Ryan Street home and the farm, that fact does not establish that his residence was other than the Ryan Street home. Justin more than adequately explained that his reason for staying at the family farm was his diabetic condition, and he evidenced his intention to have the Ryan Street home as his domicile. In *In re Estate of Meyers*, 137 Neb. at 67, 288 N.W.2d at 38, we stated: " 'A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.' " Further, Justin's repeated exercise of voting in the Royal elections since 1996 was a public assertion which clearly established his intent to have the Ryan Street home as his domicile.

As to Earleen, the county court concluded that her "residential activity" established beyond a reasonable doubt that she was not a resident of the village of Royal. The court based its conclusion in part upon Earleen's statement that it was physically impossible for her to stay in Royal because of the constant attention required by Justin's diabetic condition. It also concluded that Earleen was not habitually present at the Johnson Street home. It found that she and Justin stayed at the family farm so Marlowe could help her with Justin's care and that Earleen planned to have her legal domicile at the Johnson Street home in Royal.

The county court erred when it concluded that Earleen was not a resident of the village of Royal. Earleen had physical presence at the Johnson Street home since 1994, and she had an intention to remain there. The fact that her stay at this location was interrupted because of the constant attention required by Justin's medical condition did not establish that she resided at the family farm. Earleen had not abandoned the Johnson Street home despite the fact that she stayed at the family farm in order to care for Justin. She had a settled connection with the Johnson Street home, which connection she established in 1994, and she had the intention of someday returning to that location.

CONCLUSION

For the reasons set forth herein, we conclude that the county court erred in finding Earleen and Justin guilty of violating

§ 32-1528, and the district court erred in affirming the judgments of the county court.

The judgments of the district court are reversed, and the causes are remanded to the district court with directions to reverse the judgments of the county court and instruct the county court to dismiss the complaints against Earleen and Justin with prejudice.

REVERSED AND REMANDED WITH DIRECTIONS.

DARLENE BRUNKHARDT AND JUSTIN BRUNKHARDT, WIFE AND HUSBAND, APPELLANTS, V. MOUNTAIN WEST FARM BUREAU MUTUAL INSURANCE COMPANY, APPELLEE.

691 N.W.2d 147

Filed January 28, 2005. No. S-03-1087.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to determine the matter independently of the trial court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
5. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
6. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
7. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.

8. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
9. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, if the defendant has engaged in "continuous and systematic general business contacts" with the forum state.
10. ____: ____. If a defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert "specific jurisdiction" over the defendant depending on the quality and nature of such contact.
11. ____: ____. Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
12. ____: ____. Contacts created by another's unilateral acts are insufficient to confer on the forum state court personal jurisdiction over a nonresident defendant.
13. ____: ____. Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Harry R. Meister, of Meister & Segrist, P.C., for appellants.

Kay Lynn Bestol and Paul Kapp, of Sundahl, Powers, Kapp & Martin, for appellee.

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

CONNOLLY, J.

Darlene Brunkhardt and Justin Brunkhardt, wife and husband, appeal the district court's order dismissing their complaint seeking underinsured motorist benefits against Mountain West Farm Bureau Mutual Insurance Company (Mountain West). The court dismissed the complaint for lack of personal jurisdiction. We affirm because Mountain West lacked sufficient contacts in Nebraska to confer personal jurisdiction.

BACKGROUND

In January 2001, Darlene, a Wyoming resident, was injured in a motor vehicle collision in Scotts Bluff County, Nebraska. The

Brunkhardts later settled with the tort-feasor's insurance company. They next unsuccessfully sought underinsured motorist benefits from Mountain West and filed this action. Mountain West moved to dismiss for lack of personal jurisdiction.

The facts presented on the motion to dismiss are undisputed. Mountain West is located in Laramie, Wyoming, and sells insurance in Wyoming and Montana; it is not authorized or licensed to do business in Nebraska and has never sold insurance in Nebraska; it does not have property, employees, bank accounts, offices, telephone listings, or an agent for service of process in Nebraska; it has never advertised or solicited business in Nebraska; and it does not derive income from Nebraska.

Darlene lives in Wyoming and purchased her insurance in Wyoming, but regularly commutes to work in Nebraska. Her Mountain West agent was aware that she worked in Nebraska. The Brunkhardts presented evidence of two letters Mountain West sent to their attorney in Nebraska concerning this action. They also presented evidence about a Nebraska accident in 2001 involving their son. Regarding that accident, Mountain West sent two letters to a Nebraska attorney concerning its subrogation interest. The record contains evidence that when an insured is involved in an out-of-state accident, including Nebraska, Mountain West will sometimes demand that parties in the foreign state reimburse it. No lawsuits, however, have been filed because of those requests. Finally, the Brunkhardts presented evidence that on one occasion, Mountain West was sued in Nebraska and it defended the action.

The district court found that Mountain West did not have sufficient contacts with Nebraska to support the exercise of personal jurisdiction and dismissed the complaint.

ASSIGNMENTS OF ERROR

The Brunkhardts assign, rephrased, that the district court erred by dismissing their complaint for lack of personal jurisdiction.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to determine the matter independently of

the trial court. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

ANALYSIS

The Brunkhardts argue that Mountain West had sufficient contacts with Nebraska for the court to exercise personal jurisdiction. They point to Mountain West's communications with Nebraska attorneys and the agent's knowledge that Darlene regularly commuted to work in Nebraska. Mountain West, however, argues that any contacts with Nebraska were the result of the unilateral actions of others and are insufficient to establish minimum contacts for the exercise of personal jurisdiction.

LONG-ARM STATUTE

[3,4] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). Nebraska's long-arm statute provides: "A court may exercise personal jurisdiction over a person . . . (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." Neb. Rev. Stat. § 25-536 (Reissue 1995). Nebraska's long-arm statute, § 25-536, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Diversified Telecom Servs. v. Clevinger, supra*. Thus, we next address whether Mountain West had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.

MINIMUM CONTACTS

[5-7] If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Quality Pork Internat. v. Rupari Food Servs., supra.* To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004). The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Id.*

[8-10] A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Id.* Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in " 'continuous and systematic general business contacts' " with the forum state. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 483, 675 N.W.2d 642, 650 (2004), quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct 1868, 80 L. Ed. 2d 404 (1984). If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact. *Id.*

Here, general personal jurisdiction is not at issue. Mountain West did not have continuous and systematic general business contacts with residents of the state. It has not transacted business in the state, and its contacts have been limited to a small number of responses to claims initiated in the state. Thus, the question is

whether specific acts of Mountain West are sufficient to allow the district court to exercise jurisdiction. We determine that Mountain West's limited contacts with Nebraska residents are not sufficient to confer personal jurisdiction.

[11,12] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. See *Diversified Telecom Servs. v. Clevinger, supra.* Contacts created by another's unilateral acts are insufficient to confer jurisdiction. *Id.*

[13] Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Diversified Telecom Servs. v. Clevinger, supra.* Thus, when an insured travels to another state, his or her presence in the state is unilateral and does not serve to create purposeful contacts between the insurer and the state. See *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1987). It has also been held that the requisite minimum contacts are not established when the plaintiff's actions require the insurer to send communications into the forum. *Id.*, citing *Hunt v. Erie Ins. Group*, 728 F.2d 1244 (9th Cir. 1984).

Also, other jurisdictions have considered whether the act of insuring a person who travels to another state is sufficient to create a substantial connection with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the state. Generally, those jurisdictions hold that the act of insuring a person who might travel to a nearby state is insufficient to find that the insurer purposely directed its activities at the forum state. See, e.g., *Ex Parte Georgia Farm Bur. Mut. Auto. Ins.*, 889 So. 2d 545 (Ala. 2004); *Batton v. Tennessee Farmers Mut. Ins. Co., supra*; *Tennessee Farmers Mut. Ins. v. Harris*, 833 S.W.2d 850 (Ky. App. 1992); *Zimmerman v. American Inter-Insurance Exch.*, 386 N.W.2d 825 (Minn. App. 1986); *United Farm Bur. Mut. Ins. v. U.S. Fid. & Guar.*, 501 Pa. 646, 462 A.2d 1300 (1983).

Here, all of Mountain West's Nebraska contacts were the result of others' unilateral actions. Although Darlene drove her automobile in Nebraska, the policy was issued in Wyoming. That the agent knew that Darlene would travel to Nebraska does not constitute purposeful contact with Nebraska. Also, when Mountain West contacted the Nebraska attorneys, it was in response to claims filed on policies issued in other states. The record does not show any action where Mountain West initiated the transaction of business in Nebraska. Instead, it responded to insurance issues that were initiated by its insureds. Nothing in the record supports a conclusion that Mountain West acted in a manner that would support a conclusion that it was actively conducting business in the state. Under these circumstances, when the insurance contract was issued in Wyoming by a Wyoming company to another Wyoming resident and when contacts with the forum are the result of others' unilateral actions, the contacts are not sufficient to exercise personal jurisdiction over the defendant.

CONCLUSION

Mountain West lacks sufficient minimum contacts with the state for the court to exercise personal jurisdiction. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
MICHAEL D. HALL, APPELLEE.
691 N.W.2d 518

Filed January 28, 2005. No. S-04-438.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Criminal Law: Appeal and Error.** When the State appeals under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the scope of the appeal is set by the application for leave to docket an appeal and cannot be enlarged afterward when the State files its appellate brief.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

5. **Evidence: Words and Phrases.** "Competent evidence" is evidence that is admissible and relevant on the point in issue.
6. **Criminal Law: Motor Vehicles: Rules of Evidence: Proof.** Once the State has proved the requirements of Neb. Rev. Stat. § 60-6,192(1)(a) through (d) (Reissue 2004), a court may treat the results from a radio microwave, mechanical, or electronic speed measurement device as admissible; the State need not show that the results from the speed measurement device were also admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. **Statutes: Words and Phrases.** The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Exception sustained.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellant.

Dennis E. Martin and Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

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

CONNOLLY, J.

When a vehicle's speed is at issue, Neb. Rev. Stat. § 60-6,192(1) (Reissue 2004) requires that a peace officer's visual observations regarding speed be "corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device." In addition, § 60-6,192(1)(a) through (d) sets out requirements that the State must prove before offering results from a speed measurement device into evidence. The issue is whether—in addition to proving the requirements of § 60-6,192(1)(a) through (d)—the State must show that the results from the speed measurement device are admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995). Rule 702 generally governs the admissibility of expert testimony.

The district court, in reversing Michael D. Hall's speeding conviction, ruled that the State, in addition to proving the requirements of § 60-6,192(1)(a) through (d), must show that the results from a speed measurement device are admissible under rule 702.

The State has taken exception to this ruling under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004). We determine that when the State has proved the requirements of § 60-6,192(1)(a) through (d), a trial court has the discretion to admit the results from a radio microwave, mechanical, or electronic speed measurement device, even if the State has not shown that the results are admissible under rule 702.

BACKGROUND

While enforcing the speed limit in Omaha, police officer Ronald W. Cline noticed Hall "driving at a real high rate of speed" and "passing all slower vehicle[s] on the interstate." To confirm his suspicion that Hall was speeding, Cline used a ProLaser III speed measurement device. The ProLaser III showed that Hall's vehicle's speed was 95 m.p.h. The posted speed limit was 60 m.p.h.; Hall was charged with speeding.

Cline is certified to use the ProLaser III; to become certified, he took a class and passed a test. Cline testified that when the ProLaser III is turned on, it conducts a series of internal tests to ensure that it is functioning properly. On the day that he ticketed Hall, this internal testing indicated that the ProLaser III was functioning properly.

Before going on duty, Cline also conducted an external test on the ProLaser III to ensure that the device was correctly measuring distance. He did this by pointing the ProLaser III at an object that he knew was a certain distance away. The test showed that the ProLaser III was correctly measuring distance. This was the only external testing that Cline conducted before he ticketed Hall. Nothing in the record suggests that Cline conducted either internal or external testing after he ticketed Hall.

At trial in county court, the State asked Cline at what speed the ProLaser III showed that Hall was traveling. Hall objected, but the county court allowed Cline to testify that the ProLaser III showed that Hall was traveling at 95 m.p.h. The county court found Hall guilty.

Hall appealed his conviction to the district court. He argued that the State had failed to comply with § 60-6,192(1) which provides:

> (1) Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace

officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:

(a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;

(b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so as to allow a minimum possibility of distortion or outside interference;

(c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; and

(d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

Specifically, Hall argued that the county court had erred in finding that the ProLaser III is a "radio microwave, mechanical, or electronic speed measurement device" and that Cline had conducted sufficient external accuracy tests on the ProLaser III before and after ticketing Hall as required by § 60-6,192(1)(d).

In addition to his § 60-6,192(1) arguments, Hall also argued in the district court that the results from the ProLaser III were inadmissible under rule 702 because the State had not offered expert testimony establishing that the ProLaser III produces reliable and relevant results. Rule 702 generally governs the admissibility of expert testimony. It provides: "If scientific, technical, or other

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under rule 702, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Schafersman v. Agland Coop, supra.*

The district court reversed Hall's conviction. Its reasoning can be summarized into two main points. First, it concluded that the results from the ProLaser III were inadmissible under rule 702 because the State had failed to establish that the device produces reliable results. Second, the court ruled that the distance testing conducted by Cline did not constitute sufficient external accuracy testing under § 60-6,192(1)(d). The State was granted leave to docket an appeal under § 29-2315.01.

ASSIGNMENT OF ERROR

The State takes exception to the district court's ruling that in addition to the requirements of § 60-6,192(1)(a) through (d), the State was required to establish that the technology underlying the ProLaser III was reliable under rule 702.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Cave v. Reiser*, 268 Neb. 539, 684 N.W.2d 580 (2004).

ANALYSIS

Scope of Appeal

The State appealed the district court's decision under § 29-2315.01. Section 29-2315.01 is an exception to the general rule that the State has no right to appeal an adverse ruling in a

criminal case. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). To take an exception under § 29-2315.01, the prosecuting attorney must file with the trial court an application for leave to docket an appeal concerning the erroneous rulings or decisions. The application must be accompanied by a copy of the ruling or decision complained of, the basis and reasons for the objection, and a statement by the prosecuting attorney as to the part of the record he or she intends to present to the appellate court. § 29-2315.01. The trial court then must indicate on the application whether it is in conformity with the truth and whether the part of the record the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. *Id.* The application is then presented to the appellate court which determines whether to grant the application. *Id.*

Here, however, there is a discrepancy between the State's application for leave to file an appeal and the arguments in its brief. In its application for leave to docket an appeal, the State took exception only to the district court's holding that "the 'Daubert' analytical framework adopted in Nebraska in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862(2001) applie[s] in the context of a speeding trial in addition to the statutory foundation found at Neb. Rev. Stat. § 60-6,192." But in its brief, the State also requests that we reverse the trial court's determination that Cline failed to conduct sufficient external accuracy tests as required by § 60-6,192(1)(d). Thus, we must determine what controls the scope of this appeal: the State's application to file an appeal under § 60-6,192(1) or the assignments of error in the State's brief.

[3] The purpose of an appeal brought under § 29-2315.01 is "to provide an authoritative exposition of the law to serve as precedent in future cases." *State v. Detweiler*, 249 Neb. 485, 494, 544 N.W.2d 83, 90 (1996). Under § 29-2315.01, an appellate court determines whether authoritative exposition of the law is needed based upon the State's application for leave to docket an appeal. Thus, the scope of the State's appeal is set by the application and cannot be enlarged afterward when the State files its appellate brief.

In its application for leave to docket an appeal, the State did not take exception to the district court's conclusion that Cline

had failed to conduct sufficient external testing. Thus, we consider only the State's argument that the district court erred in ruling that the State—in addition to proving the requirements of § 60-6,192(1)(a) through (d)—must show that the results were relevant and reliable under rule 702.

An additional comment on the scope of this appeal is necessary. If the ProLaser III was not a "radio microwave, mechanical, or electronic speed measurement device," then the results from the ProLaser III could not have been used to corroborate Cline's visual observations of speed. Hall argued to the district court that the ProLaser III was not a radio microwave, mechanical, or electronic speed measurement device, but the court did not rule on this issue. Thus, for this appeal, we assume, without deciding, that the ProLaser III was a "radio microwave, mechanical, or electronic speed measurement device."

Rule 702 and Results From Radio Microwave, Mechanical, or Electronic Speed Measurement Device

The State contends that for results from a radio microwave, mechanical, or electronic speed measurement device to be admissible in proceedings when the vehicle's speed is in issue, it need only prove the four requirements of § 60-6,192(1)(a) through (d). Hall, on the other hand, argues that in addition to proving the requirements of § 60-6,192(1)(a) through (d), the State must also establish that the results were admissible under rule 702. As noted earlier, rule 702 requires a trial court to act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[4-6] We determine, however, that neither the State nor Hall correctly interprets § 60-6,192(1). 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. *Midwest Neurosurgery v. State Farm Ins. Cos.*, 268 Neb. 642, 686 N.W.2d 572 (2004). The key sentence in § 60-6,192(1) provides, "The results of such radio microwave, mechanical, or electronic speed measurement device *may be accepted as competent evidence* of the speed of such motor vehicle in any court or legal proceeding when the

speed of the vehicle is at issue." "Competent evidence" is evidence that is admissible and relevant on the point in issue. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), *overruled on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). See, also, Black's Law Dictionary 596 (8th ed. 2004) (equating term "competent evidence" to admissible evidence). Accordingly, § 60-6,192(1) is a legislative determination that once the State has proved the requirements of § 60-6,192(1)(a) through (d), a court may treat the results from a radio microwave, mechanical, or electronic speed measurement device as admissible even if the State has laid no other foundation. Thus, if the State has proved the requirements of § 60-6,192(1)(a) through (d), it need not show that the results from the speed measurement device were also admissible under rule 702. See Richard Collin Mangrum, *Interpreting Nebraska Rule of Evidence 702 After the Nebraska Supreme Court Adopted the Federal* Daubert *Standard for the Admissibility of Expert Testimony in* Schafersman v. Agland Coop, 35 Creighton L. Rev. 31, 99 (2001) (noting that § 60-6,192(1) permits results from radio microwave, mechanical, or electronic speed measurement devices "to be admitted into evidence even without any foundational evidence regarding the reliability of the underlying theory or the accuracy of the methodology incorporated into the alternative speed devices").

[7] We point out, however, that the admission of results from a speed measurement device is not—as the State seems to suggest—mandatory once the State has proved the requirements of § 60-6,192(1)(a) through (d). The statute does not say that the court *shall* accept the results as competent evidence, but, rather, that the results "*may be accepted.*" The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Thus, § 60-6,192(1) grants discretion to trial courts; if the trial court is skeptical about the technology underlying the speed measurement device, it has the discretion to require further evidence on the technology before admitting the results into evidence.

Also, the admission of results from a radio microwave, mechanical, or electronic speed measurement device does not guarantee a

conviction. The defendant remains free to offer evidence calling into question the validity of the technology underlying the device. Further, how much weight to give the results remains a determination solely for the fact finder. See *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

Effect of Our Ruling on District Court's Vacation of Hall's Conviction

In the conclusion portion of its brief, the State claims

> The foundation before the trial court was adequate under Neb. Rev. Stat. [§] 60-6,192 to support the trial court's exercise of sound discretion in allowing the speed reading from the Pro Laser 3 [sic] to be admitted at trial.
>
> It follows that the judgment of the district court should be reversed and the matter remanded to that district court with directions to affirm the original judgment of the county court.

Brief for appellant at 33. But as we have already explained, the State failed to preserve its argument that the district court erred in ruling that the distance testing conducted by Cline did not constitute sufficient external testing of accuracy under § 60-6,192(1)(d). Thus, even though the district court incorrectly ruled that the State is required to show that results from a radio microwave, mechanical, or electronic speed measurement device are reliable under rule 702, an alternative basis for affirming the district court's judgment remains intact.

CONCLUSION

We hold that when a vehicle's speed is at issue, a trial court may admit results from a radio microwave, mechanical, or electronic speed measurement device if the State proves the requirements of § 60-6,192(1)(a) through (d). This is so even if the State has not shown that the results are admissible under rule 702. However, the admission of the results is discretionary and the trial court may require further evidence if it doubts the underlying technology.

Exception sustained.

STATE OF NEBRASKA, APPELLEE, V. ROMONA ANGLEMYER, ALSO KNOWN AS ROMONA WERNER, APPELLANT.

691 N.W.2d 153

Filed January 28, 2005. No. S-04-579.

1. **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.
2. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
3. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Rules of Evidence.** The plain language of Neb. Evid. R. 901 is directory rather than mandatory.
7. ____. Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
8. **Rules of Evidence: Proof.** The proponent of evidence pursuant to Neb. Evid. R. 901 is not required to rule out all possibilities inconsistent with authenticity or to prove beyond any doubt that the evidence is what it purports to be.
9. ____: ____. The authentication requirement of Neb. Evid. R. 901 does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing sufficient to support a finding that the matter in question is what its proponent claims.
10. **Trial: Evidence: Photographs: Witnesses.** Under the illustrative model of authenticating photographic evidence, a photograph, motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed.
11. **Trial: Evidence: Photographs.** Under the "silent witness" theory of admission, photographic evidence may draw its verification not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product.
12. ____: ____: ____. Even if direct, eyewitness testimony is absent, the contents of photographic evidence itself, together with such circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate the evidence sufficiently to justify its admission.
13. ____: ____: ____. Photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to show; the showing may be made by any

evidence that bears on whether the photographic evidence correctly depicts what it purports to represent.

14. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
17. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.

Appeal from the District Court for Lancaster County, STEVEN D. BURNS, Judge, on appeal thereto from the County Court for Lancaster County, Gale Pokorny, Judge. Judgment of District Court affirmed.

Robert Wm. Chapin, Jr., of Chapin Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

Romona Anglemyer, the defendant-appellant, was convicted in a bench trial of one count of indecency with an animal, in violation of Neb. Rev. Stat. § 28-1010 (Reissue 1995), and she was sentenced to 90 days in jail and fined $500 plus costs. The primary issue in this case is whether sufficient foundation was provided for the admission of the videotape which depicted the alleged offense.

FACTUAL BACKGROUND

The prosecution in this case is based on a videotape recovered from a search of Mataya's Babydolls, a club that had been

located in Lincoln, Nebraska. Because the videotape is central to the issues presented in this case, we begin with a general description of what is depicted on the videotape. The videotape was filmed in what appears to be a motel room. Three people and a male dog are seen on the videotape, and a fourth, unseen person's voice is heard, presumably from behind the camera. On the videotape, a woman, allegedly Anglemyer, engages in various types of sexual activity with the dog. Anglemyer does not contest that the activity depicted on the videotape, if the videotape is admissible, would constitute indecency with an animal, in violation of § 28-1010. Consequently, a detailed description of the sexual activity is not necessary to our analysis of the issues presented in this case.

Jeri Roeder, a detective sergeant with the Lincoln Police Department, testified that she participated in the execution of a search warrant at Mataya's Babydolls on January 3 or 4, 2003. The purpose of the search was to locate videotapes, and several VHS and 8-millimeter videotapes were found, including the 8-millimeter videotape at issue in this case, which was labeled at trial as exhibit 15. Roeder testified that she and another investigator viewed the videotapes and recognized some of the individuals depicted in exhibit 15. Roeder said that three people were seen in exhibit 15 and that the voice of a fourth, unseen person can be heard. Roeder recognized Anglemyer in exhibit 15 and made an in-court identification of Anglemyer. Roeder identified the unseen person, by voice, as being John Ways, Jr.

Roeder testified that it did not appear to her that the videotape had been altered in any way. Roeder also explained that based on her experience as a detective familiar with video cameras, a "date stamp" is imbedded on the videotape for several seconds after the camera begins recording. The date stamp on exhibit 15 indicated that it was filmed on May 27, 2002.

Roeder stated that exhibit 15 was apparently recorded in a motel room, and an imperfection on the wall of the room led her to believe that the location of the recording could be determined. Roeder also stated that in exhibit 15, the participants discussed walking over to "the club" to watch some shows and that from her past experience with Anglemyer and Ways, she knew that they were associated with Mataya's Babydolls. Based on that

information, Roeder contacted the manager of a motel located "right next" to Mataya's Babydolls.

Ketan Patel, manager of the motel, testified that he was responsible for checking people into the motel and also had trained other employees on the check-in procedure. Patel testified that a customer checking into the motel was required, in the regular course of business, to present positive identification and to pay at check-in. Patel also testified that he inspected rooms after any reports of damage, so he was familiar with the individual guest rooms at the motel.

Patel testified that in January 2003, he cooperated with a Lincoln Police Department investigation looking for a particular motel room. The police were seeking a room with two beds on the left side of the room and a defect on the wall. Based on that description, Patel was able to identify room No. 123 at the motel as the room described. Patel also testified that he had reviewed the first few seconds of exhibit 16 and recognized the color of the motel's bedspreads and the motel's "strip on the headboard." Patel was able to identify room No. 123 on the basis of the layout and the unique defect in the wall. According to Patel, the wall was damaged in late 2001 or early 2002 and was not repaired until February or March 2003.

Patel also produced the motel's "Guest Folio print out" for May 25 and 26, 2002, which Patel explained would list guests who checked out of the motel on May 27. Patel testified that according to that record, Paul Beck of Wichita, Kansas, was the guest in room No. 123 on May 27. Patel stated that no other guest stayed in room No. 123 until another person, whose identity is not relevant to the investigation, checked in on May 29 and out on May 30. Roeder testified that after receiving this information, she contacted the Wichita Police Department, which provided photographs of Beck and Glenda Yancey Beck, whom Roeder was able to identify as the other two people on exhibit 15. Roeder went to Wichita to make contact with the Becks. Roeder testified that when she arrived at their address, she saw and recognized the dog from exhibit 15.

At trial, Roeder testified that exhibit 16, a VHS videotape, was a copy made of exhibit 15. Roeder testified that it was an accurate copy of exhibit 15 from the beginning to the "end of the part

involving an animal." Roeder explained that exhibit 15 continued with people involved that are not included on exhibit 16. The State explained that the purpose of exhibit 16 was to provide a copy that could be played on the audiovisual equipment available at the courthouse.

As previously stated, Anglemyer was convicted of indecency with an animal, was sentenced to 90 days in jail, and was fined $500 plus costs. At sentencing, the trial court noted that "Ways figures very prominently in the events that bring . . . Anglemyer before this Court." The court noted the probation officer's characterization of Ways as the "provocateur" of the offense. But the trial court also stated, "Ways is not on trial here . . . Ways' character is not a factor here. And more importantly . . . Anglemyer's friendship, and or romantic involvement if there was any or general association with . . . Ways is simply not important to me, it is not a factor here." The trial court did explain, however, that the evidence persuaded it that Anglemyer was engaged in a broader commercial enterprise with Ways. The court rejected Anglemyer's testimony that she was embarrassed by her participation in the videotape and concluded, based upon materials in the presentence investigation report, that Anglemyer was part of a larger venture for the production of bestiality. The court based its sentence on its conclusion that "[t]his is not an isolated incident, and I don't think the citizens of this community want that happening here." The court sentenced Anglemyer as previously stated, and the judgment was affirmed by the district court on appeal.

ASSIGNMENTS OF ERROR

Anglemyer assigns that the district court erred in not finding that the county court erred by (1) admitting exhibits 15 and 16 and (2) sentencing Anglemyer based on her association with Ways and making findings of fact about Anglemyer that were "not supported by the facts in the PreSentence Report of [sic] the evidence presented at trial."

STANDARD OF REVIEW

[1] 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. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[2,3] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id.* Cf. *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992) (admission or exclusion of photographs under Neb. Evid. R. 901 within discretion of trial court).

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

[5] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

ANALYSIS

Foundation for Videotapes

Anglemyer's primary argument on appeal is that the State did not present adequate foundation for the admission of exhibits 15 and 16. Anglemyer argues that the videotapes should not have been admitted without the testimony of a witness who actually saw the events depicted and could testify that the videotapes accurately represented what the witness saw. Since Roeder had no personal knowledge of the events shown on the videotapes, Anglemyer argues that Roeder was unable to provide the necessary foundational testimony.

Anglemyer's argument implicates the requirements of rule 901, which rule provides, in relevant part:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

> (a) Testimony that a matter is what it is claimed to be;
>
> . . . .
>
> (d) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;
>
> . . . .
>
> (i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result . . . .

[6,7] The plain language of rule 901 is directory rather than mandatory. *State v. Ferris*, 212 Neb. 835, 326 N.W.2d 185 (1982). We are also guided in our application of rule 901 by federal court decisions explaining Fed. R. Evid. 901, which is effectively identical to Nebraska's rule 901 and upon which it was based. Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

[8,9] It has been said that federal rule 901 "does not erect a particularly high hurdle." *U.S. v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992). "[T]he proponent of the evidence is not required 'to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.' " *U.S. v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). The authentication requirement does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing " 'sufficient to support a finding that the matter in question is what its proponent claims.' " *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 935 (9th Cir. 2002), *amended on other grounds on denial of rehearing* 313 F.3d 1093. See, also, *State v. Ferris, supra*. Cf. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

[10] Rule 901 incorporates two traditional models of authenticating photographic evidence: the illustrative or "pictorial testimony" model and the "silent witness" model. See, generally, 2 McCormick on Evidence § 214 (John W. Strong et al., 5th ed. 1999 & Supp. 2003). Under the illustrative model, a photograph,

motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed. *Id.* See, e.g., *State v. Stephenson*, 199 Neb. 362, 258 N.W.2d 824 (1977). It is this type of foundation that Anglemyer claims is lacking in this case.

[11,12] But under the "silent witness" theory of admission, photographic evidence may draw its verification not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product. 2 McCormick on Evidence, *supra*. Most commonly, such evidence has been directed at establishing the validity of the photographic process; however, other types of foundation may properly support the admission of "silent witness" evidence. See *id.* See, e.g., *U.S. v. Rembert*, 863 F.2d 1023 (D.C. Cir. 1988); *United States v. Stearns*, 550 F.2d 1167 (9th Cir. 1977); *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002); *Dept. of Safety v. Cole*, 342 Md. 12, 672 A.2d 1115 (1996); *Midland Steel v. U.A.W. Local 486*, 61 Ohio St. 3d 121, 573 N.E.2d 98 (1991); *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); *State v. Pulphus*, 465 A.2d 153 (R.I. 1983); *State v. Holderness*, 293 N.W.2d 226 (Iowa 1980); *People v. Bowley*, 59 Cal. 2d 855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963); *Brooks v. Com.*, 15 Va. App. 407, 424 S.E.2d 566 (1992). Even if direct, eyewitness testimony is absent, the contents of photographic evidence itself, together with such circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate the evidence sufficiently to justify its admission. See *United States v. Stearns, supra*. As the advisory committee notes to federal rule 901 explain, "[t]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety." See 28 U.S.C. app. rule 901 (2000).

Based on those principles, courts have found sufficient foundation for the admission of still photographs under circumstances presenting foundation comparable to that in the instant case. For example, in *Torres v. State*, 442 N.E.2d 1021 (Ind. 1982), the defendant was convicted of child molestation based upon several Polaroid photographs that were anonymously sent to police. No

witness corroborated the events depicted in the photographs. However, the victim's mother identified her daughter, the defendant, and the defendant's girl friend in the photographs, and based on her knowledge of the defendant's apartment, the victim's mother identified the background of the photographs as the defendant's residence. Based on this foundation, the Indiana Supreme Court concluded that there was sufficient evidence to support the conclusion that the photographs accurately depicted what they were purported to depict. See *id.*

In *State v. Holderness, supra*, the victim of a burglary had left a camera containing 12-exposure film in a briefcase left in his car parked in his garage. The garage was burglarized, and the briefcase stolen. Later that day, a neighborhood child brought the victim a roll of film of the kind that had been in the camera. The victim had the film developed, and the first eight pictures were ones which the victim had taken. Another picture, however, showed an unknown man on his knees looking sideways toward the camera, holding a partially open black briefcase. The victim was unable to identify the man, but the victim was able to testify that the briefcase looked exactly like his, and he identified the objects in the background of the picture as being in his backyard. The photograph was then used to identify the defendant and convict him of the burglary. The Iowa Supreme Court concluded that the prosecution had presented sufficient evidence to support a finding that the photograph was not distorted or inaccurate and was a picture of the burglar. See *id.*

Similarly, in *People v. Doggett*, 83 Cal. App. 2d 405, 188 P.2d 792 (1948), the defendants were charged with "sex perversion" based upon photographs seized from the defendants' apartment. The landlord of the apartment building identified the persons in the photographs as the defendants and testified that the photographs accurately represented the interior of the apartment, but that he had not witnessed the defendants' conduct as depicted in the photographs. Other photographic evidence demonstrated the similarity between the furnishings in the apartment and those in the photographs of the defendants. An expert witness testified that in his opinion, the photographs were genuine and had not been faked. The California Court of Appeals held that the photographs were properly admitted.

[13] The general rule, gleaned from the above cases, is that photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to depict. This is often proved by the testimony of the one who took the photograph. However, this is not necessary, and it is well settled that the showing may be made by any evidence that bears on whether the photographic evidence correctly depicts what it purports to represent. The essential element is that the photographic evidence be verified or authenticated as a genuine representation of what it purports to depict. See *People v. Doggett, supra.* This being the purpose, it is not required that an eyewitness be produced where other evidence is available to accomplish the same end. The effect and probative value of such other evidence is the important consideration, and not that the manner of making the requisite showing should be exactly the same in all cases. See *id.*

Here, it was conclusively shown by testimony that exhibit 15, with an embedded "date stamp," correctly represented and depicted the parties who occupied a certain motel room. The surroundings, furniture, and a particular imperfection on the wall of the room and other identifying features of the motel were shown to have been in part of that motel room at the time in question. There is an absence of anything which might tend to raise doubt about the matter. Under those circumstances, the verification or authentication was as satisfactory and reliable as that in the ordinary case where it depends upon the memory and integrity of a third party who may be directly interested in the result. In such a case, it can be said neither that other evidence is entirely lacking nor that proof of the requisite element was not sufficient to support the trial court's action in receiving such a videotape in evidence. Compare *People v. Doggett, supra.*

Although we did not specifically discuss rule 901, this court applied similar reasoning in *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). In that case, police saw marijuana plants growing on the defendant's property and obtained and executed a search warrant. Police seized a photograph album from the defendant's residence, containing several Polaroid photographs of the defendant and her husband with marijuana plants, and the photographs were admitted at trial over the defendant's objection.

On appeal, we concluded that the photographs were properly admitted. We explained:

> The fact that the officers obtained possession of the album prior to [the defendant's] arrest establishes that the photographs were developed at a time pertinent to the inquiry, that is, at a time prior to when [the defendant] was charged with knowingly and intentionally possessing marijuana. The fact that [the defendant] and the marijuana could be identified establishes that the photographs accurately portrayed those subjects. Thus, the record establishes an adequate foundation for those five photographs.

Id. at 741-42, 566 N.W.2d at 747.

While each of these cases involved still photographs, it is well established that the same evidentiary principles apply to videotapes. See, *Dept. of Safety v. Cole*, 342 Md. 12, 672 A.2d 1115 (1996); *Midland Steel v. U.A.W. Local 486*, 61 Ohio St. 3d 121, 573 N.E.2d 98 (1991); *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); *Straughn v. State*, 876 So. 2d 492 (Ala. Crim. App. 2003); *Brooks v. Com.*, 15 Va. App. 407, 424 S.E.2d 566 (1992). In the instant case, the State presented sufficient foundation to support the finding that the videotapes depicted what they were purported to depict. Roeder's testimony, summarized above, connects the people on the videotapes with the likely time and location of the creation of the videotapes. There is no evidence to suggest that exhibit 15 or 16 was tampered with or altered, particularly given that the videotapes were in possession of Mataya's Babydolls until they were seized by police. There is no evidence from which to infer that the State deliberately tampered with the videotapes, particularly given the presumption of regularity in the handling of exhibits by public officials. See *United States v. Stearns*, 550 F.2d 1167 (9th Cir. 1977) (finding photographs accurate when they were in possession of persons in privity with defendant until seized by police).

The county court did not abuse its discretion in admitting the videotapes at issue in this case. The contents of the videotapes, together with the information obtained from the police investigation, provided "evidence sufficient to support a finding that the matter in question is what its proponent claims." See rule 901. Anglemyer's first assignment of error is without merit.

EXCESSIVE SENTENCE

Anglemyer argues that the county court imposed an excessive sentence, because "it is obvious from a reading of the Order of Sentencing that the Court focused on [Anglemyer's] relationship with . . . Ways and appears to sentence [Anglemyer] due to that relationship." Brief for appellant at 7. Anglemyer claims that "[t]he County Court Judge repeatedly indicated [Anglemyer's] relationship with . . . Ways and repeatedly referred to the things that . . . Ways did and thus, she must be doing the same things and must now receive a maximum sentence." Brief for appellant at 7-8. Anglemyer also argues that the court failed to consider mitigating factors.

[14-17] An examination of the sentencing order does not support Anglemyer's argument. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

The trial court in this case appropriately considered evidence from the presentence investigation report indicating the scope of the enterprise in which Anglemyer was engaged. To the extent that the court considered Anglemyer's association with Ways, the "guilt by association" is limited to Anglemyer's association with an ongoing commercial venture to produce illegal material of the type presented in this appeal. Obviously, that consideration is neither irrelevant nor inappropriate. Our review of the

record reveals no abuse of the trial court's discretion in sentencing. Anglemyer's second and final assignment of error is without merit.

CONCLUSION

The videotapes pursuant to which Anglemyer was convicted were sufficiently authenticated and were properly admitted into evidence. The district court also did not err in affirming the county court's sentencing of Anglemyer. Consequently, the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF AARON D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LORENA D., APPELLANT.

691 N.W.2d 164

Filed January 28, 2005. No. S-04-590.

1. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
2. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
3. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
4. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
5. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
6. **Parental Rights: Evidence: Proof.** Where termination of parental rights is sought solely pursuant to Neb. Rev. Stat. § 43-292(7) (Reissue 2004), proof that termination is nonetheless in a juvenile's best interests will, necessarily, require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292.

7. **Parental Rights: Rules of Evidence: Due Process.** While the Nebraska Evidence Rules do not apply in juvenile proceedings, the basic requirements of due process oblige a court to consider the type of evidence used by the State in order to determine the weight to be given to that evidence.
8. **Parental Rights: Juvenile Courts: Pleadings.** Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition.
9. **Parental Rights.** The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan.
10. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Reversed.

Richard Register and Christina C. Boydston for appellant.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

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

GERRARD, J.

Aaron D. was removed from the residence of his mother, Lorena D., on May 20, 2002, following a report that he had inappropriately touched his younger sister, Carmen S. The State petitioned to terminate Lorena's parental rights on October 22, 2003, on the sole ground that Aaron had been in out-of-home placement for 15 or more months of the most recent 22 months. See Neb. Rev. Stat. § 43-292(7) (Reissue 2004). The county court, sitting as a juvenile court, terminated Lorena's parental rights, and she appeals.

BACKGROUND

Aaron was born on August 12, 1994, and was 9 years old at the time of trial. Aaron had first been removed by law enforcement from Lorena's residence in Fremont, Nebraska, on October 22, 1998, because of some bruises reported on Aaron's older brother,

Irving D., but was out of the home only until December 9. However, the Department of Health and Human Services (the Department) continued to monitor the family. Irving was 7 years old at the time and had been diagnosed with Duchenne's muscular dystrophy, making him a special needs child. In August 2001, Irving was placed in a group home because of Lorena's difficulties in meeting his needs. Irving remained in this placement at the time of trial because of his medical needs; Irving's disposition and Lorena's parental rights with respect to Irving are not at issue in this appeal. The record reflects that Aaron has three younger siblings, including Carmen, whose respective dispositions are not at issue in this proceeding. The parental rights of Aaron's father have also been terminated and are not at issue in this appeal.

Lorena testified in her own behalf, through an interpreter. Lorena testified that she had completed her education in Mexico and had tried to learn English in the United States, but "it doesn't stick." Lorena testified that Aaron was born in Mexico but that she brought Aaron to the United States with Irving because she was seeking better medical care for Irving. Irving's condition could be fatal at an early age. Lorena's immigration status is not relevant to our analysis of this appeal, except insofar as it has affected her ability to obtain transportation and employment.

The Department increased family support services to Lorena in January 2002 due to Aaron's inappropriate behaviors and Lorena's inability to control them. The State adduced testimony from Nancy Wright, a protection and safety worker for the Department. Wright was the caseworker for Aaron and Irving. Wright testified that Aaron's behaviors included running away from his house, stealing bicycles from school, and physical aggression toward other children at school and that Lorena had been unable to control those behaviors. Lorena testified that Aaron had been a "good kid" but that his behavior had changed. Lorena said that Aaron's behavior had changed as Irving's health deteriorated and that Aaron became jealous when Lorena gave birth to Carmen on December 2, 1998. Lorena testified that Aaron's behavior again became worse after Irving left the home, explaining that " '[h]e became more — like I don't know, maybe he wanted to let people know — or wanted to let it be known how he was feeling because his brother had left.' "

Aaron was again removed from Lorena's home on May 20, 2002, by law enforcement, immediately after a report that Aaron had inappropriately touched Carmen. Lorena testified that when Carmen was about 3 years old and Aaron was about 7 years old, Carmen reported that Aaron had, with his finger, touched her "colita," which can mean "rear end," but which Lorena understood to refer to Carmen's genitals. Carmen had clothes on at the time. Lorena said that she told Aaron that Carmen was his sister; that he needed to protect her, not harm her; and that if Carmen was touched again, Lorena would have to call the police. Lorena also testified that after the incident, she paid more attention to what Aaron and Carmen were doing. Lorena did not report this incident to anyone from the Department, but about 2 weeks later, Carmen told the family support worker. Lorena testified that she was not given a chance to explain what she had done in response to the incident and that " '[t]hey didn't let me say anything. They just came and took him and that was that.' "

Aaron was adjudicated on July 10, 2002, pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Cum. Supp. 2002). No appeal was taken from the adjudication. Aaron was initially placed in treatment foster care, which involves constant evaluation and psychological or psychiatric care. Aaron was then placed in agency-based foster care, which is intended to respond to children with more severe behavioral problems by providing foster parents with an agency that provides additional training and support. Wright testified that Aaron's behaviors had improved by the time of trial and that while he still had occasions of "acting out" in school, his behavior was not as violent, consisting more of attention-seeking rather than assault. Lorena testified that according to the Department, Aaron's behavior became worse after he had been removed from her home, but that she did not see that behavior during visits.

After Aaron's adjudication, the Department developed case plans for Lorena. No appeals were taken from any dispositional orders. Wright testified that Lorena's case plans had included two general goals: to provide a safe and appropriate living environment for herself and her children, and to parent her children in an effective and appropriate manner. The goal of providing a safe environment included finding and maintaining appropriate

housing, with which Wright testified Lorena had some difficulty, having been evicted from her residence twice during Wright's management of the case. Lorena was also expected to obtain and maintain sufficient employment to financially support her family, which goal Wright said Lorena was also unable to consistently achieve. Lorena said she was unable to obtain consistent employment because of her immigration status.

Lorena received food stamps, Medicaid, and assistance with her utility bills. The case plan required Lorena to prepare a household budget, which she was unable to do. Lorena had been providing a residence for the family by living with her boyfriend, Rigoberto S. (Rigo), who paid the rent and bills and provided food and clothing for Lorena and her children. Rigo and Lorena had lived together for 6 years, and he was the father of her two youngest children. Wright testified that Rigo had, at the time of trial, been incarcerated for 6 to 7 months, but Lorena testified that Rigo had been deported to Mexico. Lorena testified she was paying the rent with the help of welfare and by selling " 'noodle and tamales' " to other Hispanic families.

Lorena's second goal of effective parenting included identification and elimination of risk conditions or behaviors in her home, including domestic violence issues and single parenting issues. According to Wright, Lorena was to learn and consistently implement age-appropriate and effective discipline and communication skills, develop household rules, and obtain materials to educate herself about child growth and development. Wright testified that there had been an incident in which Rigo had pushed Lorena, and Lorena had broken a beer bottle over his head, cutting him. Rigo was apparently arrested and incarcerated on August 26, 2003; his charges, according to the Department's report, included "Failure to Appear—Driving under Suspension, No Proof of Insurance; Fugitive from Justice/Failure to Pay Costs/Fines—DUI (Douglas County); and Fugitive from Justice/Failure to Appear—DUI 3rd (Platte County)." The record suggests that Rigo had a problem with alcohol prior to his incarceration.

Wright testified that Lorena had been asked to see a therapist, but that Lorena had never sought an authorization from the Department to see a particular provider. Wright said, however, that Lorena might have seen Maria Goede, who had been the

therapist for the family and the individual therapist for Irving and Aaron. Wright testified that the Department's family support worker had tried to provide Lorena with classes or instruction on parenting skills, but that despite "all of her attempts to work on parenting education and parenting skills, Lorena just did not seem to be interested in [working on those skills] at the time." Lorena testified that her first family support worker had been helpful to her in learning parenting skills, but that the replacement family support worker had not been helpful. Lorena also testified that the Department had tried to get her to take parenting classes in Sioux City, a considerable distance from Fremont, despite her lack of reliable transportation. Wright stated that Lorena had reported, in May 2003, that she was going to work with Goede on parenting skills, but had not yet started. Lorena testified that she met with Goede for counseling sessions and had worked with Goede on parenting skills, although they had stopped the classes after Lorena's baby was born in July 2003.

Goede testified that she had a master's degree in counseling and was a certified professional counselor and licensed mental health practitioner. She had been a caseworker with the Department from 1997 to 2001. Goede was first referred to Lorena's family to treat Aaron when he was placed in foster care in Norfolk, Nebraska, where Goede's practice was located. Goede later began treating Irving, Lorena, and Carmen. Goede testified that she had been making progress with Aaron, but that her treatment of Aaron was terminated in June 2003 following a meeting with Lorena and representatives of the Department. Goede stated that she had opined that Lorena's visits with Aaron did not need to be supervised and that the Department then terminated her services as Aaron's therapist based on a "conflict of interests." Wright testified that Goede was "not following with all of the therapy goals that we had requested her to do," because Goede disagreed with a proposal to change the reunification plan.

Goede also testified that she had worked with Lorena on parenting skills. Goede stated that Lorena watched a series of Spanish-language videotapes that modeled different types of parenting skills. Goede was also able to obtain a Spanish-language parenting program from Girls and Boys Town called "Common Sense Parenting," and Lorena participated in that as well. Goede

testified that Lorena had actively participated in that training, did her homework and reading assignments, and successfully completed all of the materials that Goede had given to her. Goede explained that she had set up situations in family sessions with Lorena and Carmen and that Goede had seen improvement in Carmen's behavior and how Lorena handled Carmen. Goede also testified that she had done home visits with Lorena and Carmen and had observed "growing structure in her home" environment as a result of the parenting skills instruction.

Goede testified that prior to the termination of her treatment of Aaron, he had been having behavioral issues, including sexual issues—for instance, pulling up a dress of another child in school. Goede opined that Aaron's behavioral issues were due, in large part, to the lack of structure in the home and that "Aaron was a very distressed kid certainly, especially during that time. And children will do some pretty funky things when they're distressed." Goede opined that Aaron could be harmed if his relationship with Carmen was cut off, because Aaron felt guilty about hurting Carmen, and would be unable to deal with that issue. Goede further opined that Aaron would be harmed by discontinuation of his relationship with Irving. Wright testified that termination of Lorena's parental rights would not affect the sibling relationship between Aaron and Irving because Aaron's foster parents were willing to provide visitation between the brothers.

Goede testified that she had seen Lorena and Aaron together twice before her treatment of Aaron was terminated. Goede described Lorena and Aaron's relationship as playful, warm, and comfortable. Goede opined that terminating Lorena's parental rights could result in a sense of abandonment for Aaron and that Aaron might blame himself. Goede did not opine on whether Aaron should be allowed to live with Lorena, because Goede was not, at the time of trial, "prepared to be able to answer that without knowing where things are with [Lorena] and what she is able to provide Aaron." Goede said that in her treatment of Aaron, he had consistently expressed a desire to live with Lorena, although he wanted to visit his foster mother. During Aaron's testimony, however, the following colloquy took place with the guardian ad litem:

Q- Do you remember me talking to you about whether you'd like to live with your [foster mother] or mom, Lorena, and visit the other one?

A- Yeah.

Q- Do you remember what you told me?

A- No.

Q- Okay. Is it possible that you told me you wanted to live with [your foster mother] and visit your mom, Lorena? You might have said that? Does that mean yes?

A- Yes.

Q- You love both [your foster mother] and mom Lorena?

A- Yes.

Q- And you don't want to hurt either one of their feelings?

A- Yeah.

Q- You agree with me, you don't want to hurt their feelings? Is that yes?

A- Yes.

Wright testified that Lorena's visitation with Aaron was initially set up as weekly, but that Lorena was inconsistent in that visitation. Wright stated that because Aaron had been placed in Norfolk, which is located some distance from Fremont, transportation services had been provided to Lorena. Lorena later testified that it was "an hour and a half, no less" from Fremont to Norfolk and that she did not have a driver's license, but she admitted that the Department had provided transportation after Aaron was placed in Norfolk. Visitation between Lorena and Aaron was also provided in Wayne, Nebraska, where Irving is placed, because Irving is wheelchair-bound and it was difficult to transport Irving to another location to allow the boys to be together for their visits with Lorena.

Between May 12 and October 22, 2003, Lorena missed 16 of 27 in-person visits and 17 of 21 telephone visits. At the request of Lorena and her attorney, Lorena's visitation with Aaron was reduced to monthly, although Lorena requested an increase to two visits per month shortly before trial. Lorena testified that she missed visitation "when I had the baby," because she got an infection and "the doctor said that I just couldn't be some place where I might pick up a bacteria." Lorena also testified that sometimes when she called to speak to Aaron, he was not available to

speak to her. The parties disputed the circumstances surrounding the cancellation or failure of particular scheduled visits. Wright admitted that Lorena had given birth in July 2003 and that Lorena had told Wright that Lorena was not permitted to travel on a few occasions before the child was born.

Lorena said that when she visited with Aaron, she was told by the family support worker that she was supposed to speak English to the children. Lorena claimed that she was not allowed to speak Spanish to Aaron, although the children speak Spanish and Lorena's English is very limited. The family support worker interpreted between Lorena and Aaron. Lorena also testified that the family support worker's Spanish was poor.

Wright admitted that a Spanish-language copy of Lorena's case plan had not been prepared for her until 2003. Lorena testified that she had been provided with case plans in English, that the requirements had been explained to her in Spanish, "and [that] they basically just told me what they wanted, and it wasn't until [the interpreter] actually read the whole thing to me in Spanish, that I thought that maybe I had made some mistakes." Even after the case plans were provided in Spanish, Lorena testified that there were still many words she did not understand.

Wright concluded her testimony with her opinion that the best interests of Aaron required permanency, which could only be provided by termination of Lorena's parental rights. Wright admitted, on cross-examination, that she had not been present for all of Lorena's visits with Aaron; Wright testified that she had been present "at least twice" during Lorena's visits "some time ago." Wright stated that her opinion was based on reports from the family support worker or visitation supervisor, although she admitted that one of the most recent supervisors did not speak Spanish. Wright was the State's only witness.

On April 23, 2004, the court ordered the termination of Lorena's parental rights. The court found that Aaron was wayward or habitually disobedient, uncontrolled by Lorena, and habitually truant. The court's order refers to an incident in January 2002 in which Aaron was suspended from school for striking another student, although this incident does not appear to be otherwise reflected in the appellate record. The court concluded that Lorena had not made progress in preparing her home or

circumstances for reunification. The court concluded that Aaron had been in out-of-home placement for 15 or more of the most recent 22 months and that it was in his best interests that Lorena's parental rights be terminated. Consequently, the court terminated Lorena's parental rights. Lorena perfected this timely appeal.

ASSIGNMENTS OF ERROR

Lorena assigns, as consolidated and restated, that the court erred in (1) determining that Lorena's parental rights should be terminated pursuant to § 43-292(7) and that it was in Aaron's best interests to terminate Lorena's parental rights, (2) not requiring the State to prove noncompliance with a reasonable rehabilitation plan prior to termination, (3) refusing to declare § 43-292(7) unconstitutional as violative of Lorena's substantive due process rights, (4) refusing to allow testimony about the history of Lorena's parental care, and (5) refusing to allow the testimony of Irving. Lorena also contends that the court had no jurisdiction to enter any order with respect to Lorena or Aaron due to the State's failure to notify her country of origin pursuant to the Vienna Convention on Consular Relations.

STANDARD OF REVIEW

[1] In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

ANALYSIS

[2-5] We turn first to whether the State proved by clear and convincing evidence that termination of Lorena's parental rights was in Aaron's best interests. It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of*

Kassara M., 258 Neb. 90, 601 N.W.2d 917 (1999). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

The State sought to terminate Lorena's parental rights solely on the basis of § 43-292(7). Section 43-292 provides:

> The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court;
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period;

(6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination;

(7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months;

(8) The parent has inflicted upon the juvenile, by other than accidental means, serious bodily injury;

(9) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse; or

(10) The parent has (a) committed murder of another child of the parent, (b) committed voluntary manslaughter of another child of the parent, (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.

Section 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. Because the State proceeded solely under § 43-292(7), we must be particularly diligent in our de novo review of whether termination is, in fact, in Aaron's best interests. Generally, when termination is sought under other subsections of § 43-292, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse. Section 43-292(7) requires no such proof; thus, it is in the context of analyzing the best interests of the juvenile that courts must respect a parent's "commanding" interest in the accuracy and justice of the decision to terminate parental rights. See *In re Interest of Kassara M.*, 258 Neb. 90, 94, 601 N.W.2d 917, 922 (1999). As we stated in *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 257, 674 N.W.2d 442, 463 (2004):

> The 15-month condition set forth in § 43-292(7) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves. . . . But termination based on the ground that a child has been in out-of-home placement for 15 of the preceding 22 months is not in a child's best interests when the record demonstrates that a parent is making efforts toward reunification and has not been given a sufficient opportunity for compliance with a reunification plan.

(Citation omitted.)

[6] We do not mean to suggest that termination solely on the basis of § 43-292(7) cannot be appropriate. Obviously, there will be cases in which clear and convincing evidence to that effect will be presented. But that may prove difficult in cases where the record is insufficient to prove any of the other statutory grounds—i.e., where the parent did not abandon the child, did not neglect to protect or provide for a child, was not unfit or unable to parent, did not fail to participate in necessary rehabilitation, and was not abusive. In such cases, where termination of parental rights is sought solely pursuant to § 43-292(7), proof that termination is nonetheless in a juvenile's best interests will, necessarily, require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292.

Such evidence is lacking in this case. We acknowledge that the record does not reflect that Lorena has accomplished all of the goals set forth in her case plan. However, the record indicates she has progressed, and, as will be explained below, her "opportunities for compliance [with the case plan] may have been limited." See *In re Interest of Rebecka P.*, 266 Neb. 869, 881, 669 N.W.2d 658, 667 (2003). Most significant, however, is the failure of the State to produce the clear and convincing evidence required to show that termination would be in Aaron's best interests.

As previously stated, the sole witness to testify for the State at trial was Wright. Obviously, the Department's caseworker for a particular family is likely to be an important witness for all the parties. But here, the State used Wright as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in Aaron's best interests. Wright's testimony was based to some

extent on her own observations, but in large measure on Wright's review of the records and reports generated by the family support workers, therapists, foster parents, and others who directly observed the parties.

[7] In short, much of Wright's testimony—and thus, much of the State's case—was based on hearsay. While the Nebraska Evidence Rules do not apply in juvenile proceedings, the basic requirements of due process oblige a court to consider the type of evidence used by the State in order to determine the weight to be given to that evidence. See, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *Johanson v. Board of Ed. of Lincoln Cty.*, 256 Neb. 239, 589 N.W.2d 815 (1999). It is very difficult, with the record presented in this case, to give substantial weight to some of the key allegations made by Wright.

For instance, in Wright's final "Court Report," filed on the same date as the State's petition to terminate parental rights, one of the primary reasons cited for the decision to change Aaron's "permanency objective" to adoption—i.e., to terminate Lorena's parental rights—was that "it is reported that [Lorena] is unable to parent/manage her 4-yr old daughter during visits, forcing service providers to intervene." In other words, the State's evidence is Wright's report that *someone else* reported that Lorena was unable to manage Carmen. This hearsay contrasts sharply with Goede's testimony, which was based on her treatment of Lorena and Carmen and personal observation of the two of them together. As noted above, Goede testified that Lorena had participated in exercises intended to teach parenting skills, that Goede had seen improvement in Carmen's behavior and how Lorena handled Carmen, and that Goede had, on visits to Lorena's home, seen the home structure changing as a result of her parenting skills instruction. The foundation presented for Goede's testimony makes it more credible and persuasive than the hearsay evidence adduced by the State.

Similarly, Goede's testimony about her treatment of Aaron was not matched by the State with equally well-founded evidence. Goede admittedly had not treated Aaron for 7 to 8 months before trial, but testified, based on that treatment, that Aaron would be harmed by termination of his relationship with Lorena

and Carmen. We are mindful of Goede's conclusion. See *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). Yet, the State presented no evidence to the contrary. The State did not present testimony from, or even reports or records authored by, any of Aaron's therapists subsequent to Goede. Absent a few instances during Wright's testimony where she referred to events occurring after the filing of the State's termination petition, the record is devoid of evidence showing what was happening in Aaron's life between the filing of the petition in October 2003 and trial in February 2004.

[8] Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition. *In re Interest of Andrew M., Jr., & Marceleno M.*, 9 Neb. App. 947, 622 N.W.2d 697 (2001). Yet, the juvenile court in this case, and this court for its de novo review, was not provided with such evidence. Aaron's therapists did not testify. The Department's family support workers, who actually observed Aaron and Lorena, did not testify, nor did Aaron's foster parents, nor Aaron's teachers. The State seems to have forgotten that the focus of this proceeding is not Lorena, but Aaron, and the State thus did not present evidence directly adduced from many of the people most able to testify as to Aaron's condition, circumstances, and best interests, both before and after the filing of the termination petition. The standard for proving that termination of parental rights is in a juvenile's best interests is clear and convincing evidence, and the evidence in this record is, simply stated, neither clear nor convincing.

This is not to suggest that we are not concerned by some of the State's evidence, which raises doubts about Lorena's ability to be an effective parent. Lorena's unemployment, living situation, and failure to consistently visit Aaron are certainly troubling. But the record also suggests that those circumstances are mitigated by factors that were beyond Lorena's control. For instance, while Lorena's failure to observe her visitation arrangements is not completely explained by the record, the State did not contradict

Lorena's testimony, summarized above, that she was unable to reach some of her scheduled visits because of pregnancy and the needs of her other children. This would not be surprising, given the distance between Lorena's home and Aaron's foster home in Norfolk. It may well have been necessary, as Wright testified, to place Aaron in Norfolk in order to provide him with the services he required. Nonetheless, in determining the weight to be given to Lorena's inconsistent visitation, we cannot overlook the fact that Lorena's visitation plan was, from the outset, likely to fail, "not necessarily because she was unfit, but because she was poor and because she was located at such a great distance from the children." See *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 110, 368 N.W.2d 474, 480 (1985).

[9] Furthermore, the record does not contain any dispositional orders setting forth court-ordered rehabilitation plans, and we cannot review the reasonableness of case plans that are not contained in the record. The inadequacy of this record is not due to Lorena's failure to provide a record in support of claimed errors. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Rather, the State failed to introduce that evidence in support of its contention that Lorena failed to meet the requirements of her rehabilitative plan, and is relying on Lorena's alleged failure to comply with requirements that are not fully evidenced by the record. The record contains only one "Case Plan and Progress Report," and that is the October 22, 2003, case plan that was attached to the court report filed by the State on the same day as its petition to terminate parental rights. We cannot determine from this record whether, or to what extent, Lorena's case plans were the subject of court order or court review. Compare *In re Interest of L.J., J.J., and J.N.J., supra*. The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan, see *id.*, and because no court-ordered plan is part of our record, the reasonability of the requirements imposed on Lorena is uncertain. Under those circumstances, we cannot find Lorena's alleged noncompliance with the requirements of her rehabilitation plan to be clear and convincing evidence that termination of her parental rights is in Aaron's best interests.

We also note Goede's uncontradicted testimony that Aaron would be harmed by the termination of his relationship with Carmen, which would be a de facto result of terminating Lorena's parental rights. Juvenile courts must recognize, if possible, the interests of siblings. *Id.* The benefits to Aaron of potentially maintaining a relationship with Carmen and his other siblings also weigh against termination of parental rights, in the absence of clear and convincing evidence that termination is nonetheless in Aaron's best interests.

[10] We have stated that termination of parental rights is permissible " '[i]n the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . .' " *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). Accord *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). After our de novo review of the record, we do not find clear and convincing evidence that termination was in Aaron's best interests. "[T]he law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child." *Id.* at 465, 676 N.W.2d at 384. Those things are present here.

[11] We conclude that the county court erred in finding that the State established, by clear and convincing evidence, that termination of Lorena's parental rights was in Aaron's best interests. Having so concluded, we do not address Lorena's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004). However, because she contends that it presents a jurisdictional issue, we note Lorena's argument that the county court lacked jurisdiction because of the State's failure to notify the Mexican consulate of these proceedings pursuant to the Vienna Convention on Consular Relations, *signed* Apr. 24, 1963, art. 37, 21 U.S.T. 77, 102 (hereinafter the Convention), which provides:

> If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

. . . .

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State.

We are aware of authority contrary to Lorena's position that compliance with the Convention presents a jurisdictional prerequisite to an action. See *In re Stephanie M.*, 7 Cal. 4th 295, 867 P.2d 706, 27 Cal. Rptr. 2d 595 (1994). Cf. *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) (suggesting claimant must show prejudice resulting from alleged violation of Convention); Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 1, No. 128 (March 31, 2004) (courts must determine if violation of Convention caused actual prejudice).

But regardless of whether it is jurisdictional, we cannot analyze this issue because the only indication before this court of a violation of the Convention is the argument contained in Lorena's brief. In the absence of any evidence with respect to whether the State informed the Mexican consulate of Lorena's case, we cannot conduct a meaningful analysis.

CONCLUSION

The State did not present clear and convincing evidence that termination of Lorena's parental rights was in Aaron's best interests. The most persuasive evidence presented to the county court showed that while Lorena's improvement was sporadic, she had made progress toward being a capable parent for her children, despite significant impediments, some of which were Lorena's own doing, but some of which were placed in her path by the Department and other circumstances. The only expert testimony present in the record pertinent to how termination would affect Aaron indicated that he would be harmed by the termination of Lorena's parental rights. The State almost completely failed to provide the county court, and by extension this court, with testimony from many of the people whose opinions and observations would have been most pertinent to the principal issue—Aaron's best interests. The evidence the State did present

was largely based on hearsay and was simply not "clear and convincing."

The judgment of the county court is reversed.

REVERSED.

MARLIN E. RAUSCHER, APPELLEE, V.
CITY OF LINCOLN, APPELLANT.
691 N.W.2d 844

Filed February 4, 2005. No. S-03-894.

1. **Equity: Appeal and Error.** 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 that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Equity: Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
5. **Equity: Estoppel: Limitations of Actions.** Equitable estoppel may be successfully asserted when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.
6. **Equity: Estoppel: Fraud: Limitations of Actions.** Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by its representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
7. **Equity.** Equity is determined on a case-by-case basis when justice and fairness so require.

8. **Equity: Estoppel.** Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.
9. **Equity: Estoppel: Political Subdivisions: Limitations of Actions.** The State and its political subdivisions can be equitably estopped from relying on the statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice.
10. **Equity: Estoppel.** A claim of equitable estoppel rests in equity.
11. **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.
12. **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.
13. **Actions: Pleadings: Wages: Attorney Fees.** In a wage claim brought under Neb. Rev. Stat. § 15-841 (Reissue 1997) against a city of the primary class, there is nothing in the plain language of Neb. Rev. Stat. § 48-1231 (Reissue 2004) that requires an employee to plead a specific cause of action for attorney fees or to file a separate proceeding for attorney fees in order to receive an award of attorney fees under the Nebraska Wage Payment and Collection Act.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The City of Lincoln (City) appeals the order of the district court for Lancaster County reversing the City's decision to deny the claim for unpaid wages filed by Marlin E. Rauscher, a retired City police officer. Following an evidentiary hearing, the district court ordered the City to pay Rauscher $2,685.79 in unpaid wages. The district court also ordered the City, in accordance with the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2004), to pay Rauscher's attorney fees. The City appeals.

We agree with the district court's ruling that the record in this case demonstrates that the City was equitably estopped from asserting the statute of limitations defense to Rauscher's wage claim. We further determine that the district court did not err in its determination that the City owed Rauscher $2,685.79 in unpaid wages. We conclude that the district court did not err in ordering the City to pay Rauscher's attorney fees in accordance with the Nebraska Wage Payment and Collection Act. Attorney fees are also awarded to Rauscher in connection with this appeal. We therefore affirm the district court's decision and enter orders accordingly.

STATEMENT OF FACTS

Rauscher worked as a police officer in the City's police department. He was employed by the City as a police officer during two separate time periods. His initial employment began in April 1962 and continued until March 31, 1963, when he terminated his employment. He rejoined the police department in late summer 1965 and continued his employment with the department until his retirement on February 14, 2001. Although there was some dispute at the district court level concerning Rauscher's first day of employment in 1965, the district court found that Rauscher began working on August 30, a finding the City does not directly dispute on appeal. The two wage-related issues in this appeal occurred during Rauscher's second period of employment with the City's police department. The first issue involves an alleged failure to pay Rauscher for his first 40 hours of employment, and the second issue involves an alleged failure to pay Rauscher for 56 hours of employment due to the implementation of a pay lag.

On February 22, 2001, Rauscher received his final paycheck from the City. Upon receipt of his check, Rauscher determined certain wages he believed were owed to him were not included in the paycheck. On February 28, Rauscher filed a claim with the City for unpaid wages pursuant to Neb. Rev. Stat. § 15-840 (Reissue 1997). The claim was later amended on July 16.

Section 15-840 governs cities of the primary class and provides:

> All liquidated and unliquidated claims and accounts payable against the city shall: (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for

> which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. In order to maintain an action for a claim, other than a tort claim as defined in section 13-903, it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof, in the office of the city clerk, or other official whose duty it is to maintain the official records of a primary-class city.

Rauscher's claim, as amended, sought a total of 96 hours of unpaid wages, arising from two distinct periods of time. The first time period was from August 30 to September 3, 1965, during which Rauscher stated that the City withheld 40 hours of pay from his paycheck. The second time period began in September 1975 and continued through December of that year. Rauscher asserted that in September 1975, the City implemented a "pay lag" and withheld a total of 56 hours of pay from his paychecks over a 16-week period. Rauscher's claim, as amended, sought a total of $2,685.79 in back wages, representing 96 hours at the rate of $27.977 per hour.

In a letter dated November 7, 2001, the City stated that it had engaged in "a thorough review of [Rauscher's] claim [as amended]" and concluded that Rauscher had "not been harmed in any manner, either with respect to . . . payment received for work in 1965 or thereafter when the City instituted a pay lag." The City denied Rauscher's claim.

Rauscher appealed the City's denial of his wage claim pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1997), which controls the appeal process relative to cities of the primary class. Section 15-841 provides that "[a]ny . . . claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated in accordance with the procedures set forth in sections 15-1201 to 15-1205." Pursuant to Neb. Rev. Stat. § 15-1204 (Reissue 1997), Rauscher filed a petition with the district court. On June 7, 2002, Rauscher filed his second amended petition (petition), the operative petition for purposes of this appeal. In his petition, Rauscher

sought, inter alia, unpaid wages in the amount of $2,685.79. In his prayer for relief, Rauscher sought his court costs and attorney fees pursuant to the Nebraska Wage Payment and Collection Act, § 48-1228 et seq.

On August 9, 2002, the City filed an answer to Rauscher's petition. In its answer, the City denied it owed Rauscher unpaid wages and asserted as an affirmative defense that Rauscher's claim for wages was barred by the 1-year statute of limitations contained in § 15-840.

On April 1 and 2, 2003, the district court held an evidentiary hearing on Rauscher's petition pursuant to Neb. Rev. Stat. § 15-1205 (Reissue 1997), which provides, inter alia, that "[t]he district court shall hear the appeal as in equity and without a jury and determine anew all questions raised before the city." A total of five witnesses testified, and numerous exhibits were received into evidence, including Rauscher's pay stubs from his 1975 and 1976 paychecks and several memoranda prepared in 1975 by various City officials explaining the pay lag and the accounting for pay due when an employee left the City's service.

At trial, Rauscher testified concerning his claim for unpaid wages. As to the 40 hours of wages in 1965 that Rauscher claimed the City owed him, Rauscher explained that upon rejoining the City's police force on August 30, 1965, his first 40 hours of pay, from August 30 to September 3, were withheld and not paid to him. Rauscher stated that when he did not receive these wages, he spoke with Walter Mitchell, who was at that time the City's personnel director. As a result of his conversation with Mitchell, Rauscher testified as to his understanding to the effect that this withholding of wages was "a standard withholding that [the City did] with all of the employees" and that the 40 hours of wages would be paid to him in his final paycheck after he terminated his employment with the City.

In this regard, Rauscher testified that during his employment with the City from 1962 to 1963, his first 40 hours of wages had also been withheld by the City. He stated that after he ended this first period of employment on March 31, 1963, he received the previously withheld 40 hours of pay in his final paycheck.

Rauscher acknowledged that he knew in September 1965 that the City owed him for 40 hours of wages. Rauscher stated,

however, that based upon his understanding, partly as a result of his discussion with Mitchell and his previous experience with the City, he believed the 40 hours of wages withheld in 1965 would be paid to him when he terminated his employment with the City.

As to the 1975 wages that Rauscher claimed the City had withheld as a result of a pay lag, Rauscher explained that in September 1975, the City implemented a new schedule for calculating pay periods and releasing paychecks. As part of that process, Rauscher stated that Mitchell met with the City's police officers to explain the new schedule. According to Rauscher, he understood that as a result of the new schedule, the City was implementing a pay lag in which the City would withhold 7 hours of pay from 8 separate pay periods, or 16 weeks, beginning in September 1975 and ending in December 1975, for a total of 56 hours of pay.

Rauscher testified that as a result of the comments by Mitchell, Rauscher understood he would receive the wages withheld as a result of implementation of the pay lag when he terminated his employment with the City. Rauscher also testified that at the time Mitchell met with the police officers, Mitchell distributed a memorandum describing the pay lag. The memorandum, a copy of which was entered into evidence, explained the new pay schedule as well as the pay lag. The memorandum provided in part that "[a]t such time as an employee may leave the City service, there will be an accounting for all pay due." Rauscher also introduced into evidence copies of his pay stubs from this September to December 1975 time period, showing the pay withheld as a result of the pay lag. Rauscher testified that neither his 1975 pay stubs nor his 1976 pay stubs, the latter of which were also introduced into evidence, showed payment of the wages withheld as a result of the pay lag.

Rauscher acknowledged that he knew by December 29, 1975, that the wages withheld as a result of the 1975 pay lag had not been paid to him. Rauscher explained, however, that based upon his meeting with Mitchell and the memoranda Mitchell distributed to the police officers, Rauscher was led to believe that the 56 hours of wages withheld as a result of the 1975 pay lag would be paid to him when he terminated his employment with the City.

Rauscher testified that following his retirement on February 14, 2001, he received his final paycheck from the City. He stated

that when reviewing that check, he determined that the 40 hours of wages the City had withheld in 1965 and the 56 hours of wages the City had withheld in 1975 were not included. On February 28, he filed his claim with the City which he later amended for his total unpaid wages in the amount of $2,685.79.

In its order filed May 5, 2003, the district court reversed the City's decision denying Rauscher's claim. The district court concluded that based upon the evidence in the record, Rauscher had relied upon the City's representations that the unpaid wages would be paid to him upon the termination of his employment with the City and that he had relied upon these representations in not filing his claim until he did not receive the unpaid wages following his retirement. The district court concluded that the City was "estopped from now asserting a limitations issue on such [claim] when it was [the City's] affirmative representations that caused any delays in asserting the claim." The district court further determined that Rauscher was entitled to the wages he sought, and it entered an order in Rauscher's favor in the amount of $2,685.79. In its order, the district court also directed Rauscher to file a request for attorney fees.

On May 9, 2003, Rauscher filed an "Application for Attorney Fees and Expenses," which came on for hearing on June 20. In an order filed July 10, the district court sustained Rauscher's application for attorney fees and ordered the City to pay Rauscher $3,450 in attorney fees and $485.51 in costs. The City appeals the district court's award of unpaid wages and attorney fees to Rauscher. It has not appealed the award of costs.

ASSIGNMENTS OF ERROR

The City assigns various errors. In summary, the City claims, restated, that the district court erred (1) in determining that the City was equitably estopped from asserting the statute of limitations and (2) in determining that Rauscher was entitled to an award of attorney fees under the Nebraska Wage Payment and Collection Act.

STANDARDS OF REVIEW

[1] 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

that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[2,3] Statutory interpretation presents a question of law. *Semler v. Sears, Roebuck and Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

Timeliness of Claim Under § 15-840 and Evidence of Unpaid Wages

The City asserts that Rauscher's claim for unpaid wages was barred by the statute of limitations. We agree with the ruling of the district court that the City is equitably estopped from asserting a statute of limitations defense. The City also asserts that the evidence failed to establish unpaid wages were owed. We agree with the district court that Rauscher satisfactorily established that the City owed him unpaid wages of $2,685.79.

Section 15-840 provides in part as follows: "In order to maintain an action for a claim . . . it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof . . . ." The City argues that Rauscher's claim for unpaid wages accrued within 1 year of the City's alleged failure to pay Rauscher those wages. In this regard, the City notes that Rauscher acknowledged that he knew by September 1965 and December 1975, respectively, that the City owed him unpaid wages. The City claims that the 1-year statute of limitations in § 15-840 had already run when Rauscher filed his claim in 2001.

Relying on the record which included admissible evidence of the City's actions and representations, the district court determined that Rauscher was possessed of a good faith belief that he would receive the withheld wages when he terminated his employment with the City. As a result, the district court concluded

that the City was estopped from asserting that the statute of limitations had run on Rauscher's claim.

[4,5] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). We have observed that equitable estoppel may be successfully asserted when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Id.*

[6-8] We have recently noted that equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by its representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Id.* Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so. *Id.*

[9] We have previously recognized that the State and its political subdivisions can be equitably estopped from relying on the statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice. See *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999) (concluding that City of Lincoln

could be equitably estopped from asserting statute of limitations defense against suit brought pursuant to Political Subdivisions Tort Claims Act).

[10] A claim of equitable estoppel rests in equity. *Olsen v. Olsen, supra*. Additionally, pursuant to § 15-1205, Rauscher's appeal of the City's denial of his wage claim "shall [be heard by the district court] as 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 trial court. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

We have reviewed the record and note that there is evidence in the record, some of which we have summarized, showing that in 1965 and again in 1975, the City withheld wages from Rauscher's paycheck. Rauscher introduced documentary evidence in the form of a City memorandum and pay stubs in support of his testimony that wages of $2,685.79 were withheld and not paid. Rauscher testified that by virtue of the City's conduct and statements, he believed he would receive his unpaid wages when he terminated his employment with the City. There is also evidence in the record that during his period of employment from 1962 to March 31, 1963, the City had withheld wages from Rauscher's paycheck and that the withheld funds were paid to Rauscher when he left the City's employment. The record supports the district court's determination that Rauscher relied upon the assurances he received from the City, as well as his previous experience with the City, and as a result, did not pursue a wage claim when the City initially failed to pay Rauscher the wages he was due.

We have considered the parties' arguments and the record presented on appeal. It can be fairly said, based upon Rauscher's testimony, that he was lulled into a false sense of security that his unpaid wages would be paid upon the termination of his employment by the City, thereby causing Rauscher to subject his claim to a statute of limitations defense. We agree with the district court that the elements of equitable estoppel have been established and that Rauscher has demonstrated compelling circumstances, such that equitable estoppel should be applied to prevent the City from asserting the statute of limitations, because it would be unjust to allow the City to raise that defense when its own actions led to

Rauscher's delay in pursuing his claim. See *Woodard v. City of Lincoln, supra.*

On appeal, the City claims that it does not owe Rauscher wages attributable to the implementation of the pay lag in 1975. The City notes that it presented evidence intended to show that the wages withheld as a result of the 1975 pay lag had been repaid to Rauscher in December 1975. This evidence conflicts with Rauscher's evidence. The district court heard and observed the witnesses and accepted one version of the facts rather than another, and we give weight to the district court's resolution of this issue and its findings for which there is evidence that the City owed Rauscher $2,685.79. See *Trieweiler v. Sears, supra.*

Because equitable estoppel is appropriate in this case and the City cannot assert the statute of limitations as a defense, we agree with the district court that Rauscher's claim for unpaid wages was not barred by the statute of limitations. Further, the district court did not err in ordering the City to pay Rauscher unpaid wages in the amount of $2,685.79.

Attorney Fees Under Nebraska Wage Payment and Collection Act

After the district court entered judgment in his favor as to his unpaid wages, Rauscher filed an application for attorney fees in the amount of $3,450. The district court sustained the application. The City contends on appeal that the district court erred in awarding Rauscher attorney fees under the Nebraska Wage Payment and Collection Act, § 48-1228 et seq., in this proceeding brought under § 15-841.

With regard to an award of attorney fees, § 48-1231 provides in relevant part as follows:

> An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent

> of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

The City claims the district court erred in awarding Rauscher attorney fees under § 48-1231, because Rauscher either did not plead a separate cause of action for attorney fees in the instant case or failed to file a separate lawsuit under the Nebraska Wage Payment and Collection Act. According to the City's argument, "§ 48-1231 provides a separate and independent cause of action for the recovery of wages . . . . Rather than proceed with a claim for unpaid wages under . . . § 48-1231, [Rauscher] chose to submit a claim to the City . . . and appealed from the denial of that claim." Brief for appellant at 33. The City also asserts that because Rauscher did not bring a separate "action under the [Nebraska] Wage Payment and Collection Act," *id.* at 32, he is not entitled to an award of attorney fees. The City misperceives the provisions of the Nebraska Wage Payment and Collection Act. We conclude that the district court did not err in awarding Rauscher attorney fees in the district court under the Nebraska Wage Payment and Collection Act in this case.

At the outset, we note that in his prayer for relief in the petition, Rauscher sought attorney fees against the City under the Nebraska Wage Payment and Collection Act. We further note that we have approved an award of attorney fees under the Nebraska Wage Payment and Collection Act in a wage claim against a city of the metropolitan class brought under Neb. Rev. Stat. § 14-813 (Reissue 1997). *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). The parties do not dispute that the Nebraska Wage Payment and Collection Act applies to wage claims against the City. Compare *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990) (noting that in 1988, Nebraska Wage Payment and Collection Act was amended to include political subdivisions as employers covered by act).

Although our comments were made prior to the inclusion of political subdivisions as employers under the Nebraska Wage Payment and Collection Act, we find our observations made in

Thompson v. City of Omaha, supra, instructive here. Indeed, in *Thompson*, we rejected an argument similar to that raised by the City in the instant appeal. In *Thompson*, the appellants claimed that the Nebraska Wage Payment and Collection Act was a "special provision in regard to wage claims" and was an alternate proceeding to the statutory provisions regarding filing claims with the city. 235 Neb. at 349, 455 N.W.2d at 540. We disagreed, and observed that in that action against a city of the metropolitan class, an "[a]pplication of the [Nebraska] Wage Payment and Collection Act would not alter the need to satisfy the requisites of the claims statutes." 235 Neb. at 350, 455 N.W.2d at 540. More importantly, in *Thompson*, we stated that the "[Nebraska] Wage Payment and Collection Act provides for the award of attorney fees and costs to a successful wage claimant and does not concern conditions governing claims against a city." 235 Neb. at 350, 455 N.W.2d at 540.

[11-13] We are asked to apply § 48-1231 to the instant case. 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004). Furthermore, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003). Contrary to the City's argument, in a wage claim brought under § 15-841 against a city of the primary class such as the case before us, there is nothing in the plain language of § 48-1231 that requires an employee to plead a specific cause of action for attorney fees or to file a separate proceeding for attorney fees in order to receive an award of attorney fees under the Nebraska Wage Payment and Collection Act. It is consistent with the language of § 48-1231 that an employee pursue his or her claim against a city of the primary class in the district court under § 15-841 and, if successful in that proceeding, apply for an award of attorney fees under the Nebraska Wage Payment and Collection Act as a successful wage claimant therein.

In the instant case, Rauscher satisfied the requirements of the Nebraska Wage Payment and Collection Act. He "establishe[d] a

claim and secure[d] judgment on the claim" as required under § 48-1231 of the act. As such, he was "a successful wage claimant." See *Thompson v. City of Omaha*, 235 Neb. at 350, 455 N.W.2d at 540. Under the provisions of the Nebraska Wage Payment and Collection Act, Rauscher was entitled to an award of attorney fees, and we conclude that the district court did not err in ruling in favor of Rauscher and against the City in the amount of $3,450 for Rauscher's attorney fees incurred in the district court in this matter.

Remaining Assignments of Error

We have considered the City's remaining assignments of error, and we conclude they are without merit.

Attorney Fees on Appeal

Rauscher has filed an "Application for Attorney Fees and Expenses" in connection with this appeal pursuant to § 48-1231. The application is limited to a claim of attorney fees and is supported by an affidavit. See Neb. Ct. R. of Prac. 9F (rev. 2001). As noted above, § 48-1231 provides for an award of attorney fees "[i]f the cause is taken to an appellate court" and the employee is the successful party. Because we have determined that the district court's judgment in favor of Rauscher should be affirmed, Rauscher's application for attorney fees in this appeal is granted. Rauscher's application for attorney fees in this court in the amount of $3,540 is granted.

CONCLUSION

We agree with the district court that the City was equitably estopped from asserting the statute of limitations, and therefore the district court did not err in determining that Rauscher's claim for unpaid wages was not barred by the statute of limitations. The evidence supports the district court's judgment in Rauscher's favor in the amount of $2,685.79. We further determine that the district court did not err in awarding Rauscher his attorney fees incurred in this action in the district court pursuant to the Nebraska Wage Payment and Collection Act. We, therefore, affirm the decision of the district court in its entirety. Rauscher's application for attorney fees on appeal to this court made under the Nebraska Wage

Payment and Collection Act is granted, and we award Rauscher $3,540 pursuant to that application.

AFFIRMED.

CHRISTOPHER RANGE, APPELLANT, V. ABBOTT SPORTS COMPLEX, AN UNINCORPORATED ASSOCIATION, ET AL., APPELLEES.

691 N.W.2d 525

Filed February 4, 2005. No. S-03-1148.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
5. **Negligence: Liability: Invitor-Invitee: Notice.** In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it.
6. **Negligence: Evidence: Liability: Juries.** In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of a hazardous condition, the Nebraska Supreme Court has refused to allow a jury to speculate as to the possessor's negligence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees Ethel S. Abbott Charitable Foundation and Capital Sports Foundation.

John C. Brownrigg and Travis A. Ginest, of Erickson & Sederstrom, P.C., for appellee Lincoln Adult Soccer Association.

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

WRIGHT, J.

NATURE OF CASE

Christopher Range was injured while playing in a soccer match at the Abbott Sports Complex in Lincoln. He sued the Abbott Sports Complex; the Ethel S. Abbott Charitable Foundation, Inc. (Abbott Foundation); the Capital Sports Foundation, Inc. (CSF); and the Lincoln Adult Soccer Association (LASA). (The Abbott Foundation, the CSF, and the LASA are collectively referred to herein as "the appellees." The CSF was responsible for building and developing the Abbott Sports Complex, which is a site name only.) The Lancaster County District Court granted the appellees' motions for summary judgment, and Range appeals.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[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. *Id.*

FACTS

Range injured his right knee on April 26, 1998, while competing in a soccer match at the Abbott Sports Complex, a soccer facility operated by the Abbott Foundation. The event was sponsored by the LASA and the CSF. In his petition, Range alleged that he stepped in a hole with his right foot and that the hole was

a defective condition in the athletic field, not a condition created by use of the field for purposes of the soccer match. Range alleged that the appellees either knew of the hole or, in the exercise of reasonable care, would have discovered the hole. He claimed that as a proximate result of the appellees' negligence, he suffered serious and permanent injuries, including a rupture of his right patellar tendon and superior displacement of his patella. He sought damages of $16,000 for medical care and treatment; loss of earnings in excess of $10,000; future expenses for medical care and treatment; damages for impairment of future earning capacity; and past and future expenses for physical pain, mental suffering, disability, and embarrassment.

The trial court sustained the appellees' motions for summary judgment. It found that Range was a participant in the LASA division II soccer league in the spring of 1998 and that on April 26 at 1 p.m., his team was scheduled to play on field 13 at the Abbott Sports Complex. Range arrived at the complex 20 to 30 minutes before the match and warmed up. During this time, he did not notice any problems with the field. The center referee, Steven Stepanek, and the linesman referee, Nathan Sestak, also inspected the field prior to the match and did not notice any problems.

The trial court found that the first 80 to 85 minutes of the soccer match were played without incident. It noted that Range did not know how long the hole had existed. The court concluded that Range had failed to establish that the appellees had constructive knowledge of the hole. It found that Range had not submitted evidence from which it could be inferred that the hole had existed for a sufficient length of time prior to the injury and which would create a genuine issue of material fact as to whether the appellees had constructive knowledge of the hole. The court opined that Range had the burden to establish a prima facie case of premises liability. Since Range had admitted that there was no way of knowing how long the hole had existed, the court determined that the appellees were entitled to judgment as a matter of law. Range timely appealed.

ASSIGNMENTS OF ERROR

Range assigns as error the trial court's conclusion that the appellees were entitled to judgment as a matter of law and the

trial court's failure to conclude that a genuine issue of material fact existed regarding the appellees' constructive knowledge of the hole that allegedly caused Range's injury.

ANALYSIS

[3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004). 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. *Blue Cross and Blue Shield v. Dailey, supra.*

Range stated in his deposition that on the day of the injury, he arrived 20 to 30 minutes before the soccer match in order to warm up. He did not notice any problems with the condition of the field or any holes and did not hear anyone complain about the field's condition. Prior to that day, he had never observed a hole on any of the fields at the Abbott Sports Complex, nor had anyone else ever mentioned seeing a hole there.

Range described the incident as follows:

> I was 20 yards ahead of everybody, running straight down the field. The goalkeeper didn't come out, so I decided to veer off to the southwest corner to get an angle on the goal.
>
> . . . .
>
> . . . And before I had a chance — I was probably two or three steps away from taking a shot. I was running along. I felt — it felt similar to what you would feel if you were walking down stairs in the dark, you thought you were on the last stair, but there's still another one. It was just like I went to put my foot down and there was nothing there. Next thing I know, my kneecap is halfway up my thigh.

After the fall, Range rolled once or twice and tried to straighten his leg. He said that as he lay on the ground, he could see a hole

3 to 5 yards away, and he described it as "a small burrowing animal hole," about 4 to 5 inches wide. However, he did not talk to anyone about the hole. Range said he did not know how long the hole had been on the field, and he admitted there was no way of knowing how long it had been there.

Range said he was not aware of any defender in physical contact with him immediately prior to his fall, and the central defender was 10 yards behind him. After Range fell, he started cursing. He said one of his teammates tried to get him to stand up and get off the field, but when the teammate saw that Range's leg was injured, an ambulance was called. Range ruptured his patellar tendon and had surgery the next day. He has had five additional surgeries on the knee.

Stepanek, the center referee, stated that referees are taught to examine the field before a match. They walk through the penalty box area, across the field, and to the other end of the field. He said that he completed a walk-through inspection of the field on the day Range was injured. Stepanek did not see a hole in the penalty box or anywhere else on the field at any time on that date. He stated that it was the general practice for soccer players to report unsafe conditions to the referees and that no one reported to him that they had seen a hole prior to the match. If anyone had reported a hole in the field, the situation would have been addressed.

Sestak, another referee, served as the linesman. He said he customarily inspected the penalty box and goal area of the soccer fields prior to allowing a match to start. In this case, he inspected the areas and found no holes. Sestak agreed with Stepanek that it was the general practice among soccer players in Lincoln and Omaha to report unsafe conditions to the referees. Prior to the match, no one reported seeing a hole.

[4] A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4)

the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

In granting summary judgment, the trial court opined that the dispute between the parties was whether Range could establish constructive notice to the appellees of the hole on the soccer field. To satisfy this burden, Range had to provide some evidence that the appellees either created the hole, had actual knowledge of it, or should have discovered it by the exercise of reasonable care. The court found there was no evidence that would sustain this burden.

According to Range, the issue is resolved by determining whether the referees, in their inspection of the field prior to the match, conformed their conduct to the appropriate standard of care in order to detect any problems on the soccer field. The trial court found that Nebraska case law disagreed with Range's position.

[5,6] In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it. *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995). In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition, this court has refused to allow the jury to speculate as to the possessor's negligence. *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995).

The trial court reasoned that the appellees could be held liable only if the hole was visible and apparent for a sufficient length of time prior to Range's injury in order to impute to them constructive notice of the hole. Relying on our decision in *Herrera v. Fleming Cos., supra*, it concluded that Range could not establish that the appellees had constructive knowledge of the hole because he admitted there was no way of knowing how long the hole had existed and therefore the appellees were entitled to judgment as a matter of law.

In *Herrera*, a customer, Lorena Herrera, brought a slip-and-fall action against a grocery store after she slipped on a wet floor in the store's restroom. The district court granted the store's motion

for summary judgment. It found that Herrera had failed to establish that the store knew of the water on the floor or should have known of the water. The Nebraska Court of Appeals reversed, holding that the store had failed to make a prima facie showing that it had exercised reasonable care.

We reversed the decision of the Court of Appeals and held that a plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. The evidence of negligence is insufficient if the finder of fact must guess at the cause of the accident.

At the summary judgment hearing, the store offered Herrera's deposition, in which she stated that she did not know how long the water had been on the floor. The store had a policy of keeping the floors clean, and the floors were regularly inspected for spills. Based on this evidence, we concluded that no reasonable inference could be drawn as to the length of time the water had been on the floor. There was no evidence or reasonable inference that the store created the condition, knew of the condition, or should have known of the condition. If those facts remained uncontroverted, the store was entitled to judgment as a matter of law. Herrera failed to produce any evidence from which a reasonable inference could be drawn that the store knew or by the exercise of reasonable care should have known of the water on the floor.

In the case at bar, the trial court concluded that *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003), was applicable because the appellees established that no one knew or should have known of the hole prior to Range's injury. This shifted the burden to Range to establish that the appellees knew or by the exercise of reasonable care should have known of the hole on the soccer field prior to the injury.

The question is whether Range is entitled to an inference that the hole was present on the soccer field prior to the start of the match. Before considering whether the appellees had constructive knowledge of the hole, the evidence must at least create a reasonable inference that a hole did in fact exist prior to the start of the match.

For purposes of summary judgment, we view the evidence in a light most favorable to Range and give him the benefit of all

reasonable inferences deducible from the evidence. Range testified that a hole caused his injury. From Range's description of the hole, it is reasonable to infer that the hole was not recently created. Although Range said he did not know how long the hole had been there, he described it as somewhat round and 4 to 5 inches in diameter with grass growing around it but not inside it. It appeared to be a hole made by a small burrowing animal, but Range did not observe loose dirt around the perimeter of the hole. From these facts, Range is entitled to an inference that the hole did not come into existence during the match.

In *Herrera v. Fleming Cos., supra*, it was not possible to infer how long the water had been on the restroom floor before Herrera entered the restroom and slipped. The puddle of water could have formed very quickly. A previous user of the restroom could have created the puddle. The length of time that the water was on the floor could not be determined, and no inference that it was there for a long period of time could be given in favor of Herrera. Inferences based upon guess or speculation do not create material issues of fact for purposes of a summary judgment. See *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

Range testified that the hole appeared to have been created by a small burrowing animal and that there was grass growing around it. In responses to interrogatories, he stated that there was no fresh or loose dirt around the perimeter of the hole. These facts support a reasonable inference, not mere speculation, that the hole existed prior to the start of the soccer match.

Therefore, giving Range the benefit of all reasonable inferences deducible from the evidence regarding the existence of the hole, we conclude that a genuine issue of material fact does exist as to whether the appellees had constructive knowledge of the hole. For this reason, the trial court erred in sustaining the appellees' motions for summary judgment.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES WIDTFELDT, RESPONDENT.

691 N.W.2d 531

Filed February 4, 2005. No. S-03-1312.

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.
2. ____: ____. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
3. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. 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.
6. ____. 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.
7. ____. To determine the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the disciplinary proceeding.

Original action. Judgment of suspension and probation.

John W. Steele, Assistant Counsel for Discipline, for relator.

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Warnemunde, for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against James Widtfeldt alleging ethical violations. A referee was appointed who heard evidence and made recommendations. We order an indefinite period of suspension followed by a period of probation.

BACKGROUND

Widtfeldt was admitted to the practice of law in Nebraska in 1978 and entered practice in Holt County. He has a general practice and spends half of each day managing personal business affairs and the remainder practicing law. He has previously received a private reprimand for representing both sides of a controversy in a tax case that is unrelated to the current action.

This complaint arose after Widtfeldt filed improper motions and pleadings in several cases, stemming from difficulties he had with Attorney Forrest Peetz and the city of O'Neill. At the hearing before the referee, Widtfeldt admitted that he does not get along with Peetz and that his animosity toward Peetz had crept into his pleadings at times. The animosity stems from Peetz' 1979 purchase of a home from a judge (now deceased) and Widtfeldt's strong feelings against financial transactions between judges and attorneys. Widtfeldt stated that he remains troubled that the transaction occurred and that when he sees a judicial decision that he believes is incorrect, he worries there may be other transactions he is unaware of which may be influencing the decisions between attorneys and judges.

Widtfeldt also admitted that he experienced "significant friction" with the city of O'Neill over rental property and admitted that pleadings and motions in that case could appear to be based on personal animosity. However, he believes that his relationship with the city has improved.

The record contains examples of poorly drafted pleadings and motions that are lengthy and contain numerous, rambling, irrelevant details, making the pleadings difficult to understand. In one instance, Widtfeldt filed a motion in limine that had no relation to the alleged facts of the action. In another instance, a motion for a protective order filed by Widtfeldt against the city of O'Neill included three pages of allegations about perceived violations of various inspection laws or ordinances by the city attorney, Peetz, and another attorney.

In response to the complaint filed with the Counsel for Discipline, Widtfeldt filed lengthy responses containing irrelevant and inflammatory material. For example, Widtfeldt continued to malign Peetz and a judge about the sale of the house. In another instance, Widtfeldt's responses included multiple pages

of inflammatory allegations about Peetz' alleged drinking habits and behavior at bar association meetings. Widtfeldt compared Peetz to Adolf Hitler, stating: "Peetz[']s mustache is not the only resemblance to a certain famous dictator who liked to circumvent the law, extract oaths of allegiance to himself personally, and exterminate defenseless civilians, religious and racial minorities in the 1940s." The responses also contained allegations about irrelevant sexual activity.

Widtfeldt underwent a psychological evaluation for this action. Mark P. Hannappel, a psychologist, concluded that while Widtfeldt has superior intelligence, he is likely to have difficulty understanding nonverbal interactions, is likely to " 'get caught up in the details,' " and sometimes misses the " 'big picture.' " Hannappel noted narcissistic and obsessive-compulsive personality features and concluded that personality issues interfere with Widtfeldt's ability to reason through certain issues and form working alliances with others. According to Hannappel, Widtfeldt can understand the disciplinary actions against him and can complete a plan to modify his behavior so that there is a much greater chance that the problems will not reoccur.

After a hearing, the referee found that the pleadings contained "irrelevant, immaterial and sometimes scandalous allegations" and that they included "vast quantities of verbiage having nothing whatever to do with the captioned matters." The referee further found that the pleadings were unnecessarily detailed and complex. They took a long time to read and were unnecessarily difficult to interpret, answer, or otherwise respond to. The referee also found, however, that Widtfeldt did not plead the cases with bad intent, but instead did so in an effort to zealously represent his client and rectify problems he saw in government and the judicial branch; a finding that we disagree with. The referee agreed that counseling would benefit Widtfeldt. Widtfeldt is willing to take additional coursework or continuing legal education and work with a mentor. He also agrees to undergo further evaluation and attend followup counseling.

The referee next found that Widtfeldt's actions interfered with the administration of justice and adversely affected his fitness to practice law in violation of Canon 1, DR 1-102(A)(1), (5), and (6), of the Code of Professional Responsibility, which states:

"DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law." The referee further concluded that Widtfeldt violated his oath of office as an attorney licensed to practice law in Nebraska under Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that Widtfeldt (1) receive a public reprimand; (2) attend appropriate continuing education involving pretrial litigation; (3) consult for 1 year with a mentor, who will review Widtfeldt's pleadings and filings and file a report at the end of the year; (3) attend further counseling for 1 year; (4) be on probation for 1 year; and (5) pay costs and fees associated with the disciplinary proceeding. No exceptions have been filed.

ASSIGNMENTS OF ERROR

Neither Widtfeldt nor the Counsel for Discipline takes exception to the factual findings of the referee.

STANDARD OF REVIEW

[1] 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. *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004).

ANALYSIS

[2] Because neither party has taken exception to the referee's factual findings, the sole issue is the appropriate discipline to be imposed. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *Id.*

[3] To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *Id.* Based on our review of the record and the undisputed findings of the referee, we determine that the facts have been established by clear and convincing evidence. Based on that evidence, we conclude that Widtfeldt has violated DR 1-102(A)(1), (5), and (6), as well as the attorney's oath required by § 7-104.

[4,5] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Janousek, supra.* To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider 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. *Id.*

[6,7] 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. *Id.*; *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). To determine the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the disciplinary proceeding. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

Here, the record shows that Widtfeldt has repeatedly filed irrelevant and abusive motions and pleadings. In addition—even while under investigation—his written responses to the Counsel for Discipline included irrelevant and abusive material. Widtfeldt admits that his actions were improper and violated provisions of DR 1-102. He is, however, willing to seek further counseling and education and work with a mentor. And we note that despite his bizarre responses to the Counsel for Discipline, Widtfeldt later sought psychological counseling and was cooperative in the disciplinary process. But we cannot ignore that Hannappel found that personality issues interfere with Widtfeldt's ability to reason through certain issues and form working alliances with others. It is clear that Widtfeldt requires further treatment. Thus, our main concern is fashioning a sanction that serves to protect the public. See *State ex rel. Counsel for Dis. v. Thompson, supra.*

We have said that in cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate. *Id.* The suspension is not designed as punishment. Instead, it is meant as a time period in which the respondent can seek treatment without imposing a

danger to his or her clients. Once the respondent can demonstrate that treatment has resulted in a meaningful and sustained recovery, he should then be placed on a period of probation with treatment and practice monitoring components. See *id.*

Although Widtfeldt was not diagnosed with depression, he was found to be in need of psychological treatment. To ensure that Widtfeldt is properly treated before he returns to the practice of law, we disagree with the referee's recommendation of ordering solely probation and instead order a period of indefinite suspension followed by a period of probation of not less than 1 year. Widtfeldt may apply for reinstatement subject to the terms of probation. Upon application for reinstatement, Widtfeldt will have the burden of proving that he is fit to practice law under the terms of his probation. He will need to establish that counseling has resulted in behavioral changes that will allow him to practice law within the disciplinary rules. Such proof shall include a showing that he has continued counseling with a qualified therapist unless he is released from treatment.

Following readmission, Widtfeldt shall be subject to probation for not less than 1 year, which will include a monitor to review his pleadings. The Counsel for Discipline shall serve as the monitor. However, a practicing attorney may be substituted if Widtfeldt and the Counsel for Discipline can agree upon a practicing attorney who is willing to serve. See *State ex rel. Counsel for Dis. v. Thompson, supra.* If a practicing attorney does serve as the monitor, he or she shall not be compensated for his or her duties, but shall be reimbursed by Widtfeldt for actual expenses incurred. *Id.* At the end of the 1-year probationary period, it will be Widtfeldt's burden to show cause why the period of probation should not be extended for an additional year before he is released from probation.

CONCLUSION

We order that effective immediately, Widtfeldt be indefinitely suspended from the practice of law. He may apply for reinstatement consistent with the terms outlined above. Following reinstatement, he shall be subject to a term of probation for not less than 1 year, consistent with the terms outlined above. Widtfeldt shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and

upon failure to do so, he shall be subject to punishment for contempt of this court. In addition, Widtfeldt is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
HEATHER R. WESTER, APPELLANT.
691 N.W.2d 536

Filed February 4, 2005. No. S-03-1382.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **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.
5. **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.
6. **Statutes: Legislature: Intent: Words and Phrases.** The laxity in the use of the conjunctive "and" and the disjunctive "or" is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded for further proceedings.

Julie E. Bear, of Reinsch & Slattery, P.C., for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Heather R. Wester appeals from the order of the Cass County District Court which denied her motion to have certain convictions set aside. This appeal presents the issue of whether a person who is sentenced to a fine only may, after payment of the fine, petition the sentencing court to set aside the conviction.

SCOPE OF REVIEW

[1] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

FACTS

Wester was charged with one count of acting as a motor vehicle dealer without a license and one count of forging a title, both of which are Class IV felonies. See Neb. Rev. Stat. §§ 60-116 (Reissue 2004) and 60-1416 (Reissue 1998). The charges stemmed from Wester's selling too many motor vehicles during a calendar year without having an automobile dealer's license.

Prior to trial, the parties reached a plea agreement whereby the State would file an amended petition charging Wester with five Class I misdemeanors to which she would plead no contest. She entered the plea as a "best interest plea," which the district court accepted, and she was found guilty on all five counts. Wester was sentenced to a $250 fine for each of the counts of which she was convicted. She paid the fines the day of sentencing.

On September 18, 2003, Wester filed a motion to set aside her convictions pursuant to Neb. Rev. Stat. § 29-2264 (Supp. 2003). A hearing was held, and the district court issued an order denying the motion. The court reasoned that § 29-2264 allowed for the setting aside of a conviction only if a person had been sentenced to probation. Wester had been sentenced to a fine only, and therefore, the court concluded that her convictions could not be set aside pursuant to § 29-2264. Wester perfected a timely appeal.

ASSIGNMENTS OF ERROR

Wester argues that the district court erred by (1) finding that a sentence of probation is a necessary prerequisite to setting aside a conviction pursuant to § 29-2264 and (2) refusing to set aside her convictions pursuant to § 29-2264.

ANALYSIS

We are asked to determine whether a person who has been sentenced to a fine only is included within the class of those persons who may have their convictions set aside pursuant to § 29-2264.

The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp., supra.* When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey, supra.*

At all times relevant to this case, § 29-2264 provided in part:

> (2) Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court *or is sentenced to a fine only*, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation *and after payment of any fine*, petition the sentencing court to set aside the conviction.

(Emphasis supplied.)

The district court construed § 29-2264 to allow the setting aside of a conviction in two distinct situations: (1) when the defendant has satisfactorily fulfilled the conditions of probation for the entire time and (2) when the defendant has been discharged from probation prior to termination of the period of probation and after the payment of any fine imposed. The court noted that the statute falls within the Nebraska Probation Administration Act and concluded that the defendant's being placed on probation is a prerequisite to having a defendant's conviction set aside.

Wester argues that the district court ignored the plain meaning of § 29-2264 and failed to consider the effect that a 1993 amendment to the statute had on its current interpretation. She asserts that the amendment expanded the statute to include circumstances in which a person has been sentenced to pay a fine only. She argues that the addition of the language "or is sentenced to a fine

only" has no significance unless it was intended to permit the setting aside of a conviction when the defendant has been sentenced to a fine only.

The State argues that the amendment has resulted in an ambiguity in § 29-2264(2). It claims that the phrase "or is sentenced to a fine only" conflicts with the portion of the statute stating that § 29-2264(2) applies only after fulfillment or discharge from probation and after payment of any fine. It therefore argues that the phrase "and after payment of any fine" must be construed as conjunctive. The State claims that if the Legislature intended for § 29-2264 to be applicable to those who have been fined only, the phrase would have to be disjunctive and would read " '**or** after payment of any fine.' " Brief for appellee at 5.

In *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002), we held that § 29-2264 was constitutional and did not violate the separation of powers clause of the Nebraska Constitution. We stated: "Section 29-2264 may be applied only in limited circumstances. For example, a conviction cannot be set aside unless the person has been placed on probation or is sentenced to a fine only." *State v. Spady*, 264 Neb. at 104, 645 N.W.2d at 543.

[3-5] *Spady* is distinguishable from the case at bar in that the defendant in *Spady* was sentenced to probation. However, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). 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. *State v. Spady, supra.*

Prior to its amendment, § 29-2264 (Reissue 1989) stated, in relevant part:

> (2) Whenever any person is convicted of a crime and is placed on probation by the court, he may, after satisfactory fulfillment of the conditions of his probation for the entire

> period thereof, or after discharge from probation prior to the termination of the period thereof, petition the sentencing court to set aside the conviction.

The 1993 amendment added the language "or is sentenced to a fine only." We believe the purpose of such amendment was to include those persons who were sentenced to a "fine only" in the class of persons who are eligible to have their convictions set aside.

Part of the language in § 29-2264 (Supp. 2003) ("after discharge from probation . . . and after payment of any fine") may appear to exclude those who have been sentenced to a fine only. This interpretation would necessitate two conditions as prerequisites for the setting aside of a conviction: (1) the fulfillment or discharge of probation and (2) the payment of any fine. However, this interpretation fails to give effect to the language of the 1993 amendment which included those defendants who have been sentenced to a fine only.

[6] We have previously discussed the use of the words "and" and "or" in the context of statutory interpretation. The laxity in the use of the conjunctive "and" and the disjunctive "or" is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature. *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952). See, also, *State ex rel. City of Grand Island v. Union Pacific R. R. Co.*, 152 Neb. 772, 785, 42 N.W.2d 867, 875 (1950) (" '[c]ourts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive' "); *Carlsen v. State*, 127 Neb. 11, 19, 254 N.W. 744, 748 (1934) ("[i]n criminal statutes, when necessary to give effect to any part of a statute or to the intention of the legislature, the word 'and' may be substituted for 'or' and *vice versa*").

The meaning of a statute is a question of law, and we resolve this question independently of the conclusion reached by the trial court. It appears obvious that when the Legislature enacted the 1993 amendment to § 29-2264(2), it intended to include those who had been fined only within the class of those who could have their convictions set aside. In order to effectuate this intent, we conclude that § 29-2264(2) applies after (1) the satisfactory fulfillment of the conditions of probation for the entire period, (2)

the discharge from probation prior to termination of the period of probation, or (3) after the payment of any fine if the defendant has been sentenced to a fine only. Thus, the district court erred in concluding that Wester's being placed on probation was a prerequisite to the application of § 29-2264.

Wester also assigns as error the district court's refusal to set aside her convictions pursuant to § 29-2264. She asks us to remand the cause to the district court with instructions to do so.

Section 29-2264 indicates that it is the province of the sentencing court to set aside a conviction. Further, the statute gives guidelines to the sentencing court for determination of whether to set aside a conviction. In the present case, the district court was the sentencing court. However, the court denied Wester's motion for the reason that the statute did not apply because she had not been sentenced to probation. Therefore, the court never performed the analysis for setting aside convictions pursuant to § 29-2264.

[7] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). The district court did not analyze whether Wester's convictions should be set aside under the dictates of § 29-2264, and therefore, we are unable to reach the second assignment of error.

CONCLUSION

For the reasons stated above, the district court's order overruling Wester's motion to set aside her convictions is reversed and the cause is remanded for further proceedings to determine whether Wester is entitled to have her convictions set aside pursuant to § 29-2264.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LOUIS K. LIVINGSTON, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY, APPELLEES.

692 N.W.2d 475

Filed February 11, 2005. No. S-02-310.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
3. **Wages: Words and Phrases.** Deferred compensation is defined as compensation which is earned in exchange for services rendered.
4. **Statutes: Presumptions: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed.
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. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Howard Kaiman and Edward W. Hasenjager for appellant.

Tijiuana R. Smith-Secret and A. Justin Cooper for appellee Metropolitan Utilities District.

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

MCCORMACK, J.

NATURE OF CASE

Louis K. Livingston brought a declaratory judgment action seeking a determination of the rights, duties, and obligations of the parties relating to his claim for lifetime long-term disability

(LTD) benefits pursuant to a policy of insurance issued by his former employer, Metropolitan Utilities District (MUD). At the conclusion of Livingston's case in chief, the district court granted a motion for directed verdict in favor of MUD. The district court subsequently denied Livingston's motion for new trial. Livingston appeals.

BACKGROUND

Livingston began employment with MUD on December 1, 1964. At trial, Livingston testified that he applied for the job with MUD in 1964. He claimed that MUD told him that the board of directors of MUD would be approving a lifetime LTD program the following year. Livingston testified that as a result of an automobile accident in 1963, he and his wife both sustained injuries. The prospect of becoming eligible for such a policy with a lifetime benefit, therefore, played a significant role in his decision to accept employment with MUD. Livingston also testified that he turned down another job offer for the reason that MUD offered better overall compensation and that the benefits package included the lifetime LTD plan.

In December 1965, Livingston became eligible for and enrolled in MUD's LTD plan. The 1965 LTD policy provided in relevant part:

> **Benefit for Loss of Time During Total Disability Due to Sickness or Accidental Bodily Injury**—If total disability of a protected person due to sickness or accidental bodily injury commences while the protected person is insured under the policy and is under the regular care and attendance of a legally qualified physician, and the protected person remains continuously so totally disabled throughout a duration equal to the Elimination Period, the Company will pay to the protected person the Monthly Income Benefit applicable to the protected person in accordance with the Plan of Insurance for each month . . . throughout which such total disability continues beyond the applicable Elimination Period, but not beyond the Benefit Expiration Date specified in the Plan of Insurance.

The policy defines "Benefit Expiration Date" as the "Lifetime of the protected person."

On June 17, 1991, Livingston became disabled and unable to work and received biweekly accident and sickness benefits from MUD. On or around June 5, 1992, Livingston received and read a certified letter from MUD stating that effective June 22, his accident and sickness benefits from and employment with MUD would end. The letter gave Livingston the option of applying for LTD benefits through its LTD carrier, retiring from MUD, or becoming a vested term employee under MUD's pension plan. Selecting the first option, Livingston, who was 59 years old at the time, applied for and was placed on LTD in July 1992 and began receiving a disability benefit of $2,023.93 per month. Notwithstanding his continuing disability, Livingston's LTD benefits terminated on April 13, 1998, his 65th birthday.

Livingston brought suit against MUD and the LTD carrier. He contended that he was entitled to lifetime LTD benefits as promised to him by MUD in 1964 and as provided in the LTD policy in effect in 1965 when he enrolled in the plan.

At trial, MUD argued that revisions were made to MUD's LTD policy between 1965 and 1992 and that those revisions were applicable to Livingston. The human resources manager for MUD, John Hemschemeyer, testified for MUD regarding a revision to the LTD policy effective September 1, 1967. Hemschemeyer testified that under the 1967 LTD policy, benefits expired when covered persons reach age 65. Hemschemeyer noted that there was no lifetime benefits language in the 1967 LTD policy. The 1967 policy was not offered into evidence.

Offered and received into evidence was a notice to all MUD employees from the compensation and benefits administrator dated November 30, 1979. The 1979 notice stated that the board of directors passed a resolution amending the LTD contract in several respects, but left in place the provision terminating benefits at age 65 for active employees who sustain total disability before age 60. Livingston acknowledged that if the 1979 notice was posted on an MUD office bulletin board, then he had seen it.

Hemschemeyer further testified regarding a revised LTD policy effective in 1989. Hemschemeyer testified that the 1989 policy provided a maximum benefits period extending to age 65 for covered persons sustaining total disability prior to age 60. Livingston testified that he received, but apparently did not read,

a copy of the 1989 insurance policy booklet setting forth the above-described provisions. The 1989 policy was offered and admitted into evidence.

At the close of Livingston's case in chief, MUD moved for a directed verdict, which the district court granted. The court found that the 1965 LTD policy was not ambiguous and that as a matter of law, the LTD benefits Livingston received were those guaranteed by the provision in the 1965 policy for benefits after age 65. The district court found that MUD made both the company's and Livingston's contributions to his retirement plan while he was on disability leave as required by the 1965 policy. The court further found that as a matter of law, MUD had the right to change its LTD policy as long as notice of the change was provided to employees. The court found that in this case, Livingston received sufficient notice of any purported change to the 1965 policy. Livingston filed a motion for new trial, which the district court denied. Livingston appeals. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Livingston assigns, renumbered and restated, that the district court erred in (1) finding that MUD had the right to change or modify the 1965 LTD policy; (2) finding that the 1965 LTD policy was not ambiguous and that it provided him with the same benefits he was currently receiving; (3) excluding from evidence photographs of Livingston's wife taken in the summer of 1963, showing injuries she sustained in an automobile accident; (4) receiving into evidence the June 5, 1992, letter from MUD; (5) allowing MUD to cross-examine beyond the scope of the pleadings, thereby allowing MUD to raise an affirmative defense not pled in its operative answer; (6) allowing MUD to cross-examine Hemschemeyer beyond the scope of direct examination; (7) participating in the cross-examination of Hemschemeyer beyond the scope of direct examination; and (8) making its ruling in reliance on certain testimony of Hemschemeyer.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission

of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003); *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003); *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003).

ANALYSIS

MUD'S ABILITY TO MODIFY LTD POLICY

In his first assignment of error, Livingston argues that the district court erred in concluding that MUD had the right to modify the 1965 LTD policy. In support of his position, Livingston relies on *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), and *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000). Both *Halpin* and *Miller* were decided under the Contracts Clause of the U.S. Constitution; thus, we interpret Livingston's first assignment of error as arguing that MUD's modification of the LTD policy was a violation of that clause.

Livingston's claim essentially argues that at the time he was offered and accepted employment with MUD, he was promised that he would have the option to obtain lifetime LTD coverage. He claims that he relied upon that promise in accepting employment with MUD and that he, in fact, applied for lifetime LTD coverage as soon as he was eligible. Livingston argues that his contractual rights were interfered with when MUD eliminated the portion of the LTD coverage which provided for lifetime benefits. In response, MUD argues that Livingston's reliance on the 1965 LTD policy was not reasonable and that Livingston suffered no detriment as a result of his reliance. MUD further argues that it had the right to modify the policy and that it provided sufficient notice to Livingston that modifications had been made.

Livingston's claim presents three issues: (1) whether the LTD policy at issue is akin to a pension or deferred compensation such that Livingston had a contractual right for the purposes of the Contracts Clause; (2) if Livingston did have such a right, then when did this right vest; and (3) whether MUD's modification violated the Contracts Clause.

We first turn to the issue of whether the LTD policy at issue is a pension. In *Halpin*, which Livingston cites in support of his argument that his contractual rights were unconstitutionally modified, we held that Nebraska has long recognized that pensions are not gratuities. In *Halpin*, the court held that a pension plan offered to officers of the Nebraska State Patrol was not a gratuity, but instead was "deferred compensation, earned in exchange for services rendered [and creates] in the employees reasonable expectations entitled to legal protection." *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. at 898, 320 N.W.2d at 914. As a result of the finding that the plaintiffs had expectations in the pension plan entitled to legal protection, this court went on to conduct a Contracts Clause analysis. In doing so, we concluded that the State Patrol's modification of the plaintiffs' pensions unconstitutionally interfered with the plaintiffs' contractual rights.

In *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995), this court was asked to determine whether a supplemental cost-of-living benefit offered by the city to its firefighters was a pension. In concluding that it was a pension, we noted that "the benefits were fixed when conferred, and only the *payment* of those benefits was deferred to a later date." (Emphasis in original.) *Id.* at 963, 531 N.W.2d at 548. In response to the city's argument that the supplemental benefit plan was not a pension but a gift, we noted further that

> if the city wanted to classify the supplemental benefit as a gift, it could have stated such in the ordinance enacting the supplemental benefit. Nothing in the enacting ordinance puts employees or potential employees on notice that the supplemental benefit could be taken away with the stroke of a pen. . . .
>
> . . . We find that due to the lack of information from which an employee could ascertain that the supplemental benefit plan was a mere gratuity from the city, the city treated the

> supplemental benefit plan like a pension. As noted above, if the city wanted to limit the scope of the supplemental benefit plan to that of a mere gratuity, it could have plainly stated so in the enacting ordinance.

Id. at 963-64, 531 N.W.2d at 548-49.

[3] Deferred compensation, again, is defined as compensation which is earned in exchange for services rendered. See, *Calabro v. City of Omaha, supra*; *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Unlike the pension plan in *Halpin* and the supplemental benefit plan in *Calabro*, the LTD policy at issue does not meet this definition. Enrollment in this LTD plan was purely voluntary on the part of MUD employees. The accrual of coverage under this policy was not contingent upon the rendering of services, but instead depended upon the payment of premiums and the occurrence of an injury. We determine that the LTD policy in this case is not a pension.

Further supporting our conclusion that the LTD plan is not a pension is Neb. Rev. Stat. § 14-1022 (Reissue 1962) (now codified at Neb. Rev. Stat. § 14-2111 (Cum. Supp. 2004)). That section provides, in relevant part:

> The board of directors of any metropolitan water or metropolitan utilities district *may* also provide benefits for, insurance of, and annuities for the present and future employees and appointees of the district covering accident, disease, death, total and permanent disability, and retirement, *all or any of them, under such terms and conditions as the board may deem proper and expedient from time to time.*

(Emphasis supplied.) § 14-2111(1). This section has remained substantively unchanged from 1962 to the present.

[4] Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Thus we conclude that the use of the word "may" in this statute implies that the MUD board of directors has discretion with regard to whether any LTD plan is implemented. We further conclude that the use of the word "may," as well as the phrase "as

the board may deem proper and expedient from time to time," gives the board the discretion to modify those terms of employment enumerated in the statute, should the board see fit to do so.

Also relevant when analyzing the impact of former § 14-1022 is *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995). There, this court noted that the supplemental benefit plan was a pension and not a gratuity due in part to the lack of language in the enacting ordinance informing "employees or potential employees . . . that the supplemental benefit could be taken away with the stroke of a pen." *Id.* at 963, 531 N.W.2d at 548. The language required by *Calabro* regarding notice to employees and potential employees was provided by § 14-1022, which stated that a board of directors may provide benefits "under such terms and conditions as the board may deem proper and expedient from time to time." Thus, the board of directors retained the discretion to modify the terms of MUD's LTD coverage.

Having found that the LTD policy at issue was not a pension or deferred compensation, we conclude that Livingston had no contractual right in that policy for Contracts Clause purposes. For the sake of completeness, we note that *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990), appears to hold, with little analysis, that health insurance is akin to deferred compensation. To the extent that *Omer* is inconsistent with this opinion, it is disapproved.

Given the above conclusion, we need not undertake a Contracts Clause analysis in determining whether MUD unconstitutionally impaired Livingston's contractual rights. Such a conclusion does not end our inquiry, however. We must still determine whether MUD was otherwise prohibited from modifying the terms of the LTD policy.

As noted above, § 14-1022 (now codified at § 14-2111) provided that the MUD board may provide disability insurance to its employees and that the terms and conditions of such insurance may be set and modified by the board as the board deems proper. A review of the record shows that such terms and conditions were modified periodically throughout Livingston's employment, including, significantly, the elimination of the lifetime LTD benefits. We conclude that MUD was within its statutory authority in modifying the terms of the LTD policy it offered to its employees.

The district court did not err in finding that MUD had the right to modify the 1965 policy. Livingston's first assignment of error is without merit.

POLICY AMBIGUITY

In his second assignment of error, Livingston argues that the district court erred in finding that the 1965 LTD policy was not ambiguous and that it provided him with the same benefits he was currently receiving.

[5] Having concluded that MUD had the authority to modify the LTD policy at issue, any change in Livingston's benefits was permissible. We need not, therefore, decide whether the 1965 policy benefits would be the same as Livingston's current benefits. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

EXCLUSION OF PHOTOGRAPHS

In his third assignment of error, Livingston argues that the district court erred in not admitting certain photographs taken of his wife following a 1963 automobile accident. Livingston argues that these photographs help establish his credibility with respect to his wife's injuries as being foremost in his mind when he accepted MUD's offer of employment.

[6] The district court refused to admit the photographs of Livingston's wife taken following the 1963 accident. At trial, however, Livingston was permitted to testify regarding that accident; he testified that his wife suffered injuries and that MUD's LTD benefits policy was a significant factor in his decision to accept MUD's offer of employment. Furthermore, Livingston's wife was also permitted to testify regarding the accident and the fact that she suffered injuries in that accident. We also note that our review of the record indicates that MUD presented no evidence or testimony which tended to call Livingston's credibility on the issue of his wife's injuries or his desire for LTD benefits into question. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). As a result, we conclude that even if the district court erred in the exclusion of the photographs, an issue we

do not decide, said error is without prejudice. Livingston's third assignment of error, therefore, is without merit.

REMAINING ASSIGNMENTS OF ERROR

[7] Livingston assigns five additional errors. In his brief, Livingston fails to raise or argue assignments of error Nos. 4 and 5. Errors that are assigned but not argued will not be addressed by an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). With respect to assignments of error Nos. 6 through 8, Livingston's argument consists of a few sentences which, in essence, restate Livingston's assignment of error with respect to that particular issue. These statements do not constitute the required argument in support of the assigned error. See *State ex rel. City of Alma v. Furnas Cty. Farms, supra*. We conclude that assignments of error Nos. 4 through 8 are without merit.

CONCLUSION

We determine that the court did not err in concluding that MUD had the ability to modify the LTD policy at issue. For the reasons set forth above, we conclude that the decision of the district court should be affirmed.

AFFIRMED.

STEPHAN, J., not participating.

IN RE TRUST OF MONROE D. ROSENBERG, DECEASED. MARILYN J. TIPP, APPELLANT AND CROSS-APPELLEE, V. WILLIAM L. REINBRECHT, SUCCESSOR TRUSTEE AND PERSONAL REPRESENTATIVE, APPELLEE AND CROSS-APPELLEE, AND MAYNARD ROSENBERG, APPELLEE AND CROSS-APPELLANT.

693 N.W.2d 500

Filed February 18, 2005. Nos. S-03-563, S-03-612.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.

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. **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. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered.
5. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Actions: Final Orders.** For purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding includes every special statutory remedy which is not in itself an action.

Appeals from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Vacated and remanded with directions.

Jerry W. Katskee, of Katskee, Henatsch & Suing, for appellant.

Howard N. Epstein, of Liakos, Epstein & Matukewicz, L.L.P., for appellee Maynard Rosenberg.

William L. Reinbrecht, of Car & Reinbrecht, P.C., L.L.O., pro se.

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

MCCORMACK, J.

NATURE OF CASE

These consolidated cases present issues related to the administration of the Monroe D. Rosenberg Trust Agreement. We conclude that we do not have jurisdiction over one of the issues presented on appeal. We further conclude that the county court's failure to hold an evidentiary hearing requires us to vacate, and remand for such a hearing.

BACKGROUND

In 1984, Monroe D. Rosenberg executed the primary instruments of his estate plan: a last will and testament and a trust agreement. Monroe's will made no provision for his wife or his three children from a prior marriage: Marilyn J. Tipp, Maynard

Rosenberg, and Howard Rosenberg. Instead, Monroe devised his estate to the trustee of his trust. Article VI of the trust created by Monroe provided that upon his death:

> [T]he Trustee shall transfer the trust estate as then constituted (including but not limited to any insurance proceeds, death benefits, or property receivable by the Trustee by reason of the Grantor's death and any property receivable by the Trustee pursuant to the will of the Grantor) into a separate trust, to be known as the "Family Trust" . . . .

The trust further provided that the assets of the family trust be divided equally between Monroe's living children. The trust's stated objective was to ensure that "the Grantor's issue will enjoy the benefits of and ultimately receive a substantial portion of the Grantor's estate." The trust named Tipp as successor trustee.

Monroe died on December 15, 2001. He was survived by his wife, Tipp, Maynard, and Howard. Monroe and his wife had previously entered into a prenuptial agreement, and she is not making a claim against the estate.

On April 22, 2002, Maynard initiated a proceeding in the county court under Neb. Rev. Stat. § 30-2806 (Reissue 1995). Maynard sought to remove Tipp as the trustee and also raised issues with respect to Tipp's administration of the trust. After a hearing, the county court removed Tipp as trustee on December 31, 2002, replaced her with William L. Reinbrecht, and ordered Reinbrecht to file an accounting within 90 days. Tipp did not appeal from this order.

In the months that followed, several items were filed with the court, as described in greater detail below, culminating with orders entered on May 1, 2003. As relevant to the assignments of error on appeal and cross-appeal, the court (1) did not surcharge Tipp for her management of a duplex, (2) ordered Tipp to return $10,000 to the trust stemming from a payment Monroe made to his wife, and (3) ordered Tipp to return to the trust the following assets owned by Monroe prior to his death: MetLife insurance policy proceeds, U.S. Bank account proceeds, First Federal Lincoln account proceeds, Nebraska State Bank account proceeds, Omaha Public Power District (OPPD) bonds, and U.S. Treasury notes. The court also ordered that trust funds be used to pay Tipp's attorney fees and costs as well as Reinbrecht's fees

and costs. Tipp filed her appeals to these orders on May 13 and 28, 2003.

ASSIGNMENTS OF ERROR

Tipp assigns that the county court erred in (1) removing her as trustee and replacing her with Reinbrecht; (2) ordering her to reimburse the trust $10,000, stemming from a payment made by Monroe to his wife; (3) ordering Tipp to pay to the trust the following assets: MetLife insurance policy proceeds, U.S. Bank account proceeds, First Federal Lincoln account proceeds, Nebraska State Bank account proceeds, OPPD bonds, and U.S. Treasury notes; and (4) approving the statement for services of Reinbrecht in the amount of $11,355.12.

On cross-appeal, Maynard assigns that the court erred in (1) failing to order that his attorney fees be paid from the trust, (2) awarding Tipp attorney fees from the trust, and (3) failing to surcharge Tipp for her management of the duplex.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). 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. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002).

ANALYSIS

Removal of Trustee

In her first assignment of error, Tipp argues that the district court erred in removing her as trustee. The court did so by an order entered on December 31, 2002, in which the court also appointed Reinbrecht to be the successor trustee and ordered him to file an accounting within 90 days.

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Maynard argues

that the court's December 31, 2002, order was a final order and that because Tipp did not file an appeal within 30 days of that order, we do not have jurisdiction over this issue. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

[4] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which 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 judgment is rendered. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); Neb. Rev. Stat. § 25-1902 (Reissue 1995). The district court's December 31, 2002, order did not determine the action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Thus, we consider whether it was made during a special proceeding and affected a substantial right.

Nebraska law grants courts jurisdiction over subject matter relating to trusts. Prior to January 1, 2005, the operative date of the Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. § 30-3801 et seq. (Cum. Supp. 2004), jurisdiction was granted to courts pursuant to § 30-2806 (repealed by 2003 Neb. Laws, L.B. 130), and expressly included jurisdiction over proceedings to remove a trustee. See § 30-2806(1). However, while this appeal was pending, the NUTC became operative. Now, the county court's jurisdiction over matters relating to trusts is codified at § 30-3814. In addition, the provisions dealing with removal of a trustee are codified at § 30-3862.

Section 30-38,110(a)(3) provides that the NUTC

> applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the code does not apply and the superseded law applies[.]

Thus, we are required to apply the NUTC in this case, absent "[substantial] interfere[nce] with the effective conduct of the judicial proceedings or prejudice [to] the rights of the parties." As

noted above, jurisdiction over proceedings to remove a trustee has been shifted from § 30-2806 to §§ 30-3814 and 30-3862. We find no prejudice to the parties in applying the NUTC in this case.

[5,6] Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). We have also stated that for purposes of § 25-1902, a special proceeding includes every special statutory remedy which is not in itself an action. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

In *In re Estate of Snover*, 233 Neb. 198, 201-02, 443 N.W.2d 894, 897 (1989), this court stated:

> Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.

Under these rules, we conclude that a proceeding initiated pursuant to §§ 30-3814 and 30-3862 of the NUTC to remove a trustee is a special proceeding within the meaning of § 25-1902.

We also conclude that the removal of a trustee under §§ 30-3814 and 30-3862 affects a substantial right. Maynard analogizes the present case to the removal of a personal representative. We have held that a proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of § 25-1902 and therefore is a final order and is appealable, even though it may not terminate the action or constitute a final disposition of the case. See *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). In *In re Estate of Snover*, we concluded that "[g]iven the scope of the personal representative's power over the interests of the beneficiaries and other interested parties in an estate, the right conferred by § 30-2454 to petition the county court to remove the personal representative for cause is a substantial right." 233 Neb. at 203, 443 N.W.2d at 898. The same can be said of proceedings to remove a trustee. Therefore, we conclude that the district court's December 31, 2002, order removing Tipp as trustee was a

final order. Tipp's failure to appeal from that order within 30 days precludes us from considering her first assignment of error.

Remaining Assignments of Error

Each of the remaining assignments of error on appeal and cross-appeal arose from the district court's May 1, 2003, orders. A recitation of the events leading up to May 1 is warranted.

After Reinbrecht assumed the duties of trustee, he filed several items with the court. On March 13, 2003, he filed an inventory of assets that Monroe owned at his death. On April 7, Reinbrecht filed a "Petition for Instruction and Application for Review of Fees," in which Reinbrecht requested "guidance" from the court regarding several issues, including whether various assets Tipp acquired at Monroe's death should be returned to the trust pursuant to article VI of the trust agreement. Those assets included: proceeds from a MetLife insurance policy, which named Tipp as the beneficiary; proceeds in a U.S. Bank account, which was held in the names of Monroe, his wife, and Tipp; proceeds from the First Federal Lincoln account and from a Nebraska State Bank account, both of which named Tipp as the payable-on-death beneficiary; OPPD bonds, and U.S. Treasury notes held jointly by Monroe and Tipp. Also on April 7, Reinbrecht filed an application for approval of his own fees and costs in the amount of $11,355.12. Finally, also on April 7, Reinbrecht filed a report in which he made numerous recommendations to the court. Those recommendations addressed many of the issues raised by Reinbrecht in his April 7 "petition for instruction."

Tipp filed a resistance to Reinbrecht's report in which she took exception to Reinbrecht's recommendations. Thereafter, on April 22, 2003, Maynard and Howard filed their own "application for instruction" in which they posed several questions to the court, sought answers, and made arguments. Tipp filed a resistance, arguing against Maynard and Howard's positions.

In light of all the items filed, the parties got together in court on April 28, 2003. No witnesses testified, and only one exhibit was offered and received into evidence: a one-page list, in Monroe's handwriting, of various bank account numbers and life insurance policy numbers. Instead, the parties' attorneys presented brief arguments, and the court announced its findings after

having "reviewed all the filings." Those findings were reduced to the written orders entered on May 1, 2003.

The court's failure to hold a formal evidentiary hearing prior to entering its May 1, 2003, orders is of great concern to us, as it was to us in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004). In that case, the Douglas County Court entered orders in a conservatorship proceeding after engaging in discussions with the parties, but without receiving any *evidence* on which to base those orders. Such is the situation here. The court and parties assembled for arguments but examined no witnesses and received only one exhibit into evidence. As stated above, in the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). 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. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). The district court's May 1, 2003, orders are not supported by competent evidence. We vacate, and remand to the county court with directions to hold an evidentiary hearing.

VACATED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
LORELE LESOING-DITTOE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DOUG DITTOE, APPELLANT.
693 N.W.2d 261

Filed February 18, 2005. Nos. S-03-1004, S-03-1005.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeals from the District Court for Lancaster County, KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgments of District Court reversed, and causes remanded with directions.

Mark A. Fahleson and Glen Th. Parks, of Rembolt, Ludtke & Berger, L.L.P., for appellants.

Jon Bruning, Attorney General, Kimberly A. Klein, Gary E. Lacey, Lancaster County Attorney, Alicia B. Henderson, and Jarrod P. Crouse, Senior Certified Law Student, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Lancaster County Court ordered that a dog owned by Lorele Lesoing-Dittoe and Doug Dittoe (collectively the Dittoes) be destroyed. The Lancaster County District Court affirmed the judgment of the county court, and the Dittoes appeal.

SCOPE OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Jensen, ante* p. 213, 691 N.W.2d 139 (2005).

[2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.*

[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Guardianship &*

Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004).

FACTS

The Dittoes live on an acreage near Lincoln, Nebraska. They own a female malamute-shepherd mix dog named "Murphy." During 1996, Murphy left the Dittoes' yard on four separate occasions and attacked or injured other dogs in the nearby area.

The Dittoes took a number of steps to confine and train Murphy in order to prevent further incidents. Because Murphy was able to jump over a small fence that surrounded the Dittoes' backyard, they installed an invisible fence, but the system did not function properly and Murphy was shocked repeatedly. This system was removed, and in March 1997, the Dittoes installed a 6-foot-high three-rail iron fence at a cost of $20,000. Murphy was not involved in any further incidents until 2001.

On March 17, 2001, Doug inadvertently left a gate open. Murphy and another dog owned by the Dittoes ran at large while the Dittoes were out for the evening, and Murphy attacked a dog owned by John Matejovich. Matejovich stated that he heard yelping after he let his dog out onto the patio. He found Murphy holding his dog by the back of the neck. Matejovich separated the dogs and took his dog into the house. Matejovich's dog had a wound on the side of its neck, and 2 days later, he took the dog to the veterinarian. No stitches were required, and the veterinary bill was $34.06.

On March 19, 2001, the Dittoes were notified by the Lancaster County sheriff's office that Murphy had been declared a potentially dangerous dog pursuant to Neb. Rev. Stat. § 54-617(6) (Reissue 2004). A complaint was filed against Doug on March 22, alleging that Murphy had been allowed to run at large in violation of Neb. Rev. Stat. § 54-608 (Reissue 2004). A complaint was filed against Lorele on March 27, alleging that Murphy and a dog named "Chloe" had "wounded, injured, worried or chased" a domestic animal belonging to John or Beverly Matejovich. See Neb. Rev. Stat. § 54-601 (Reissue 2004). The Dittoes pleaded no contest to the charges.

On April 6, 2001, the State filed a motion for disposition of Murphy pursuant to Neb. Rev. Stat. § 54-611 (Reissue 2004). The

motion alleged that the "reasonable and proper" disposition was the destruction of Murphy. See *id.*

At a proceeding characterized by the State as a "sentencing hearing," Lorele testified that after the March 2001 incident, they added spring-loaded gates and padlocks to the fence and that there had been no further incidents of Murphy's leaving the yard. She stated that the Dittoes had set up fencing systems, taken Murphy to obedience school, and socialized her by visiting dog runs and by inviting other animals to their home. Lorele noted that Murphy was currently being supervised whenever she was in the backyard and that she had never exhibited any threatening behavior toward children or adults in the Dittoe home.

Doug testified that on March 17, 2001, he took Murphy and Chloe for a walk. When he returned, he forgot to close one gate, and the dogs got out while the Dittoes were away for the evening. Doug stated that the Dittoes had taken several steps to ensure that no future incidents would occur, including installing spring-loaded hinges on both fence gates, installing padlocks on the gates, and posting signs instructing that the gates must remain closed at all times. Doug did not believe that Murphy was a dangerous dog or that she needed to be destroyed.

Dr. Valerie Aliano, Murphy's veterinarian since 1995, testified that she had treated at least 10,000 animals over the course of 18 years of practice. Aliano stated that Murphy had never caused any trouble with other dogs while she was at Aliano's clinic. Murphy did not react aggressively even when invasive procedures were performed. Based on her training and experience, it was Aliano's opinion that Murphy was not a threat to other animals and that she should not be destroyed.

Lancaster County Sheriff Terry Wagner testified that he had personally spent time with Murphy and observed the steps that the Dittoes had taken to confine her. Based on his information and experience, Wagner agreed with Aliano's opinion that it would be unreasonable to destroy Murphy.

Six other individuals testified as to Murphy's nature and the steps taken by the Dittoes to contain her within the confines of their property. These witnesses had personally observed and spent time with Murphy, and in some instances, their children and pets had spent time with Murphy as well. Each witness testified based

on personal experience that destruction of Murphy was not reasonable or proper.

The county court found that the 1996 attacks appeared to be unprovoked and that in at least two of the cases, it appeared that Murphy was "stalking" the other dogs. The court opined that if Murphy got loose, she would be a threat to any dog, and that although the Dittoes had spent considerable money to erect and maintain a fence, they could not guarantee that Murphy would not get loose again. The court ordered that Murphy be confiscated by the Lancaster County sheriff's office, which acts as the animal control authority for the county, and that Murphy be destroyed in an expeditious and humane manner within 30 days of the order if no appeal was filed. In addition, Lorele and Doug were each fined $100 plus costs, and they were ordered to pay the Matejoviches' veterinary bill of $34.06.

The Dittoes appealed to the Lancaster County District Court, which ordered that Murphy remain in the custody of the Dittoes during the pendency of the appeal. The district court found no error on the record of the county court. It noted that the question was not whether the district court would have ordered Murphy's destruction, but whether the county court abused its discretion. It found no abuse of discretion, and it affirmed the judgment of the county court. The Dittoes timely appealed from that order.

ASSIGNMENT OF ERROR

The Dittoes make a number of assignments of error. However, we address only one because it is dispositive of this appeal: The district court erred when it found no error in the county court's conclusion that the destruction of Murphy was "reasonable and proper."

ANALYSIS

Section 54-611 provides:

> In counties having a population of eighty thousand or more inhabitants and cities of the first class contained in such counties, if upon final hearing the defendant is adjudged guilty of any violation of sections 54-601 and 54-608 to 54-610, the court may, in addition to the penalty provided in section 54-613, order such disposition of the offending dog as may seem reasonable and proper.

The issue is whether the destruction of Murphy was a reasonable and proper disposition.

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Jensen, ante* p. 213, 691 N.W.2d 139 (2005). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[4] However, because the dispositional order in this case is more akin to a sentence, our review is for abuse of discretion. See *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

Upon a finding that the Dittoes were guilty of violating §§ 54-601 and 54-608, the county court was allowed to order "such disposition of the offending dog as may seem reasonable and proper." See § 54-611. The provision in § 54-611 that allows the court to order disposition is similar to Neb. Rev. Stat. § 29-2280 (Reissue 1995), which allows a court to order restitution to the victim of a crime. In that situation, restitution is " 'a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court.' " *State v. Holecek*, 260 Neb. 976, 981, 621 N.W.2d 100, 104 (2000). Therefore, we consider whether the county court abused its discretion when it ordered the destruction of Murphy.

In 1996, Murphy was involved in four separate incidents during which she attacked other dogs. No other incidents occurred until March 2001, when Murphy was inadvertently allowed to run at large. The incident resulted in what appears to be a relatively minor injury, in that the owner of the other dog waited 2

days to have the dog seen by a veterinarian and the bill for treatment was $34.06.

At the "sentencing hearing," no evidence was offered that Murphy has ever attacked or harmed a human. One owner of a dog that had been injured by Murphy 5 years earlier stated in an affidavit that Murphy should be destroyed, and two other dog owners testified to holding the same opinion.

Aliano, the veterinarian who had treated Murphy since 1995, testified based on her experience, education, and knowledge of dog behaviors that Murphy was an alpha dog, which is a dog that tries to assert dominance over other animals. If an animal submits, Murphy will not take any other action because "all she is trying to do is say, 'I'm top dog in this situation.' " Aliano said that the injuries inflicted by Murphy were consistent with an alpha dog type of confrontation. Aliano said that an alpha dog could be aggressive toward other dogs and yet pose no threat to humans. She stated that Murphy was not a threat to people. Aliano said Murphy's interaction with other dogs in the waiting room of the veterinary clinic had been appropriate, had been well controlled, and did not show any kind of aggression toward other animals. Aliano said she has never had to have a veterinary technician assist her to control Murphy, to use a muzzle on Murphy, or to have Murphy wait in an examination room rather than the waiting room.

Aliano, who had been a veterinarian for 18 years, opined that the Dittoes had "gone above and beyond what most people would do to correct the situation to make sure" that Murphy did not harm another dog. In her 18 years of practice, Aliano had seen a number of animals that were aggressive, but she had never had a problem with Murphy. She had on occasion recommended euthanasia for certain animals because of behavior problems and was not opposed to euthanasia because there were times that it was necessary. Because of the proper precautions that the Dittoes had taken, she believed that Murphy was not a threat. In Aliano's opinion, Murphy was not a dog that was going to go after any animal because it was prey. Murphy was less dangerous than many of the dogs Aliano treated. When asked for her opinion based upon her training and her personal observations of Murphy, Aliano replied that she "absolutely [did] not believe that [Murphy] needs to be destroyed."

The Lancaster County sheriff's office acts as the animal control authority for the county. Wagner, the Lancaster County sheriff, testified that he was familiar with dangerous dog situations. Wagner stated that he knew Doug from high school and had visited the Dittoe home on social occasions. Wagner was familiar with Murphy's past history, but he had never seen Murphy behave aggressively and did not consider her to be dangerous.

Wagner had observed the fence around the backyard of the Dittoe residence and described it as "[p]retty massive," "real substantial," and "it does a good job of containing the backyard." Wagner said the steps taken by the Dittoes were reasonable to confine a potentially dangerous dog. Based on his training and experience in law enforcement and on his personal observation of Murphy, Wagner did not believe a proper disposition would be to destroy Murphy.

Linda Vavrus, who worked as a gardener for the Dittoes, testified that Murphy and Chloe were very friendly dogs. The dogs greeted Vavrus and her employees at the gate and then watched the gardeners as they worked. Vavrus said none of her crew had ever been bothered by the dogs, and she had never witnessed any violent behavior on the part of either of the dogs. Vavrus said that she did not consider either Murphy or Chloe to be a dangerous dog and that neither should be destroyed.

A number of relatives and friends of the Dittoes testified that Murphy had not posed a threat to their children and other dogs. Cindy Rempe testified that her children have taken care of the Dittoes' dogs and stayed with them when no adult is present, including over weekends. She had never seen Murphy act aggressively toward her children, other humans, or other animals. Rempe said she did not believe Murphy was a dangerous dog and did not believe that she should be destroyed.

Lorele's sister, Jennifer Lesoing-Lucs, had a dog that played with Murphy. Lesoing-Lucs said her dog had never been injured as a result of playing with Murphy. Her opinion was that Murphy should not be destroyed because she was not a threat.

Donna Carlsen, Doug's sister, testified that she visited the Dittoes with her dog. Carlsen said she had never observed any acts of aggression or injury by Murphy or Chloe. Carlsen's children also play with Murphy, and there have been no aggressive

incidents toward her children. Carlsen said she did not believe Murphy should be destroyed.

Becki Seoane, a friend of the Dittoes, testified that her children and their friends have played with Murphy on a regular basis and that she had never observed or had reported to her any act of aggression by Murphy toward a child. Seoane did not consider Murphy to be a dangerous animal or an aggressive dog, and she did not believe Murphy should be destroyed.

Laird Haberlan, a friend of the Dittoes, said his 6-year-old son played with Murphy. Haberlan has no concern for his son's safety around Murphy, and he had never seen Murphy act aggressively toward his son, other people, or other animals. He did not believe Murphy should be destroyed.

Although there were some recommendations for Murphy's destruction from the owners of the dogs that had been attacked, neither Wagner nor Aliano agreed with those recommendations. Thus, the two expert witnesses who had personally observed Murphy's behavior and the location in which she was confined did not believe that it would be proper to destroy her. These individuals had previously dealt with aggressive animal situations during their professional careers and did not believe the dog should be destroyed.

It is apparent from the record that the Dittoes have gone to extraordinary measures to prevent the reoccurrence of the dog's escape. They have constructed a 6-foot-high iron rail fence at a cost of $20,000. The gate which allowed the dog to escape is now spring loaded and locked. It is also significant that Wagner testified that the fence was substantial and did a good job of containing the dogs. Wagner, as a government official responsible for enforcing the statutes governing dogs, opined that Murphy's destruction was not a proper disposition.

Pursuant to § 54-611, the county court may order such disposition of an offending dog as may seem reasonable and proper. Whether such disposition is reasonable is dependent upon the particular circumstances. Under the facts and circumstances of this case, we conclude that the order for the destruction of the dog was not reasonable. The county court therefore abused its discretion in ordering the destruction of the dog.

CONCLUSION

The judgments of the district court, which affirmed the combined judgment of the county court, are reversed, and the causes are remanded with directions that the district court shall enter orders reversing the judgment of the county court that ordered destruction of the dog named "Murphy."

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DONELL KING, APPELLANT.

693 N.W.2d 250

Filed February 18, 2005. No. S-03-1160.

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 discretion a factor in determining admissibility.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Effectiveness of Counsel: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
6. **Trial: Courts: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid, and whether that reasoning or methodology can be applied to the facts in issue.
7. **Trial: Rules of Evidence: Expert Witnesses.** A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. If it is necessary for the court to conduct an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert

testimony is scientifically valid and reliable. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Rev. Stat. § 27-403 (Reissue 1995).

8. **Trial: Expert Witnesses.** A trial court is not required, sua sponte, to make explicit on-the-record rulings regarding the admissibility of expert testimony.
9. ____: ____. A trial court is not always required to hold a hearing prior to qualifying an expert pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
10. **Trial: Evidence.** An objection based upon insufficient foundation is a general objection.
11. **Trial: Expert Witnesses.** A general foundational objection fails to alert the trial court, or opposing counsel, to any issue pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
12. **Trial: Evidence: Appeal and Error.** An objection on the basis of foundation alone fails to preserve for appellate review an issue pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
13. ____: ____: ____. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
14. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
15. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
16. **Habitual Criminals: Prior Convictions: Right to Counsel: Proof.** For purposes of Neb. Rev. Stat. § 29-2221 (Reissue 1995), it is not enough for the State to show the presence of counsel at sentencing alone. The State must also show the presence of counsel at the time of conviction. Absent such proof, the evidence is insufficient to prove that the earlier convictions were counseled.
17. **Habitual Criminals: Proof.** Pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995), in order to be sentenced as a habitual criminal, a defendant must twice have been convicted of a crime, sentenced, and committed to prison, in this state or any other state.
18. **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 Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part sentences vacated and cause remanded with directions.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Following a jury trial, Donell King was found guilty of first degree sexual assault, kidnapping, and robbery. Thereafter, King was found to be a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995) and was sentenced to 10 to 25 years' imprisonment for first degree sexual assault, 10 to 25 years' imprisonment for kidnapping, and 10 to 25 years' imprisonment for robbery. The sentences were ordered to run consecutively.

BACKGROUND

The State alleges that on the night of January 30, 2002, H.W. was abducted, sexually assaulted, and robbed by King. As H.W. approached a stop sign after leaving a hospital in Omaha, Nebraska, where she had attended an evening meeting, King entered H.W.'s vehicle through the front passenger door. Pursuant to King's instructions, H.W. continued to drive the vehicle until King ordered her to move to the back seat of the car so he could drive.

The State claimed that during the abduction, King demanded that H.W. give him money. King went through H.W.'s purse and took approximately $140 in cash and her checkbook, credit cards, automated teller machine (ATM) card, and driver's license. He also took her jewelry. King then drove to an ATM and used H.W.'s ATM card to withdraw money from her account. After leaving the ATM, King drove to an unknown location where he demanded that H.W. take off her clothing and then forced her to engage in oral sex and sexual intercourse.

The State further contends that after sexually assaulting H.W., King drove the vehicle to another location, where he parked the

car. King took the vehicle's keys, put them in a glove, and told H.W. to watch where he dropped the glove. He advised H.W. that when she could no longer see him, she could retrieve the keys. The evidence reveals that after retrieving her keys, H.W. returned to the hospital, where she was examined and the police were called. King was subsequently arrested and charged with first degree sexual assault, kidnapping, and robbery.

As part of his defense at trial, King admitted to taking H.W.'s money and property but denied sexually assaulting her. King claimed that on the day in question, H.W. approached him, wanting to purchase crack cocaine, and that with her permission, he got into her vehicle to complete the transaction. King claimed that after H.W. purchased the cocaine, he and H.W. smoked the drug together. King claims that afterward, H.W. wanted to purchase additional cocaine, and that with her permission, he drove her vehicle to a house, where more drugs were acquired. He then drove to an ATM, where he claims that H.W. authorized King to withdraw money for the second purchase. King claimed that he and H.W. then smoked the newly purchased cocaine and thereafter had consensual sexual intercourse in her vehicle. King admitted that after engaging in sexual intercourse with H.W., he stole the items from her purse. However, at trial, King claimed that he did not rob her because he did not take her money or jewelry by force or threats of force.

At trial, counsel for King made a general foundational objection to the testimony of Dr. Raymond Schulte and Omaha police officers Jerry Martinez and John Gasko. The State intended to have these witnesses testify regarding H.W.'s alleged use of crack cocaine on the night of her assault. Over these objections, Schulte, who was H.W.'s gynecologist and who had conducted an examination of H.W. following her sexual assault, testified that H.W. showed no signs of contact with or usage of a controlled substance when examined. Similarly, Martinez and Gasko were allowed to testify that in their opinions, H.W. was not under the influence of crack cocaine that evening. Later that day, after the witnesses had testified, King's attorney met with the prosecutors and the trial judge in chambers to discuss evidence issues which had arisen at trial. During that meeting, King's attorney renewed his general foundational objections. King's attorney also objected

to the testimony of the officers on the ground that they had not been previously identified as officers pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1995). King's attorney commented that he believed he had also objected on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which he thought was basically the same as a foundational objection. Following his conviction, King timely appealed, and we moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

On appeal, King argues that Schulte, Martinez, and Gasko were improperly allowed to testify. King maintains that these individuals testified as experts and that the trial court failed to conduct a proceeding to determine whether they were qualified to testify under *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra.* Further, King argues that the State failed to provide notice, as required under § 29-1912, that it intended to offer the expert testimony of Martinez and Gasko. It is King's position that the State had a duty to disclose results and reports which documented examinations conducted by the witnesses. King also argues that his trial counsel was ineffective as a result of counsel's failure to anticipate the expert testimony of Schulte, Martinez, and Gasko and counsel's failure to make proper objections to their testimony. Finally, King argues that there was insufficient evidence to find that he was a habitual criminal, as the evidence failed to establish that King was represented by counsel at all critical stages of his prior criminal proceedings, including sentencing.

ASSIGNMENTS OF ERROR

King assigns, restated, that (1) the trial court erred in admitting the testimony of the officers who were not properly qualified as experts, (2) the trial court erred in finding the State had no obligation to notify King of its intent to use expert testimony on the subject of whether H.W. was under the influence of crack cocaine, (3) King had ineffective assistance of counsel stemming from counsel's failure to object to the admission of opinion testimony regarding whether H.W. was under the influence of crack cocaine, and (4) the trial court erred in finding he was a habitual criminal.

STANDARD OF REVIEW

[1-3] 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 discretion a factor in determining admissibility. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

[4] Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

ANALYSIS

King assigns four errors on appeal. Each will be addressed in the order assigned.

DAUBERT OBJECTION

In his first assignment of error, King argues that the trial court erred in admitting the testimony of Schulte, Martinez, and Gasko with respect to their opinions that H.W. was not under the influence of crack cocaine on the night of her assault. King maintains that the trial court failed to conduct a proceeding to determine whether these witnesses were qualified to testify as experts and that therefore, the witnesses should not have been permitted to testify regarding H.W.'s alleged drug use. During the testimony of Schulte, Martinez, and Gasko, King's trial attorney objected generally on the basis of foundation.

[5,6] An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to

disclose the basis of that opinion on cross-examination. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004); *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (*Daubert/Schafersman*). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004); *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[7] We recently stated in *State v. Tolliver*, 268 Neb. 920, 927-28, 689 N.W.2d 567, 575 (2004):

> A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the judge may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative

than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

We recently discussed our standard for the admissibility of expert testimony in *Carlson v. Okerstrom*, 267 Neb. 397, 410, 675 N.W.2d 89, 103 (2004): "Under rule 702, it is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion." In *Schafersman v. Agland Coop*, 262 Neb. 215, 232, 631 N.W.2d 862, 876-77 (2001), we stated: "[I]n those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to [rule] 702 whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."

[8,9] A trial court, however, is not required, sua sponte, to make explicit on-the-record rulings regarding the admissibility of expert testimony. *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995). Nor is a trial court required to always hold a hearing prior to qualifying an expert pursuant to *Daubert/Schafersman*. *U.S. v. Solorio-Tafolla*, 324 F.3d 964 (8th Cir. 2003). We conclude that in order to preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert/Schafersman*, a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence.

[10-12] In the present case, King's objections to the opinion testimony of Schulte, Martinez, and Gasko were based on "foundation" and that the State had not complied with § 29-1912(e). An objection on the basis of insufficient foundation is a general objection. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Such an objection fails to alert the trial court, or opposing counsel, to any *Daubert/Schafersman* issue. See *U.S. v. Barker*, 27 F.3d 1287 (7th Cir. 1994). Consequently, an objection on the basis of foundation alone fails to preserve for appellate review a *Daubert/Schafersman* issue.

[13] Because King's foundational objection was not sufficient to preserve a *Daubert/Schafersman* issue for appellate review, we

look to whether the foundational objection was properly overruled. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *State v. Davlin, supra*; *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994). Neither of those criteria is met in the present case. Thus, King's first assignment of error is without merit.

Failure to Notify Opposing Counsel of Expert Testimony

King next argues that pursuant to § 29-1912(e), once mutual and reciprocal discovery was ordered by the trial court, the State was obligated to disclose to King the nature of the testimony it intended to elicit from Martinez and Gasko. Section 29-1912(e) requires the State to permit the defendant to inspect and copy or photograph the results and reports of physical or mental examinations and the scientific facts or experiments made in connection with the particular case. The testimony of Martinez and Gasko was that based on their experience and training, it was their opinion that H.W. did not appear to be under the influence of drugs or alcohol at the time they interviewed her. The record is devoid of any evidence that there were records of the two officers' observations other than would be contained in the police reports. The police reports in this case, as noted by the prosecutor, had been voluntarily turned over to the defense counsel. The requirements of § 29-1912(e), therefore, had been met by the State, and King's assignment of error in this regard is without merit.

Ineffective Assistance of Counsel

In his third assignment of error, King argues that his trial counsel was ineffective as a result of counsel's failure to anticipate the expert testimony of Martinez and Gasko. King claims counsel should have properly objected to their testimony regarding H.W.'s alleged drug use, i.e., object on the basis of *Daubert/Schafersman*.

[14] King raises his claim of ineffective assistance of counsel for the first time on direct appeal. Such a claim, however, need not be dismissed merely because it is made on direct appeal. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). The determining factor is whether the record is sufficient to adequately review the

question. *Id.* If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

Although we have held that certain elements of what is alleged to be ineffectiveness of counsel in this case have resulted in a waiver, the record is not sufficient for us to determine whether, absent a hearing, there was ineffectiveness of counsel.

Habitual Criminal Enhancement—Representation by Counsel

In his final assignment of error, King argues that the trial court erred in finding him to be a habitual criminal. King claims the two prior convictions relied on by the State did not meet the State's burden of proof for enhancement under § 29-2221 because the State failed to show that he was represented by counsel during all "critical stages" of those criminal proceedings, including conviction and sentencing. Brief for appellant at 23. We conclude that the State failed to meet its burden.

[15,16] In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004). *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), is our latest pronouncement and controls the issue of whether, under § 29-2221, the State has met its burden of showing a prior counseled conviction. See *State v. Hall, supra.* In *Thomas*, we held that it not enough for the State to show the presence of counsel at sentencing alone for purposes of § 29-2221. The State must also show the presence of counsel at the time of conviction. *State v. Thomas, supra.* Absent such proof, the evidence is insufficient to prove that the earlier convictions were counseled for the purposes of § 29-2221. *State v. Thomas, supra.*

Although in *Thomas*, we held that proof of counsel, or an intelligent and knowing waiver of counsel by the defendant, at the time of sentencing is not alone sufficient for purposes of § 29-2221, we have not previously addressed whether evidence of counsel or the waiver of counsel at the time of conviction alone will suffice. We

agree with King that for purposes of habitual criminal sentencing, the State must prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings. See *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (stating absence of counsel during sentencing after plea of guilty, coupled with assumptions concerning defendant's criminal record which were materially untrue, deprived defendant of due process), citing *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). See *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999) (where, citing *Mempa v. Rhay, supra*, we held that advisement to criminal which indicates he or she has no constitutional right to counsel at time of sentencing is prejudicial error).

The State claims that exhibits 60, 61, 65, and 66 prove King's 1994 conviction. Exhibit 60 is a document from the office of the state's attorney in Cook County, Illinois. Attached to it is the November 22, 1994, order of sentence and commitment. Exhibit 61 is a certified statement of conviction by the clerk of the circuit court for Cook County, which shows that on November 22, King was sentenced to 12 years' imprisonment. Exhibit 65 is an order of the circuit court for Cook County dated October 25, 1994, which shows the name of King's defense attorney. Exhibit 66 is King's trial proceedings held in the circuit court for Cook County on October 25. Exhibits 60, 61, 65, and 66, however, do not establish that King was represented by counsel or had waived the right to counsel at the time of sentencing for his 1994 conviction. We conclude, therefore, that the trial court erred in using King's 1994 conviction to enhance King's sentences.

[17] In order to be sentenced as a habitual criminal, a defendant must twice have been convicted of a crime, sentenced, and committed to prison, in this state or any other state. § 29-2221. Because King's 1994 sentence could not be utilized for enhancement as a habitual criminal, the State failed to meet its burden of proving two prior convictions, sentences, and incarcerations. Therefore, King should not have been sentenced as a habitual criminal.

[18] Because we have determined that King's 1994 conviction could not be used for enhancement purposes, we need not decide the issues presented with respect to King's 1993 conviction. An appellate court is not obligated to engage in an analysis which is

not needed to adjudicate the case and controversy before it. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). We do note, however, that the preferable procedure to prove enhancement is to follow the statute, Neb. Rev. Stat. § 29-2222 (Reissue 1995), and introduce authenticated copies of the former judgment and commitment.

We vacate King's sentences and remand the cause to the trial court with directions for a new enhancement hearing and for resentencing following the hearing.

CONCLUSION

As to assignments of error Nos. 1 through 3, we determine, for the reasons set out above, that these assignments of error are without merit. With regard to assignment of error No. 4, habitual criminal, the State did not meet its burden of showing that King was counseled at all critical stages of his 1994 conviction. The trial court's finding that King was a habitual criminal, therefore, was error. We therefore vacate King's sentences and remand the cause with directions for a new enhancement hearing and for resentencing after said hearing.

AFFIRMED IN PART, AND IN PART SENTENCES VACATED AND CAUSE REMANDED WITH DIRECTIONS.

ROBERT SOTO, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

693 N.W.2d 491

Filed February 18, 2005. No. S-04-569.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong.

3. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Constitutional Law: Immunity: Waiver.** The Constitution of the State of Nebraska permits the State to lay its sovereign immunity aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
5. **Statutes: Immunity.** Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity.
6. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
7. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.
8. **Workers' Compensation: Final Orders: Time.** Waiting-time penalties, as provided in Neb. Rev. Stat. § 48-125 (Reissue 2004), apply to final adjudicated awards.
9. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
10. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
11. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
12. ____. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
13. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
14. **Constitutional Law: Statutes: Appeal and Error.** It is the duty of the Nebraska Supreme Court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
15. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
16. **Workers' Compensation: Time: Attorney Fees.** The purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in Neb. Rev. Stat. § 48-125 (Reissue 2004), is to encourage prompt payment by making delay costly if the award has been finally established.
17. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
18. **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.

19. **Workers' Compensation: Final Orders: Legislature: Time.** With respect to that portion of a workers' compensation award against the State which exceeds $50,000, the 30-day period specified in Neb. Rev. Stat. § 48-125(1) (Reissue 2004) does not begin until the first day after the judgment becomes final on which the State could request review and appropriation pursuant to Neb. Rev. Stat. § 48-1,102 (Reissue 2004) during a regular session of the Legislature. A waiting-time penalty may be assessed pursuant to § 48-125 if payment is not made within 30 calendar days thereafter.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellant.

Jon Bruning, Attorney General, and Tom Stine for appellee.

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

STEPHAN, J.

The issue presented in this appeal is whether the State of Nebraska, as an employer, may be assessed a waiting-time penalty and attorney fees when payment of a portion of a workers' compensation award issued against it is delayed for more than 30 days after becoming final because of the State's compliance with the payment procedure specified in Neb. Rev. Stat. § 48-1,102 (Reissue 2004).

BACKGROUND

On January 28, 2000, Robert Soto filed a petition in the Workers' Compensation Court seeking temporary and permanent total disability benefits due to injuries sustained while working for the State of Nebraska as an employee of the Department of Roads. On January 9, 2001, the Workers' Compensation Court entered an award in favor of Soto. On January 17, an order nunc pro tunc was entered to correct a mathematical error in the award. A review panel of the Workers' Compensation Court affirmed and awarded an attorney fee of $2,500. The Nebraska Court of Appeals affirmed the decision of the review panel in an opinion not designated for permanent publication, awarding an additional attorney fee of $3,000. *Soto v. State*, No. A-01-834, 2002 WL 976005 (Neb. App. May 14, 2002) (not designated for permanent publication). The decision of the Court of Appeals was not appealed by either party,

and the mandate was issued on June 27, 2002. As of the date of the Court of Appeals' award, the State owed Soto $71,666.64 for past benefits and attorney fees and was obligated to pay further benefits of $409 per week. On June 7, before the mandate was issued, the State paid Soto $50,000 of the judgment amount but withheld payment of $21,666.64, asserting that § 48-1,102 prevented it from paying that balance until the Nebraska Legislature reviewed the award and made a specific appropriation. The State made the weekly payment of $409 as ordered beginning June 18, 2002.

On November 15, 2002, Soto filed a second petition seeking immediate payment of the $21,666.64 balance, as well as additional payments and/or fees for waiting time pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). The State discontinued making weekly payments after January 27, 2003. As of April 21, 2003, the Legislature had not reviewed or made specific appropriation for the payment of the balance of Soto's award.

Following a hearing on May 15, 2003, the compensation court determined that the balance on the award subject to penalty was $16,166.64, and assessed a waiting-time penalty of $8,083.32 for this unpaid compensation. In addition, the court imposed a penalty of $204.50 per week for all weekly benefits unpaid after January 27, 2003, until weekly benefits were no longer delinquent.

The State appealed, and a review panel of the compensation court reversed the penalty award. The review panel reasoned that in enacting § 48-1,102, the Legislature could not have intended to make the State of Nebraska liable for additional compensation in the form of waiting-time penalties when the legislative review and specific appropriation required by the statute entailed a process which inevitably would delay payment "well in excess of thirty days." Soto perfected a timely appeal from this order, and we granted his petition to bypass.

ASSIGNMENT OF ERROR

Soto assigns, combined and restated, that the review panel erred in reversing the award on the basis of its determination that the State was not liable for a waiting-time penalty under § 48-125.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1)

the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 2004).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong. See *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

[3] When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

ANALYSIS

[4-6] The Constitution of the State of Nebraska permits the State to lay its sovereign immunity aside and consent to be sued on such terms and conditions as the Legislature may prescribe. Neb. Const. art. V, § 22; *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity. *Id.* A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004); *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

With respect to workers' compensation claims, the Legislature has stated that "[t]he Nebraska Workers' Compensation Act shall apply to the State of Nebraska [and] to every governmental agency created by it . . . ." Neb. Rev. Stat. § 48-106(1) (Reissue 2004). In part V of the act, codified at Neb. Rev. Stat. §§ 48-192 through

48-1,109 (Reissue 2004), the Legislature set forth "uniform procedures for the bringing of workers' compensation claims against the state" which "shall be used to the exclusion of all others." § 48-192. Two statutes within part V of the act are pertinent to our analysis of this case. Section 48-199 provides:

> In all suits brought under sections 48-192 to 48-1,109, *the state shall be liable in the same manner and to the same extent as a private individual under like circumstances*, except that no writ of execution shall issue against the state or any state agency, and disposition of or offer to settle any claim made under sections 48-192 to 48-1,109 shall not be competent evidence of liability of the state or any employee or amount of damages.

(Emphasis supplied.) Section 48-1,102 provides:

> Any award to a claimant and any judgment in favor of a claimant under sections 48-192 to 48-1,109 shall be certified by the Attorney General to the Director of Administrative Services, who shall promptly issue his or her warrant for payment of such award or judgment out of the Workers' Compensation Claims Revolving Fund, if sufficient money is available in such fund, *except that no portion in excess of fifty thousand dollars of any award or judgment shall be paid until such award or judgment has been reviewed by the Legislature and specific appropriation made therefor.* Delivery of any warrant in satisfaction of an award or judgment shall be made only upon receipt of a written receipt by the claimant in a form provided by the Attorney General.

(Emphasis supplied.)

[7-8] The dispute in this case involves the relationship of these two statutes with § 48-125, which provides in pertinent part that

> all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court.

As construed by this court, this section authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000); *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Waiting-time penalties, as provided in § 48-125, apply to final adjudicated awards. *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

[9] Soto argues that because § 48-199 makes the State "liable in the same manner and to the same extent as a private individual under like circumstances," with no stated exception for waiting-time penalties, a penalty should be assessed with respect to that portion of the award which was not paid within 30 days after it became final. The State does not argue that the statutes present any tension with regard to timely payment of ordered weekly benefits. The State does argue, however, that it is not liable for waiting-time penalties for amounts over $50,000 because § 48-1,102 requires it to submit the portion of the award exceeding $50,000 to the Legislature for review and specific appropriation prior to payment, a process which ordinarily requires more than 30 days because the Legislature does not sit in continuous session. The trial judge generally agreed with Soto's reading of the relevant statutes, but the review panel agreed with the State's interpretation. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002); *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). Applying this standard, we conclude that the statutes before us in this case are open for construction.

[10-12] We are guided by familiar principles. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004); *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003). Statutes relating to the same subject

matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004); *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

In this case, there is a conflict between § 48-199, which makes the State liable for workers' compensation "in the same manner and to the same extent as a private individual under like circumstances," and § 48-1,102, which requires legislative review and appropriation with respect to that portion of a workers' compensation award against the State which is in excess of $50,000, a requirement not imposed upon private employers. The specific requirement of § 48-1,102 controls over the general language of § 48-199, and the State is therefore required by law to obtain legislative review and specific appropriation for the amount of any award exceeding $50,000 before payment of such amount can be made.

[13,14] Soto, however, argues such a requirement is unconstitutional under the principle that " '[t]he separation of powers doctrine prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.' " Brief for appellant at 12, quoting *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). In response, the State argues that § 48-1,102 does not envision legislative "review" that would permit substantive alteration of a final workers' compensation judgment, but merely provides for an official examination to verify a lawful basis for appropriation of public moneys, and that thus, the statute does not run afoul of the separation of powers doctrine. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). It is the duty of this court to give a

statute an interpretation which meets constitutional requirements if it can reasonably be done. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). We conclude that the State's interpretation of § 48-1,102 is reasonable and therefore hold that the statute so construed does not violate the separation of powers doctrine. We likewise find no merit in Soto's argument that the statute deprives him of equal protection of the law or constitutes special legislation.

[15] It is clear that compliance with § 48-1,102 will necessarily result in portions of some final workers' compensation awards against the State remaining unpaid for more than 30 days. The Legislature convenes annually on the "first Wednesday after the first Monday in January" and remains in regular session for up to 90 legislative days in odd-numbered years and 60 legislative days in even-numbered years unless extended by a vote of four-fifths of all members. See Neb. Const. art. III, § 10. Thus, as noted by the review panel, there is no evidence that the Legislature was in session when the judgment in this case became final on June 27, 2002, and the next regular session would not have commenced until January 2003. We further agree with the review panel that it is unlikely that the Legislature intended, by enacting § 48-1,102, to subject the State to waiting-time penalties in cases where compliance within 30 calendar days was impossible. Similarly, we reject Soto's argument that the State is obligated to call the Legislature into special session, if necessary, in order to comply with § 48-1,102 and avoid a waiting-time penalty. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001); *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

[16,17] On the other hand, we find nothing in the Nebraska Workers' Compensation Act reflecting a legislative intent to completely absolve the State from liability for waiting-time penalties on portions of awards which are subject to the review and appropriation requirement of § 48-1,102. As the trial judge noted, the purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in § 48-125, is to encourage prompt payment by making delay costly if the award has been finally

established. *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998); *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998). The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act. *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). Thus, we cannot conclude that in enacting § 48-1,102, the Legislature intended to create a circumstance whereby the State could indefinitely delay payment of a portion of a workers' compensation judgment without penalty by not promptly pursuing legislative review and appropriation as required by § 48-1,102.

[18,19] 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. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002). In order to harmonize §§ 48-199, 48-1,102, and 48-125 in the context of waiting-time penalties in a manner which is consistent with the overall purpose of the act, we hold that with respect to that portion of a workers' compensation award against the State which exceeds $50,000, the 30-day period specified in § 48-125(1) does not begin until the first day after the judgment becomes final on which the State could request review and appropriation pursuant to § 48-1,102 during a regular session of the Legislature. A waiting-time penalty may be assessed pursuant to § 48-125 if payment is not made within 30 calendar days thereafter.

In this case, Soto's award became final on June 27, 2002, when the mandate of the Court of Appeals issued. The Legislature next convened in regular session on January 8, 2003. 1 Leg. J. 98th Leg., 1st Sess. 1 (January 8, 2003). The parties stipulated that as of April 21, 2003, the Legislature had not reviewed or made specific appropriation for payment of the award. However, because the record does not specifically reflect the first date on which the State could have requested legislative review and appropriation pursuant to § 48-1,102, or whether the balance of the award was paid within 30 days of such date, we cannot determine whether a

waiting-time penalty should be assessed. Accordingly, we reverse the judgment of the review panel of the Workers' Compensation Court and remand the cause with directions to further remand to the trial judge for further proceedings consistent with this opinion to determine whether a waiting-time penalty and attorney fee should be assessed pursuant to § 48-125.

REVERSED AND REMANDED WITH DIRECTIONS.

JERRY STEVENS AND CYNTHIA STEVENS, APPELLANTS,
V. DOWNING, ALEXANDER, WOOD & ILG,
A PARTNERSHIP, ET AL., APPELLEES.
693 N.W.2d 532

Filed February 25, 2005. No. S-03-782.

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 determine the matter independently of the trial court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **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.
4. **Actions: Parties.** Pursuant to Neb. Rev. Stat. § 25-301 (Cum. Supp. 2004), every action shall be prosecuted in the name of the real party in interest.
5. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
6. **Actions: Parties.** The purpose of the inquiry as to whether a party is a real party in interest is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Actions: Parties: Standing.** The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional.
8. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
9. **Bankruptcy.** Federal law determines the scope of a debtor's bankruptcy estate.
10. **Actions: Bankruptcy.** State law determines only whether a cause of action accrued to the debtor as of the commencement of the bankruptcy case; once that determination has been made, federal law controls whether the trustee can maintain a cause of action on behalf of the bankruptcy estate.

11. **Actions: Bankruptcy: Malpractice: Attorney and Client.** Federal law provides that when a legal malpractice cause of action has accrued to the debtor as of the commencement of the bankruptcy case, it becomes part of the bankruptcy estate.
12. **Pleadings: Bankruptcy.** Under title 11 of the U.S. Code, when a debtor files a voluntary petition in the bankruptcy court, the debtor is divested of all his or her assets and the assets are transferred to the bankruptcy estate.
13. **Actions: Bankruptcy.** Legal or equitable interests, as referenced in 11 U.S.C. § 541(a)(1) (2000), include any causes of action belonging to the debtor at the time the bankruptcy case is commenced.
14. **Bankruptcy: Property.** In a chapter 12 bankruptcy proceeding, property of the bankruptcy estate includes all legal or equitable interests the debtor acquires before and after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.
15. **Actions: Bankruptcy: Property: Abandonment.** Once a cause of action becomes the property of the bankruptcy estate, it remains so unless abandoned by the estate.
16. **Bankruptcy: Abandonment: Words and Phrases.** Abandonment is the divestiture of the bankruptcy estate's interest in the property, and once abandoned, a debtor's rights to the property are treated as if no bankruptcy petition was filed.
17. **Bankruptcy: Property: Abandonment: Notice.** In order for property of the bankruptcy estate to be abandoned, notice of the proposed abandonment must be given and a hearing held on any timely objections to the abandonment.
18. **Bankruptcy: Property: Abandonment.** Where property has not been scheduled by a debtor or disclosed to creditors, there can be no abandonment of the property.
19. **Bankruptcy.** A debtor seeking protection under the bankruptcy laws must disclose to the bankruptcy court all assets, or potential assets. This duty is a continuing one that does not end once the forms are submitted to the court.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Arlan G. Wine for appellant.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The district court for Sarpy County granted summary judgment in favor of the appellees, Downing, Alexander, Wood & Ilg; Nebraska Law Offices, P.C.; Shawn M. Ilg; and Ilg, P.C., L.L.O., and dismissed the legal malpractice claim of the appellants, Jerry Stevens and Cynthia Stevens, after determining the appellants

were not the real parties in interest. The appellants perfected this appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm.

BACKGROUND

From October 1997 until April 2000, the appellants were represented by Ilg. Ilg initially represented the appellants with respect to a loan payment default and an upcoming balloon payment. He later represented them with respect to the filing and prosecution of a chapter 12 bankruptcy case, which offers reorganization protection for farmers. See 11 U.S.C. § 1201 et seq. (2000 & Supp. II 2002). During most of the appellants' representation by Ilg, Ilg was associated with the law firm of Downing, Alexander, Wood & Ilg. However, in December 1999, Ilg left that firm and is currently an attorney with the defendant law firm Ilg, P.C., L.L.O. Since January 2000, the firm of Downing, Alexander, Wood & Ilg has been known as Downing, Alexander & Wood.

In February 1998, the appellants filed for chapter 12 bankruptcy protection, and in February 1999, the appellants' third amended bankruptcy plan was confirmed. According to the appellees, the appellants' bankruptcy is still ongoing. In April 2000, Ilg withdrew as the appellants' attorney and the appellants retained new counsel. In 2002, the appellants filed on their own behalf the present legal malpractice action. In their petition, and the amended petition that followed, the appellants alleged that the appellees were negligent in their representation of the appellants prior to the filing of the bankruptcy petition by advising the appellants to cease making payments on their home mortgage because the debt would be restructured under the bankruptcy and that the attorneys delayed the filing of the bankruptcy petition for over 3 months. The petition also alleges the appellees were negligent following the filing of the petition in a number of respects relating to the prosecution of the bankruptcy proceeding. In their answer, the appellees asserted as affirmative defenses that the appellants were not the real parties in interest and that the amended petition failed to state a cause of action against the appellees.

Thereafter, the appellees filed a motion for summary judgment claiming the appellants "are not the real parties in interest and

not vested with the purported causes of action set forth in their Amended Petition." The district court agreed and granted summary judgment in favor of the appellees. Relying on *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992), the district court concluded that the malpractice action belonged to the bankruptcy estate and that, therefore, the appellants were not the proper parties in interest to bring the claim.

ASSIGNMENTS OF ERROR

The appellants allege that the district court erred in (1) holding that the appellants had no standing to bring forth the lawsuit in their own names and (2) sustaining the appellees' motion for summary judgment and dismissing the case.

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 determine the matter independently of the trial court. *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, *ante* p. 222, 691 N.W.2d 147 (2005).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

[3] 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. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

ANALYSIS

On appeal, the appellants argue that the district court erred in (1) holding that the appellants had no standing to bring forth the lawsuit in their own names and (2) sustaining the appellees' motion for summary judgment and dismissing the case. The appellants argue that after the confirmation of their bankruptcy plan, the property of the bankruptcy estate, including any causes of action, revested in them. The appellants claim that as a result of the revesting of property, they are the real parties in interest to bring the malpractice action. The appellants concede, however,

that any damages recovered would be subject to claims of their creditors. The appellees argue that the appellants' "revesting" argument is without merit because the appellants did not disclose the cause of action as an asset to the bankruptcy court.

[4-6] The appellants contend that the district court erred in dismissing their malpractice action on the basis that they are not the proper parties in interest. Neb. Rev. Stat. § 25-301 (Cum. Supp. 2004) provides that subject to an exception not involved in this case, "[e]very action shall be prosecuted in the name of the real party in interest . . . ." See, also, *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). We have stated:

> " 'To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.' "

Id. at 931, 652 N.W.2d at 870. " 'The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.' " *Eli's, Inc. v. Lemen*, 256 Neb. 515, 527, 591 N.W.2d 543, 552 (1999).

[7,8] The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional. *Id.* The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Governor's Policy Research Office v. KN Energy, supra.*

The appellants claim that upon the confirmation of their chapter 12 bankruptcy plan, the property of the bankruptcy estate, including any causes of action, revested in them. As a result of the revesting of the property, the appellants claim they are parties in interest with respect to the present malpractice suit. We disagree.

[9-11] Federal law determines the scope of a debtor's bankruptcy estate. *In re Segerstrom*, 247 F.3d 218 (5th Cir. 2001). State law determines only whether a cause of action accrued to the debtor as of the commencement of the bankruptcy case; once that determination has been made, federal law controls whether the

trustee can maintain a cause of action on behalf of the bankruptcy estate. *Id.* Federal law provides that when a legal malpractice cause of action has accrued to the debtor as of the commencement of the bankruptcy case, it becomes part of the bankruptcy estate. *Id.*

[12-14] Under title 11 of the U.S. Code, when a debtor files a voluntary petition in the bankruptcy court, the debtor is divested of all his or her assets and the assets are transferred to the bankruptcy estate. 11 U.S.C. § 541(a) (2000). As stated in § 541(a)(1), the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." The reference in § 541(a)(1) to "legal or equitable interests" includes any causes of action belonging to the debtor at the time the bankruptcy case is commenced. See, *In re Segerstrom, supra*; *In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). Additionally, with respect to chapter 12 bankruptcy, the property of the estate also includes "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first." 11 U.S.C. § 1207(a)(1). Thus, under a chapter 12 bankruptcy proceeding, when a cause of action accrued to a debtor is immaterial to the determination of whether the claim is part of the bankruptcy estate, so long as the case has not been closed, dismissed, or converted to a chapter 7 bankruptcy. There is no evidence in the record of this case that the appellants' bankruptcy case has been closed, dismissed, or converted. Consequently, we conclude that the present malpractice claim is the property of the bankruptcy estate.

Having determined that the appellants' malpractice claim is the property of the bankruptcy estate, we must determine whether the appellants can bring the cause of action in their own names. We have previously addressed whether a debtor has standing to bring a cause of action in his or her own name when the cause of action accrues before the bankruptcy petition was filed. In *Pappas v. Sommer, supra*, we held that the debtors did not have standing to bring their legal malpractice claim which accrued prior to the filing of their bankruptcy petition because the cause of action was the property of the bankruptcy estate and that thus, the trustee, not the debtor, was the proper party to litigate the claim. We similarly

conclude that under the circumstances of this case, the appellants do not have standing to bring this cause of action and, therefore, are not the real parties in interest.

[15-18] Once a cause of action becomes the property of the bankruptcy estate, it remains so unless abandoned by the estate. 11 U.S.C. § 554(d) (2000). Abandonment is the divestiture of the bankruptcy estate's interest in the property, and once abandoned, a debtor's rights to the property are treated as if no bankruptcy petition was filed. 5 Collier on Bankruptcy § 554.02[3] (15th ed. 2004). In order for property of the bankruptcy estate to be abandoned, notice of the proposed abandonment must be given and a hearing held on any timely objections to the abandonment. 11 U.S.C. § 554(a); Fed. R. Bankr. P. & Off. Bankr. Forms 6007. Alternatively, property may be abandoned where it has been scheduled under 11 U.S.C. § 521(1) (2000) and has not been administered when the bankruptcy case is closed. 11 U.S.C. § 554(c). "Abandonment presupposes knowledge." 5 Collier on Bankruptcy, *supra*, § 554.03 at 554-13. Where property has not been scheduled by a debtor or disclosed to creditors, there can be no abandonment of the property. See, *Vreugdenhill v. Navistar Intern. Transp. Corp.*, 950 F.2d 524 (8th Cir. 1991); 5 Collier on Bankruptcy, *supra*, § 554.03. In *Vreugdenhill*, the court held that under the federal Bankruptcy Code, the debtor must formerly schedule the property before the close of the case for the property to be abandoned by operation of law.

In the present case, there was no abandonment of the appellants' malpractice claim pursuant to § 554(a). There was also no abandonment under § 554(d), since the appellants' bankruptcy case remains open; nor could there have been an abandonment, because the appellants failed to schedule the claim as an asset. We conclude, therefore, that the cause of action belongs to the bankruptcy estate and that the appellants have no standing to bring the lawsuit.

[19] In reaching this conclusion, we reject the appellants' argument that upon confirmation of their bankruptcy plan, the present cause of action revested in them, making them the proper parties to bring the claim. A debtor seeking protection under the bankruptcy laws must disclose to the bankruptcy court all assets or potential assets. See 11 U.S.C. §§ 521(1) and 541(a)(7). This duty

is a continuing one that does not end once the forms are submitted to the court. See *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). Here, the appellants did not disclose the malpractice claim as an asset to the bankruptcy court and therefore the claim could not revest in them. See *Valley Federal Sav. Bank v. Anderson*, 612 N.E.2d 1099 (Ind. App. 1993).

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

DENNY WIEKHORST EQUIPMENT, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. TRI-STATE OUTDOOR MEDIA GROUP, INC., APPELLEE AND CROSS-APPELLANT.

693 N.W.2d 506

Filed February 25, 2005. No. S-03-1114.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Collateral Estoppel.** Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
3. **Landlord and Tenant: Leases: Appurtenances.** In the absence of an agreement, the right of a tenant to remove a fixture from real property must be exercised during the term of the lease.
4. ____: ____: ____. Where a lessee is given the right to remove fixtures, he must exercise that right within a reasonable time. When the lessee fails to remove the fixtures within a reasonable time, he loses his right thereto.
5. **Real Estate: Appurtenances.** Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

William E. Gast, of William E. Gast, P.C., L.L.O., and Gene M. Eckel for appellant.

Richard A. Drews, of Taylor, Peters & Drews, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court enjoined Tri-State Outdoor Media Group, Inc. (Tri-State), from removing an advertising structure (billboard) on land owned by Denny Wiekhorst Equipment, Inc. (Wiekhorst), until on or after July 2007. The court also ordered Tri-State to pay annual rent in a sum equaling 25 percent of the annual gross rent it received for advertising fees. Wiekhorst timely appealed, and Tri-State has filed a cross-appeal.

SCOPE OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

FACTS

In 1985, Western Outdoor Advertising Company (Western) erected a billboard on property owned by Roy A. Smith, who operated H.P. Smith Motors. The billboard measures 14 by 48 feet and has two faces. It is attached to a 36-inch diameter, single-pole all-steel structure. The property on which the billboard is located overlooks Interstate 80 in Omaha, Nebraska.

The lease agreement between Western and Smith, dated July 1, 1985, provided for an initial 5-year term, renewable for "an additional" 5-year period, in the event that Western gave written notice of its intention to exercise the option to renew at least 10 days "prior to the expiration of the initial five-year period of this lease." The lease stated that Western was to pay rent of $1 per year, in return for which Smith received a discounted rate on advertising his business on the billboard. The lease was renewed once for a 5-year term beginning on November 11, 1991. The record does not indicate that any party attempted to renew the lease after this first renewal.

The record is unclear as to the precise date, but in 1997 or 1998, Tri-State purchased Western, allegedly acquiring its property, equipment, structures, and display and lease contracts. There is no evidence in the record concerning this transaction, and we are unable to determine what Tri-State actually purchased. Tri-State had no communication with Smith concerning its acquisition of Western's leases. Tri-State continued to renew permits to operate the billboard and to collect advertising fees without rendering payment of rent or other consideration to Smith. Nor did Tri-State account to Smith for advertising fees received. Smith sold his automobile dealership in 1997, and he had apparently forgotten about the lease until he was contacted by Wiekhorst about purchasing the property on which the billboard stands.

On or about April 25, 2002, Tri-State filed for bankruptcy protection under chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of Georgia, Columbus Division.

In July 2002, Wiekhorst purchased the real estate upon which the billboard is located from Smith for $500 in cash and a $7,000 donation to a charity of Smith's choice. The warranty deed was recorded on July 31. The property is approximately 5 feet wide at one end and 28 feet wide on the other, and approximately 60 feet long. One of the co-owners of Wiekhorst stated that the property is of little use for any purpose other than a billboard.

Wiekhorst sought relief from the automatic stay of the bankruptcy court and asked for a determination that the lease agreement concerning the billboard was terminated or had expired. In Tri-State's proposed chapter 11 plan, it sought to assume the alleged executory contract or unexpired lease at issue. Wiekhorst objected. The bankruptcy court found that the lease between Smith and Western had terminated or expired prior to the filing of the bankruptcy action, so there was no executory contract or valid unexpired lease for Tri-State to assume or reject. For this reason, the bankruptcy court granted Wiekhorst relief from the stay and sustained its objection to Tri-State's proposed assumption of the alleged lease. The bankruptcy court directed Tri-State to pay Wiekhorst an administrative fee of $3,600, based on $600 per month for 6 months.

Wiekhorst subsequently learned that Tri-State intended to remove the billboard from the property. Wiekhorst agreed, but insisted that removal could be accomplished only by compliance with certain conditions. The parties were unable to agree on the proper method of removal.

On February 28, 2003, Tri-State sent crews to Omaha to simply cut off the billboard pole at the ground and leave the foundation buried in the ground. Tri-State was prevented by Wiekhorst from entering the property to remove the billboard and subsequently claimed that it was damaged in the amount of $2,550 for expenses incurred, including labor and travel for the crews sent to remove the billboard.

On April 8, 2003, Wiekhorst filed an amended petition in Douglas County District Court, in which it stated that Tri-State claimed some ownership rights in the billboard through a lease agreement entered into on or before July 1, 1985, by and between Smith and Western. Wiekhorst alleged that Tri-State and/or Western had been in breach of the obligations stated in the lease agreement and that no consideration had been paid under the lease agreement since at least July 1997. Wiekhorst alleged that the lease agreement specifically provided that the billboard at issue was a part of the demised premises which reverted to the owner of the property upon expiration or breach of the lease. Wiekhorst asserted that it was the owner of the billboard and that Tri-State had no right to remove it.

The trial court found that the value of the property was totally dependent upon its use as a site for advertising and that if the billboard were removed 18 years after its construction and after changes to the Omaha Municipal Code, the property would become worthless. It found that Wiekhorst, as the owner of the property, would suffer irreparable injury if Tri-State were allowed to remove the billboard.

The trial court found that the billboard had not been removed during the term of the lease or any extension thereof and that there had not been any attempt to remove the billboard within a reasonable time after the expiration of the lease. It also found that Tri-State continued to collect fees for billboard advertisements without paying rent to the owner of the property.

The trial court concluded that Tri-State had conducted business after expiration of the lease as if it had a "de facto lease" with the landowner, first Smith and then Wiekhorst. It therefore enjoined Tri-State from removing the billboard from Wiekhorst's property until on or after July 2007, the completion of the fifth year of the parties' de facto lease. Tri-State was ordered to pay annual rent to Wiekhorst in a sum equaling 25 percent of the annual gross rent received by Tri-State for advertising fees.

As to Tri-State's counterclaim, the trial court found that Tri-State should not have dispatched sign removal crews to Omaha until a mutual agreement concerning removal had been reached. Since the parties had not agreed as to the method of removal, Tri-State was on notice that Wiekhorst would not consent to Tri-State's planned method of removal. The court dismissed Tri-State's counterclaim with prejudice.

Wiekhorst appeals from the order, and Tri-State has filed a cross-appeal.

ASSIGNMENTS OF ERROR

Wiekhorst asserts that the trial court erred (1) in finding that a 5-year de facto lease existed between the parties, notwithstanding the fact that on February 19, 2003, the U.S. Bankruptcy Court for the Middle District of Georgia found that there was no valid unexpired lease from and after the April 2003 filing of Tri-State's bankruptcy petition; (2) in ruling that Tri-State owned the billboard at the time of trial, notwithstanding the fact that Tri-State failed to remove it within a reasonable time following the July 2000 expiration of the lease between the parties' predecessors in interest; and (3) in ruling, in effect, that Tri-State could remove the billboard at the termination of a de facto lease in July 2007.

On cross-appeal, Tri-State asserts that the trial court erred (1) in finding that a 5-year de facto lease existed between Tri-State and Wiekhorst from and after July 2002, after it was determined on February 19, 2003, by the bankruptcy court that there was no valid unexpired lease between the parties; (2) in finding that Tri-State failed to remove the billboard within a reasonable time after expiration of the lease, without determining that Tri-State had ever abandoned the billboard; (3) in finding that Wiekhorst would suffer irreparable harm without an adequate remedy at law,

which would justify injunctive relief preventing Tri-State from removing the billboard until July 2007; and (4) in denying Tri-State recovery of expenses incurred in sending crews to Omaha to remove its billboard, when the crews were prevented from doing so by a temporary restraining order obtained by Wiekhorst in violation of the automatic stay in Tri-State's bankruptcy case.

ANALYSIS

Wiekhorst commenced this action in Douglas County District Court seeking an injunction and other equitable relief. An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

We first consider the trial court's determination that a 5-year de facto lease existed between the parties. Each party claims this finding was erroneous because the bankruptcy court had previously found that there was no valid unexpired lease. Each party asserts that the doctrine of collateral estoppel prevented relitigation of the issue of whether a lease existed between them.

Tri-State filed its bankruptcy petition on April 25, 2002, in the U.S. Bankruptcy Court for the Middle District of Georgia. An order of relief was entered the following day. The bankruptcy court then entered an order authorizing the filing of certain lists, including a list of billboard leases, under seal.

On December 12, 2002, Wiekhorst filed an objection to Tri-State's assumption of the lease between Smith and Western. Wiekhorst alleged that the lease was dated July 1, 1985, expired on July 1, 1990, and was not extended and that Western and/or Tri-State were holdover tenants and at some point ceased paying rent. Wiekhorst alleged that it had attempted to collect rent from Tri-State after Wiekhorst purchased the property, but its requests for payment were ignored by Tri-State. An amended plan of reorganization provided that Tri-State would assume all executory contracts not identified for rejection, and because the expired lease was not identified, Wiekhorst inferred that the lease would be assumed. Wiekhorst stated it was filing an objection because

it believed that there was no lease to assume and that an order of confirmation would promote the holdover tenancy.

Wiekhorst sought relief from the automatic stay of the bankruptcy court and asked for a determination that the lease agreement for the billboard was terminated or had expired. The bankruptcy court entered an order on February 19, 2003, granting Wiekhorst relief from the automatic stay. The court found that there was no valid unexpired lease or executory contract between Western (Tri-State's predecessor) and Smith, because the lease between them had terminated or expired prior to the filing of the bankruptcy petition. Thus, the bankruptcy court made a finding that there was no valid unexpired lease or executory contract for Tri-State to assume or reject.

This court must give full faith and credit to judgments rendered by federal courts. See *Hayes v. Payne Investment Corporation*, 127 Neb. 24, 254 N.W. 684 (1934). See, also, *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991); *State Bank of Towner v. Edwards*, 484 N.W.2d 281 (N.D. 1992) (state court has no power to review decisions of federal court and is bound by related bankruptcy proceedings).

[2] In addition, the finding that no lease existed between Tri-State and Wiekhorst cannot be relitigated under the doctrine of collateral estoppel. Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). In the case at bar, these conditions are satisfied.

First, the trial court determined that a de facto lease existed between the parties. However, the identical issue was previously determined by the bankruptcy court, which found that there was no valid unexpired lease between these parties.

Second, the bankruptcy court's finding as to the nonexistence of a lease was a final adjudication on the merits. This determination was included in an "Order Granting Relief From Automatic Stay" and in an "Order Sustaining Objection to Assumption of Alleged

Executory Contract." No further action was needed concerning whether there was a lease between the parties.

Tri-State and Wiekhorst were both parties in the bankruptcy court, which satisfies the third element of collateral estoppel. The fourth element requires that there was an opportunity to fully and fairly litigate the issue in the prior action. Wiekhorst and Tri-State were both represented before the bankruptcy court.

The determination of whether a lease existed between Tri-State and Wiekhorst had previously been decided, and that issue could not be relitigated in this action. See *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). We conclude that the trial court erred in determining that a de facto lease existed between the parties.

Since there was no valid unexpired lease for Tri-State to assume and no lease existed between Wiekhorst and Tri-State, we examine what rights Tri-State has in the billboard.

Tri-State's rights are based upon the rights of its predecessor, Western. The lease between Western and Smith provided that Western would pay $1 per year to Smith to rent space on the property for the billboard. The lease was entered into in 1985 for a 5-year term, and it was renewed in 1991 for an additional 5-year term. The record does not support a finding that the lease was renewed at the end of the second 5-year period. Thus, when Western sold its assets to Tri-State in 1997 or 1998, no lease existed between Western and Smith.

The bankruptcy court determined that there existed no valid unexpired lease between Western and Smith and that, therefore, there was no valid unexpired lease for Tri-State to assume. The lease provided that Western could remove the billboard "at any time during the term of this lease or any extension thereof, or within a reasonable time after the expiration of this lease or any extension thereof." Western did not remove the billboard during the lease or within a reasonable time after its expiration.

The trial court noted that Tri-State obviously kept the billboard in place after the lease expired because it was collecting advertising fees without having to pay rent to the landowner. Until Wiekhorst purchased the property in July 2002 and attempted to buy the billboard, Tri-State was content to collect advertising fees without making any rental payments. As the trial court stated,

"After having feasted on the collection of advertising fees on a rent free basis between 1998 and July 2002, it seems manifestly unfair and unreasonable to now allow the defendant to invoke a right of removal clause . . . ."

[3] In the absence of an agreement, the right of a tenant to remove a fixture from real property must be exercised during the term of the lease. *Free v. Stuart*, 39 Neb. 220, 57 N.W. 991 (1894). If the tenant leaves the premises without removing the fixtures and the landlord takes possession, the fixtures become the property of the landlord. *Id.* See, also, *Stevens v. Burnham*, 62 Neb. 672, 87 N.W. 546 (1901) (right of tenant, or of those claiming through or under him, to remove trade or agricultural fixture from leased premises, expires with tenancy); *Friedlander v. Ryder*, 30 Neb. 783, 47 N.W. 83 (1890).

[4] Other courts have held similarly. In *Smith v. United States*, 113 F.2d 191, 193 (10th Cir. 1940), the court held that "[w]here a lessee is given the right to remove fixtures, he must exercise that right within a reasonable time. When the lessee fails to remove the fixtures within a reasonable time he loses his right thereto." See, also, *Wilson v. Davis*, 202 Ark. 827, 153 S.W.2d 171 (1941); *Wadman v. Burke*, 147 Cal. 351, 81 P. 1012 (1905); *Mullins v. Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951); *Bernard v. Crosby*, 121 Wash. 257, 209 P. 524 (1922).

In the case at bar, ownership of the billboard is determined by the lease agreement. The lease provided:

> [A]ll signs . . . placed on the demised premises by Lessee shall at all times be and remain the personal property of Lessee, subject to removal by the Lessee at any time during the term of this lease or any extension thereof, or within a reasonable time after the expiration of this lease or any extension thereof.

Thus, the lease granted Western the right to remove the billboard at the expiration of the lease or within a reasonable time thereafter. This right did not transfer to Tri-State when it purchased Western's assets, because there was no valid unexpired lease.

Wiekhorst cites as authority *Adams Outdoor Adv. Ltd. Part. v. Long*, 253 Va. 206, 483 S.E.2d 224 (1997). In that case, a billboard was erected more than 65 years earlier by Consolvo & Cheshire, an advertising agency. The lease provided that all billboards were

the property of the lessee and that the lessee could remove the billboards upon termination of the lease. Subsequent leases between successor landowners and different lessees stated that " 'signs, structures and equipment' " erected by the lessee were the property of the lessee and could be removed by the lessee. *Id.* at 208, 483 S.E.2d at 226.

In 1993, the landowner, Robert E. Long, notified Adams Outdoor Advertising Limited Partnership (Adams) that the lease for a billboard was being terminated. Adams accepted the cancellation and notified Long that it would schedule demolition of the billboard. Long filed an action to enjoin Adams from demolishing the billboard because Long wanted to use the billboard to advertise his own business. The trial court held that Long, as the landowner, owned the billboard, and the Virginia Supreme Court affirmed that holding.

Because the billboard was permanently affixed to the land, the appellate court held that the billboard's character was determined by the agreement between the parties, if one existed. "Whether such a structure remains personalty, owned by the person who erected the structure, or becomes part of the realty, and thus owned by the landowner, is determined . . . by an agreement establishing the nature and ownership of the structure . . . ." *Id.*

The court stated:

> When tenants retain ownership of structures they erect on property and are allowed to remove the structures, the removal generally must occur within a reasonable period after the end of the tenancy. If the structure is not removed, it becomes the property of the landlord because it is affixed to the land. 1 Raleigh C. Minor, *The Law of Real Property* § 37 (Frederick D.G. Ribble ed., 1928).

253 Va. at 209, 483 S.E.2d at 226.

Consolvo & Cheshire had constructed the billboard and did not remove it at the conclusion of its tenancy or within a reasonable time thereafter. "Consequently, the billboard, which was permanently affixed to the land, became part of the realty and the property of the landowner. When Long acquired the land, he acquired the billboard as part of the land purchased." *Id.* at 209, 483 S.E.2d at 227. The court stated that the entry of a former tenant onto the land to remove the structure would itself constitute

a trespass, citing 2 Thompson on Real Property § 13.05(c) (David A. Thomas 2d ed. 1994).

In the case at bar, Western entered into a lease agreement with Smith in 1985, and Western leased the property from Smith until 1996. Western did not remove the billboard within a reasonable time after termination of the lease. The billboard then became part of the realty and belonged to Smith, who subsequently sold the property and the billboard to Wiekhorst.

When Tri-State purchased Western's assets, including certain leases, it did not acquire a lease for the billboard because Western had no interest in the billboard after the expiration of its lease with Smith. Thus, Tri-State had no interest in the billboard. Tri-State did not attempt to renew the lease with Smith. Instead, Tri-State elected to continue collecting advertising fees without compensating or accounting to the landowner. It did not operate as if it had a de facto lease with Wiekhorst because it paid nothing to Wiekhorst, even though it was collecting advertising fees. Tri-State subsequently refused to compensate Wiekhorst for use of the property.

[5] We further note that this court has held, "Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case." *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 23, 374 N.W.2d 838, 842 (1985). In the case at bar, Smith testified that he believed he was selling the property and the billboard to Wiekhorst because Smith owned the property and he believed Tri-State had abandoned the billboard by discontinuing rent payments. The billboard became a part of the realty upon termination of the lease and the failure of Western to remove the billboard within a reasonable time thereafter. It became the property of Smith, who subsequently sold it to Wiekhorst.

If a court of equity has properly acquired jurisdiction of a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999). We agree with the trial court's finding that the billboard had not been removed within a reasonable time after expiration of the lease. However, the court erred in holding that a de

facto lease existed and that the billboard belonged to Tri-State. The court also erred in directing that Tri-State retain use of the billboard for advertising purposes until 2007.

Upon remand, we direct the trial court to order Tri-State to account to Wiekhorst for the net profits from advertising fees received by Tri-State from the date Wiekhorst purchased the real estate to the present, less any administrative fee paid to Wiekhorst as ordered by the bankruptcy court.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment consistent with this opinion. There is no merit to the remaining issues in Tri-State's cross-appeal, and it is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DARYL B. ANDERSON, APPELLANT.
693 N.W.2d 267

Filed February 25, 2005. No. S-03-1118.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
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. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
5. **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.
6. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Christopher J. Lathrop for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Daryl B. Anderson appeals from his conviction for causing serious bodily injury while driving under the influence of alcohol during a September 25, 2002, motor vehicle accident with Jaime Hillman. Anderson raises issues related to the jury instructions given at his trial, the sufficiency of the evidence to support his conviction, and the voir dire of prospective jurors.

II. BACKGROUND

Anderson was charged with causing serious bodily injury while driving under the influence of alcohol in violation of Neb. Rev. Stat. § 60-6,198 (Reissue 2004) (count I); operating a motor vehicle without an operator's license in violation of Neb. Rev. Stat. § 60-484 (Cum. Supp. 2002) (count II); operating a motor vehicle without proof of financial responsibility in violation of Neb. Rev. Stat. § 60-321 (Reissue 2004) (count III); and operating an unregistered motor vehicle in violation of Neb. Rev. Stat. § 60-302 (Supp. 2001) (count IV). Counts II, III, and IV are not subjects of this appeal.

Jury selection for Anderson's trial began on July 9, 2003. That morning, 37 individuals reported for jury duty and 24 of them initially constituted the jury panel. During the court's questioning of the 24 prospective jurors, 1 prospective juror was excused for cause by the court and was immediately replaced on the panel. Shortly thereafter, the court passed the panel for cause and the State began its voir dire. During the State's questioning of the panel, another prospective juror was excused for cause. After the court excused that prospective juror, Anderson asked the court whether the excused prospective juror needed to be replaced on the panel. The court answered, "No, not until the time that we get

down to 12 jurors that you don't have a strike for." The State continued its questioning of the panel, and five more prospective jurors were excused for cause. Anderson did not request that these five prospective jurors be replaced on the panel, and they were not replaced. Upon conclusion of its voir dire, the State passed the panel for cause. The panel then consisted of 18 prospective jurors.

After Anderson passed the panel, the district court stated the following:

> At this time counsel may exercise [their] peremptory challenges.
>
> I would tell the prospective jurors and members of the panel that each side has a right to six peremptory challenges. If they exercise those to the point where there's only 12 of you remaining, then I will call more to be examined for cause.
>
> So, counsel, bearing that in mind, you may exercise those. I would tell the parties they don't have to exercise any of them, it's up to them.

The parties then exercised their peremptory challenges, striking a total of 6 prospective jurors from the panel, 3 by each party, leaving 12 prospective jurors on the panel. The court then called six prospective jurors forward to the panel to be questioned. As the court questioned those six prospective jurors, one was excused for cause and immediately replaced. The district court passed the panel for cause, and during the State's voir dire, two prospective jurors were excused for cause and both were immediately replaced. After the State and then Anderson passed the panel for cause, the court instructed both parties that they could exercise their three remaining peremptory challenges against any of the 18 remaining prospective jurors. Each party did so, leaving the 12 individuals who were sworn in as jurors.

The State's first witness at trial was Stephanie Sorgenfrei, a friend of Hillman. On the day of the accident, Sorgenfrei and Hillman had lunch together at a restaurant in Papillion. After lunch, the two traveled east on Cornhusker Road in separate vehicles, with Sorgenfrei following behind Hillman. As Hillman and Sorgenfrei crested a hill approaching the intersection of Cornhusker Road and Eagle Hills Drive, Sorgenfrei testified that she saw a Chevrolet Suburban, driven by Anderson, at that

intersection, sitting across both eastbound lanes of Cornhusker Road and facing north. Sorgenfrei testified that Hillman attempted to evade the Suburban by maneuvering her car into the turning lane for westbound traffic when Anderson's Suburban lunged forward —"like a tiger attacking his prey"—and struck Hillman's vehicle. The parties stipulated that Hillman suffered serious bodily injury as a result of the collision.

Deputy Brian Jarrett of the Sarpy County sheriff's office responded to the accident. Jarrett testified that upon making contact with Anderson at the scene, he could smell a very strong odor of alcohol on Anderson and noticed that Anderson's eyes were watery and bloodshot and that his speech was slurred. Jarrett further testified that after Anderson was transported to the hospital, Anderson told Jarrett that he had had "a few VO Canadian Whiskey drinks" upon waking that morning and then had more drinks later that morning. While at the hospital, a blood sample was drawn from Anderson. A chemical test performed on that sample indicated a blood alcohol content of .272 grams of alcohol per 100 milliliters of blood. Anderson also submitted to a breath test after being transported from the hospital to the county jail. The breath test indicated a breath alcohol content of .260 grams of alcohol per 210 liters of breath.

At the close of all the evidence, the jury received the following instruction on the elements of causing serious bodily injury while driving under the influence of alcohol:

INSTRUCTION NO. 3

Under **Count I** of the Information in this case, depending on the evidence, you may find the Defendant:

(1) Guilty of Driving under the influence of alcohol causing serious bodily injury; or

(2) Guilty of driving under the influence of alcohol; or

(3) Not guilty.

A. ELEMENTS

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of driving under the influence of alcohol causing serious bodily injury are:

(1) The Defendant operated a motor vehicle;

(2) The Defendant operated a motor vehicle in violation of Nebraska Revised Statute Section 60-6,196;

(3) *The Defendant's act of driving proximately resulted in serious bodily injury to Jaime Hillman*;

(4) The act took place on or about September 25, 2002;

(5) The act took place in Sarpy County, Nebraska.

Section 60-6,196 states in part as follows:

(1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:

(a) While under the influence of alcoholic liquor *or of any drug*;

(b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or

(c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

. . . .

The Defendant's operation of a motor vehicle while under the influence of alcohol caused serious bodily injury to Jaime Hillman if Jaime Hillman's serious bodily injury occurred in a natural and continuous sequence, and without the Defendant's act the serious bodily injury would not have occurred. *If, on the other hand, you find that the acts or omissions of Jaime Hillman were the sole cause of her serious bodily injury, you must find Defendant not guilty.*

(Emphasis supplied.)

Anderson made three objections to this instruction. First, he argued that subparagraph A(3) above should have stated: "The Defendant's act of driving *in violation of § 60-6,196* proximately resulted in serious bodily injury to Jaime Hillman." He also argued that the words "or of any drug" should not have been included in the instruction when there was no evidence offered that he was under the influence of any drug. Finally, he argued that the last sentence quoted above should have read: "If, on the other hand, you find that the acts or omissions of Jaime Hillman were the sole *proximate* cause of her serious bodily injury, you must find the Defendant not guilty." The court overruled each objection.

The jury found Anderson guilty on counts I, II, and IV. He was sentenced to probation for a period of 18 months. Anderson filed a timely notice of appeal, and we granted the State's petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Anderson assigns, rephrased and consolidated, that the district court erred in (1) overruling each of his three objections to the jury instructions, (2) finding there was sufficient evidence to convict him of causing serious bodily injury while driving under the influence of alcohol, (3) overruling his objection to testimony regarding the blood alcohol test results, and (4) not replacing the prospective jurors excused for cause on the jury panel before the parties began exercising their peremptory challenges.

IV. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

V. ANALYSIS

1. Jury Instructions

Anderson unsuccessfully objected to jury instruction No. 3 on three grounds, which now become his first three arguments on appeal.

(a) Implication of Drug Use

Anderson argues that the district court erred in including the words "or of any drug" in the jury instruction when no evidence was offered at trial that Anderson was under the influence of any drugs. Anderson relies on *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). There, a jury received an instruction stating, " 'This is a criminal case in which the State of Nebraska has

charged [the defendant] with causing serious bodily injury by driving under the influence of alcoholic liquor or *drugs*.' " (Emphasis in original.) *Id.* at 467, 558 N.W.2d at 302. Another instruction stated, " 'The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of *causing* serious bodily injury while driving under the influence of alcoholic liquor *or drugs* are as follows . . . .' " (Emphasis in original.) *Id.* at 465, 558 N.W.2d at 301. We concluded that including the word "drugs" in the instructions was plain error because it implied that the defendant was a drug user and because there was no evidence in the record regarding drug use by the defendant.

[3,4] Upon careful consideration of our decision in *State v. Adams, supra*, we decline to apply it here to reverse Anderson's conviction. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Furthermore, jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *Id.*

Viewed as a whole, we conclude that the jury instructions do not make the same implication as that made in *State v. Adams, supra*. In *Adams*, the implication that the defendant may have been a drug user was created by including the word "drugs" in statements about what the defendant had been charged with and could be convicted of. The same cannot be said of the instructions in this case. In jury instruction No. 2, the jury was told that count I of the information charged Anderson with "operat[ing] a motor vehicle under the influence of alcohol and caus[ing] serious bodily harm." The word "drugs" does not appear in this instruction. In jury instruction No. 3, the jury was told it could find Anderson guilty of driving under the influence of alcohol causing serious bodily injury, driving under the influence of alcohol, or not guilty. The instruction said nothing relating to Anderson's driving under the influence of any drug. The instruction did use the word "drug" but only when the instruction quoted Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). Read as a whole, the instructions conveyed to the jury that Anderson was charged with operating a motor

vehicle while under the influence of alcohol, but not drugs. Anderson's argument is without merit.

(b) Proximate Cause Instruction

Anderson argues that the district court erred in instructing that "[t]he Defendant's act of driving proximately resulted in serious bodily injury to Jaime Hillman." Anderson contends that it was error to instruct the jury that the mere act of driving need proximately cause Hillman's serious bodily injury.

Anderson relies on *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997), in which the defendant was convicted of causing serious bodily injury while driving under the influence of alcohol. The jury in *Adams* was instructed that the material elements of the crime included " '[t]hat while so operating a motor vehicle [the defendant] did proximately cause serious bodily injury to [the victim].' " 251 Neb. at 465, 558 N.W.2d at 301. The defendant appealed to the Court of Appeals, which reversed the judgment and remanded the cause for a new trial. It concluded that the instructions failed to properly instruct the jury that the act of driving while under the influence must proximately cause serious bodily injury. *State v. Adams*, No. A-95-669, 1996 WL 219671 (Neb. App. Apr. 30, 1996) (not designated for permanent publication). The State petitioned for further review to this court, and we affirmed the decision of the Court of Appeals.

State v. Bartlett, 3 Neb. App. 218, 525 N.W.2d 237 (1994), provides a more detailed explanation of the proximate cause element of causing serious bodily injury while driving under the influence. The Court of Appeals found plain error when a jury was instructed that the material elements of the crime were in part as follows:

> "1. [the defendant] was operating a motor vehicle; and,
>
> "2. when he did so, he caused serious bodily injury to [the victim]; and,
>
> "3. when he did so, he had a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his blood . . . ."

Id. at 223, 525 N.W.2d at 241. The *Bartlett* court interpreted Neb. Rev. Stat. § 39-669.39 (Cum. Supp. 1992) (now codified at § 60-6,198) to require that the defendant's act of driving while intoxicated must proximately cause serious bodily injury:

> To interpret the statute otherwise, that is, to find that the statute criminalizes any bodily injury which the defendant proximately causes if the defendant happens to be driving while intoxicated, would result in an absurdity. If we were to interpret the statute in such a way, it would impose strict liability upon a defendant for an act such as assaulting his passenger, if it caused serious bodily injury, so long as the defendant happened to be driving and happened to be intoxicated in violation of § 39-669.07 [now codified at § 60-6,196]. Rather, the conduct which the statute seeks to criminalize is some *act* of the defendant which proximately causes serious bodily injury. The only act mentioned in the statute is the act of driving while intoxicated. Therefore, we believe the act of driving while intoxicated must proximately cause the injury.

(Emphasis in original.) *State v. Bartlett*, 3 Neb. App. at 224, 525 N.W.2d at 241.

In the case at bar, instruction No. 3 required proof beyond a reasonable doubt of a nexus between the defendant's *act of driving* and the serious bodily injury, rather than merely requiring proof that the injury occurred *while* the defendant was driving. It logically follows that Anderson's "act of driving" occurred while Anderson was under the influence. Therefore, read as a whole, the jury instructions fairly presented the law so that the jury could not be misled.

(c) "Sole Cause" Instruction

Anderson argues that the statement made in jury instruction No. 3, "If . . . you find that the acts or omissions of Jaime Hillman were the sole cause of her serious bodily injury, you must find Defendant not guilty" should have instead been written as "sole proximate cause."

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Anderson has failed to demonstrate any prejudice as a result of this omission. As the Court of Appeals described in *Bartlett*, "[the victim's] actions were not a defense to this charge so long as [the defendant's] conduct was a contributing factor, i.e.,

also a proximate cause." *State v. Bartlett*, 3 Neb. App. 218, 229, 525 N.W.2d 237, 244 (1994). While flawed, the instruction in this case was not prejudicial.

2. Sufficiency of Evidence

Anderson argues that there was insufficient evidence to convict him of causing serious bodily injury while driving under the influence of alcohol. He contends that the State failed to offer any evidence that his alcohol use was the proximate cause of Hillman's injuries.

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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). Anderson recognizes that "[t]aking the facts most favorable to the State, the State showed that . . . Anderson was under the influence of alcohol, a collision occurred between his vehicle and Jaime Hillman's vehicle, and . . . Hillman was seriously injured." Brief for appellant at 15. In addition, Sorgenfrei testified that Hillman attempted to avoid Anderson's vehicle on the road but was struck when Anderson's vehicle lunged into Hillman's vehicle. This is sufficient evidence to find that Anderson's act of operating a motor vehicle in violation of § 60-6,196 proximately caused serious bodily injury to another.

3. Blood Alcohol Test

[5] Anderson also assigns that the district court erred in overruling his objections to testimony regarding the blood alcohol test, a test he contends was not performed in accordance with the standards and procedures required by law. Assuming, for the sake of argument, that the court did err, we conclude that such error was harmless. 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. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

In addition to the results of the blood alcohol test, the record also contains evidence that a chemical breath test was performed on Anderson, revealing a breath alcohol content in excess of the

legal limit. Anderson has not taken exception to the chemical breath test results. That evidence supports the finding by the jury that Anderson was in violation of § 60-6,196 at the time of the accident, rendering this assignment of error meritless.

4. Voir Dire

Finally, Anderson argues that the district court committed prejudicial error when it excused six prospective jurors for cause but did not replace them on the jury panel prior to the parties' first use of peremptory challenges.

The record reveals the inconsistent actions of the district court in replacing some excused prospective jurors but not others, as recounted in detail above. The court, on its own motion, initially excused one prospective juror for cause and immediately replaced her on the panel. Subsequently, during the State's voir dire of the panel, six prospective jurors were excused for cause but were not replaced. After the parties' first round of peremptory challenges were exercised, additional individuals were called to the panel. Those that were thereafter excused for cause were immediately replaced on the panel.

After the first prospective juror had been excused but not replaced, Anderson inquired, "Judge, do we need to replace [this juror]?" The court answered, "No, not until the time that we get down to 12 jurors that you don't have a strike for." Anderson did not make an objection, and the court excused five more jurors for cause and did not replace them on the panel.

[6] We question the court's management of the jury pool in this case, but Anderson did not object to the district court's actions. Instead he inquired about the procedure. The failure to make a timely objection waives the right to assert prejudicial error on appeal. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002). That rule has equal application here. Anderson's failure to object to the district court's actions is a waiver of his right to assert this argument on appeal.

VI. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

IN RE TRUST CREATED BY HAROLD INMAN, DECEASED. ROBERT H. BRACKETT, TRUSTEE OF THE HAROLD INMAN REVOCABLE TRUST, APPELLANT, V. MARYANN TREMAINE ET AL., APPELLEES.

693 N.W.2d 514

Filed February 25, 2005. No. S-03-1183.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
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. **Evidence: Words and Phrases.** Competent evidence is evidence which is admissible and tends to establish a fact in issue.

Appeal from the County Court for Douglas County: JOSEPH P. CANIGLIA, Judge. Affirmed.

Kenneth W. Pickens and Luke H. Paladino, Senior Certified Law Student, of Pickens, Green & Gleason, L.L.P., for appellant.

Monte Taylor, of Taylor, Peters & Drews, for appellees.

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

STEPHAN, J.

Robert H. Brackett, as trustee of a revocable trust created by his grandfather, Harold Inman, now deceased, petitioned the county court for Douglas County for authority to sell certain real property held by the trust to himself. After an evidentiary hearing at which several beneficiaries of the trust appeared in opposition to the proposed sale, the court denied Brackett's petition. He perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTS

Inman, as settlor, executed a revocable trust agreement dated March 9, 1994, naming himself as the initial trustee. The beneficiaries of the trust included Inman's two daughters and seven

grandchildren, including Brackett, who was also named as successor trustee. Brackett became the trustee upon Inman's death and had served in that capacity for approximately 7 years as of the hearing held in this matter in August 2003.

The trust instrument directed that certain assets be distributed from the trust to various beneficiaries upon Inman's death. Those assets are not involved in this appeal. The trust assets also included approximately 189 acres of farmland located in Washington County, Nebraska. The trust instrument directed that Elizabeth Peters, one of Inman's surviving daughters, was to receive rental income from 55 acres of this land during her lifetime and that upon her death, Brackett was to receive the income during his lifetime. The trust instrument further provided that Brackett was to receive income from the remainder of the farmland and that upon his death, it was to be divided among the other beneficiaries or their issue.

Brackett executed a real estate purchase agreement dated September 30, 2002, whereby he agreed to purchase from "Robert Brackett as Trustee of the Inman Living Trust" a portion of the Washington County land held by the trust, consisting of 42 acres, of which 30 were tillable. On April 14, 2003, Brackett registered the trust in the county court for Douglas County and petitioned the court to approve the proposed sale of the 42-acre tract. All nine beneficiaries of the trust, including Brackett, were listed in the petition as interested parties. Brackett alleged in his verified petition that he had purchased a home and moved it "onto the real property he proposes to sale [sic] to himself." He further alleged that if the court approved the sale at a price of $84,000, a reasonable rate of return on the proceeds would exceed the income being generated by the subject property. Five of the beneficiaries thereafter filed a written objection to the proposed sale on grounds that it "serves no one's interest but the Trustee's, reduces the value of the residuary estate and amounts to a calloused disregard of the Trustee's fiduciary obligation to protect the interests of the trust beneficiaries."

An evidentiary hearing on the proposed sale was held on August 15, 2003. Brackett testified that the only assets held by the trust at that time were the 189 acres of Washington County farmland, which included the 42 acres he proposed to sell, and $300 in

cash. The 30-acre tillable portion of the 42-acre parcel was rented on a cash basis and generated income of $64 per acre, totaling $1,920. Bracket testified that the proposed purchase price of $84,000 was based upon an appraised value of $2,000 per acre. Frederick Wohlenhaus, a licensed real estate appraiser, testified that he appraised the 189-acre tract in the fall of 1999, in March 2002, and in early August 2003. He also examined the 42-acre parcel which was the subject of the proposed sale. Wohlenhaus concluded that the highest and best use of the land was agricultural and that the fair market value of the 42-acre parcel was $2,000 per acre.

Brackett testified that he purchased an old farmhouse at auction and moved it onto the 42-acre parcel in June 2002, prior to seeking court approval of the sale. He further acknowledged that as a condition of the proposed sale, he would grant a permanent easement for ingress and egress to the remaining property which is located generally northeast and southwest of the 42 acres. Brackett believed, but was not certain, that the rate of return on the farmland was approximately 2⅓ percent, based upon its appraised value. Although he professed no experience in investing, he believed that the proceeds from the sale of the land could be invested to earn a greater return. He testified that if the sale were authorized, he would employ a broker to invest the proceeds, but indicated that further research would be necessary to determine the specific investments to be made. Brackett testified that he had previously attempted to sell the entire parcel of land held by the trust but received no offers.

Dr. David Volkman testified on behalf of Brackett as an expert in economics and finance. Volkman reviewed the trust instrument, the assets held and income earned by the trust, the Nebraska Uniform Prudent Investor Act, information from the National Council of Real Estate Investment Fiduciaries, equity returns from a database, and the appraisals prepared by Wohlenhaus. Based upon this information, Volkman opined that because the assets of the trust were not diversified, the standards of the Nebraska Uniform Prudent Investor Act were not met. Volkman analyzed the diversification of the trust in relation to the return and risk of the investments and compared the rate of return on farmland as opposed to other types of investments. Asked to evaluate the risk associated with the trust assets as then held, Volkman stated:

> The greatest risk is that it's not diversified. It's invested all in one asset. And when you invest in one asset, you significantly increase the probability of not receiving the return that you would like to it. It would be similar if you went out and bought one stock and put all of your savings in one stock. There's a high probability you may not get the return that you want from that one stock.

Volkman further testified that farmland has a lower rate of return and higher risk for rate of return compared to the Dow Jones index, a higher rate of return and higher risk than treasury notes, and a significantly lower rate of return but also less risk than the NASDAQ Composite Index. He testified that the overall risk to the beneficiaries could be reduced by having a portion of the corpus invested in farmland and other portions in investments which would yield a higher rate of return.

Maryann Tremaine, Inman's other surviving daughter, testified as a spokesperson for the five beneficiaries who filed a written objection to the sale. She opposed the sale because of her belief that Inman intended the farmland to remain in trust for all of the beneficiaries and that it would increase in value over time. Another beneficiary who joined in the written objection testified that she opposed the sale for generally the same reasons. Two beneficiaries who did not file written objections also testified in opposition to the sale. Peters opposed the sale because she believed the property should remain "in the family" and was satisfied with the current income. One of Inman's granddaughters who is a beneficiary of the trust testified that she opposed the sale because "I truly believe my grandfather left the property for everybody to enjoy. It has sentimental value to the whole family, not just one person."

In its order denying Brackett authority to execute the proposed sale, the county court found that "seven of the nine trust beneficiaries oppose the sale; that there is no persuasive evidence that the proposed sale would enhance or protect the interests of the beneficiaries and that there is a likelihood that the sale would lessen the value of those interests."

ASSIGNMENTS OF ERROR

Brackett assigns, combined and restated, that by denying him authority to sell the trust property to himself, the probate court (1)

failed to allow him to diversify the assets of the trust in compliance with the Nebraska Uniform Prudent Investor Act and (2) erroneously allowed principles against self-dealing to trump statutory law and trust provisions that authorized the requested sale.

STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Conservatorship of Hanson, supra*; *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). Competent evidence is evidence which is admissible and tends to establish a fact in issue. *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998).

ANALYSIS

The Nebraska Uniform Trust Code (NUTC) was enacted in 2003 and became operative on January 1, 2005, during the pendency of this judicial proceeding. See Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Cum. Supp. 2004). Although not briefed or argued by the parties, this operative date has significance in this case because the NUTC applies to certain preexisting trust relationships. § 30-38,110. See, generally, John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312 (2003). Specifically, § 30-38,110 provides in pertinent part:

> (a) Except as otherwise provided in the Nebraska Uniform Trust Code, on January 1, 2005:
>
> (1) the code applies to all trusts created before, on, or after January 1, 2005;
>
> (2) the code applies to all judicial proceedings concerning trusts commenced on or after January 1, 2005;

(3) the code applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the code does not apply and the superseded law applies; and

(4) an act done before January 1, 2005, is not affected by the code.

Under § 30-38,110(a)(1), the NUTC is generally applicable to all trusts in existence on January 1, 2005, subject to certain statutory and perhaps constitutional exceptions. See Gradwohl & Lyons, *supra*. Because this judicial proceeding was commenced prior to the operative date of the NUTC, § 30-38,110(3) requires us to apply the NUTC except in those instances where we determine that such application would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties," in which instance, we must apply prior law which has been superseded by the NUTC.

In his brief, Brackett argues that this action is governed by Neb. Rev. Stat. § 30-2822(2) (Reissue 1995), which provided in pertinent part: "Any sale or encumbrance to the trustee . . . is voidable by any trust beneficiary except one who has consented after fair disclosure, unless (a) the trust instrument provides otherwise; or (b) the transaction is approved by the court after notice to interested persons." This statute was repealed by the NUTC. 2003 Neb. Laws, L.B. 130 (operative date January 1, 2005). Under the corresponding provision of the NUTC, a transaction involving trust property entered into by the trustee for the trustee's own personal account

is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by section 30-3894;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 30-3898; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

§ 30-3867(b). Both statutes authorize a transfer of trust assets by a trustee to the trustee's own account with court approval, and the only issue presented in this appeal is whether the county court erred in not approving Brackett's proposed sale of trust assets to himself. Because we perceive no prejudice to any party in analyzing this issue under the NUTC, we do so pursuant to § 30-38,110(a)(3).

Resolution of the issue prescribed by this appeal requires an examination of the relationship between two separate legal duties owed by a trustee to the beneficiaries of the trust. The first is the duty of loyalty, which is substantially the same under the NUTC and prior law. Under the NUTC, "[a] trustee shall administer the trust solely in the interests of the beneficiaries." § 30-3867(a). Likewise, under the former law, "[a] trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." Neb. Rev. Stat. § 8-2206 (Reissue 1997). Similar substantive provisions of the Nebraska Uniform Prudent Investor Act, formerly codified at Neb. Rev. Stat. §§ 8-2202 to 8-2205 (Reissue 1997), are also now included in the NUTC at §§ 30-3883 to 30-3886. Accordingly, pursuant to § 30-38,110(a)(3), we shall refer to the provisions of the NUTC in discussing the trustee's duties of loyalty and compliance with the prudent investor rule.

The record reflects that Brackett has purely personal reasons for seeking to acquire the 42-acre parcel from the trust. Brackett, who described himself as one who invests, remodels, and sells real estate, testified that he moved the farmhouse which he had purchased at auction to the trust property because he had "nowhere else to put it." He further acknowledged that he sought more land than was necessary for a home site because "I wanted my kids to have a good sized piece of land. I've always worked the land when I was a kid there and played up there. And it has some sentimental value, and I wanted more of a farmstead for my kids to grow up on." Brackett argues, however, that the county

court should nevertheless have approved the sale because investment of the proceeds in something other than agricultural real estate would provide diversification of trust assets in a manner consistent with the prudent investor rule, thereby benefiting all the beneficiaries.

The prudent investor rule applicable to trustees is now codified at §§ 30-3883 to 30-3889. Included in that rule is the principle that a "trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." § 30-3885. On the record before us, we conclude that there was no absolute duty to diversify the trust assets which would compel court approval of the proposed sale. The prudent investor rule is a "default rule" which "may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." § 30-3883(b). It is true, as Brackett argues, that the trust instrument in this case gave the trustee broad powers in dealing with trust assets, including the power "[t]o receive, hold, manage and care for the property held in trust," and "[t]o sell publicly or privately for cash or on time, property, real or personal, held in trust . . . ." However, the trust instrument also conferred upon the trustee the power

> [t]o retain any property, whether consisting of stocks, bonds, other securities, participations in common trust funds, or of any other type of personal property or of real property, taken over by it as a portion of the trust, *without regard to the proportion such property or property of a similar character so held may bear to the entire amount of the trust*, whether or not such property is of the class in which trustees generally are authorized to invest by law or rule of court; *intending thereby to authorize the Trustee to act in such manner as will be for the best interest of the trust beneficiaries*, giving due consideration to the preservation of principal and the amount and regularity of the income to be derived therefrom.

(Emphasis supplied.) With respect to assets originally placed in trust, this provision modifies the general duty to diversify by authorizing the trustee to retain nondiversified assets if retention would be in the best interests of the beneficiaries.

Furthermore, the trustee's statutory duty to diversify trust assets is subject to the general "prudent investor" standard of care which requires a trustee to consider various circumstances relevant to the trust or its beneficiaries in investing and managing trust assets. § 30-3884(c). These circumstances include "[a]n asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." § 30-3884(c)(8). We agree with a commentator who has noted that a similar provision in the Nebraska Uniform Prudent Investor Act could be utilized as a basis for justifying "non-diversification" of a family farm or ranch held in trust in favor of retaining the asset "for future generations of the family." Ronald R. Volkmer, *The Latest Look in Nebraska Trust Law*, 31 Creighton L. Rev. 221, 246 (1997). Brackett's professed "sentimental" attachment to the farmland which has been in his family for many years is clearly shared by the other family members who are beneficiaries of the trust. Those who filed an objection or testified in opposition to the proposed sale expressed the view that excising a 42-acre parcel from the 189-acre farm would have a detrimental effect upon their special relationship with the asset without achieving any appreciable benefit.

Brackett does not argue that his duty to diversify is absolute, but relies upon *Love v. Fauquet*, 184 Neb. 250, 166 N.W.2d 742 (1969), to support his argument that because the power to sell is clearly vested in his discretion, the sale should be allowed unless there is a clear abuse of discretion by him and the remainder beneficiaries should not be allowed to abdicate or control the sale. In *Fauquet*, the settlor devised an 80-acre farm in trust for the support and maintenance of a life beneficiary. The trust permitted invasion of the corpus in order to accomplish its objective. After liquid assets of the trust became depleted, the trustee sold the farm at a fair price. The remainder beneficiaries sought to set aside the sale in order to preserve the trust corpus and restrict the life beneficiary and the trustee to the income from the land. This court affirmed the dismissal of the action, determining that there was no conflict of interest on the part of the trustee with respect to the sale and that under the terms of the trust, the risk of invasion of the trust principal to provide liquid assets for support of the life beneficiary fell on the remainder beneficiaries. The instant case is clearly distinguishable from *Fauquet*, in that none of

the beneficiaries are dependent upon the trust for support. Peters, the only income beneficiary other than Brackett, testified that she considered the income from the farm held in trust to be sufficient. Moreover, *Fauquet* involved a sale to a disinterested third party with the express consent of the income beneficiary.

Historically, the law has looked with disfavor upon a trustee selling trust assets to himself. See, e.g., *Lancaster County Bank v. Marshel*, 130 Neb. 141, 264 N.W. 470 (1936). While such transactions are not absolutely prohibited under current law, they are voidable by a beneficiary unless specifically authorized by the trust instrument, approved by a court, or consented to or ratified by the beneficiary. See § 30-3867(c). It logically follows that a court should not approve such a transaction over the objection of a beneficiary unless it can be clearly demonstrated that the transaction is consistent with the trustee's duty to administer the trust solely in the interests of the beneficiaries. See Restatement (Third) of Trusts § 170, comment *f.* at 196 (1992) (noting that "court will permit a trustee to purchase trust property only if in its opinion such purchase is for the best interest of the beneficiary"). We agree with the county court that the evidence in this case does not meet this test. Brackett presented no specific plan for investment of the proceeds from the proposed sale, and thus, any potential benefit to the beneficiaries in the nature of increased income without a corresponding increase in risk to the principal is speculative. There is no evidence that additional income is needed in order to carry out any specific purpose of the trust, and the beneficiaries have articulated a legitimate interest in maintaining the geographic integrity of the farm that has been in their family for many years.

We conclude that the judgment of the county court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Finding no error appearing on the record, we affirm.

AFFIRMED.

ANNE DWORAK, APPELLANT, V.
FARMERS INSURANCE EXCHANGE, APPELLEE.
693 N.W.2d 522

Filed February 25, 2005. No. S-03-1428.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Insurance: Motor Vehicles: Contracts: Tort-feasors.** Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James E. Harris, Britany S. Shotkoski, and Michaela E. Welniak, of Harris Kuhn Law Firm, L.L.P., for appellant.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Anne Dworak sued her insurer, Farmers Insurance Exchange (Farmers Insurance), seeking underinsured motorist benefits and other relief pursuant to the Unfair Insurance Claims Settlement Practices Act, Neb. Rev. Stat. §§ 44-1536 to 44-1544 (Reissue 1998). Farmers Insurance moved for summary judgment, asserting that the suit was barred under Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) because the statute of limitations applicable to Dworak's suit against the driver of the other vehicle had expired prior to Dworak's commencement of the current action against

Farmers Insurance. The Douglas County District Court entered judgment in favor of Farmers Insurance.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[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. *Id.*

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

FACTS

At all times relevant to this appeal, Farmers Insurance provided automobile insurance coverage to Dworak, including underinsured motorist liability protection. On September 17, 1997, Dworak was involved in an automobile accident in Omaha. The driver of the other vehicle was Tammi Smith. As a result of the accident, Dworak incurred a number of physical injuries, some necessitating surgery.

On August 13, 2001, Smith's insurer, American Family Insurance, offered to settle with Dworak for its policy limits of $50,000. Dworak then wrote to Farmers Insurance to notify the company of the settlement offer in accordance with Neb. Rev. Stat. § 44-6412(2) (Reissue 2004).

On September 7, 2001, Dworak filed suit against Smith and an entity referred to in the petition as "Farmers' Insurance Company." Dworak claimed damages caused by Smith's negligence and sought a declaration of Dworak's rights under the underinsured motorist provisions of her insurance contract with Farmers Insurance. On the same day, Farmers Insurance wrote to notify Dworak that it would "exercise its 44-6412 opportunity" to substitute payment for the settlement proposed by Smith's insurer, American Family Insurance, pursuant to § 44-6412(2).

The district court dismissed Dworak's petition without prejudice on July 11, 2002, pursuant to the court's case progression standards. No summons was ever served upon the defendants.

Dworak filed the current action against Farmers Insurance on October 15, 2002. She sought a declaration of her "rights, status and other legal obligations and entitlements" pursuant to the underinsured motorist provisions of her insurance policy issued by Farmers Insurance. Farmers Insurance moved for summary judgment, claiming that because Dworak's cause of action against Smith was barred by the applicable statute of limitations, Dworak's suit against Farmers Insurance was also barred, pursuant to § 44-6413(1)(e).

The district court granted summary judgment in favor of Farmers Insurance. The court found that Dworak's claim against Smith had expired on September 17, 2001, and certainly no later than March 7, 2002 (the end of the 6 months allowed for service of summons with respect to the suit filed on September 7, 2001), both of which were several months before the filing of the present action. Accordingly, the court held that the present action was barred pursuant to § 44-6413(1)(e). Dworak perfected an appeal to this court.

ASSIGNMENTS OF ERROR

Dworak's assignments of error can be summarized as follows: The district court erred in finding that her present lawsuit against Farmers Insurance was barred pursuant to § 44-6413(1)(e).

ANALYSIS

The issue is whether § 44-6413(1)(e) applies to the case at bar. In its order sustaining summary judgment for Farmers Insurance, the district court relied upon § 44-6413(1)(e), which states:

> (1) The uninsured and underinsured motorist coverages provided in the Uninsured and Underinsured Motorist Insurance Coverage Act shall not apply to:
>
> . . . .
>
> (e) Bodily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist.

Dworak asserts that the district court erred in applying § 44-6413(1)(e). She concedes that service of summons in the original suit against Smith was not timely, but contends that the subsequent dismissal of that suit had no effect on the present action against Farmers Insurance. She claims that because the original action was dismissed without prejudice, she could refile suit against Farmers Insurance when her cause of action for underinsured motorist benefits accrued. According to Dworak, the district court erred in failing to consider the issue of when such a cause of action would accrue for underinsured motorist benefits.

Dworak claims that her cause of action is controlled by Neb. Rev. Stat. § 25-205 (Reissue 1995), which provides that an action on a written contract must be commenced within 5 years. At trial, Dworak asserted that Farmers Insurance breached its obligations under its policy of insurance sometime after September 14, 2001. Therefore, she claimed the 5-year limitation for actions on written contracts permitted her to commence her action against Farmers Insurance within 5 years of September 14.

[4] Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). Because of the derivative nature of underinsured motorist coverage, two statutory limitations periods are arguably applicable to an insured's action against the underinsured motorist carrier. *Id.* The first is found in § 44-6413(1)(e), which provides that underinsured motorist coverage shall not apply to an action for "[b]odily injury . . . of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the . . . underinsured motorist." The second is found in § 25-205, which provides for a 5-year statute of limitations on written contracts.

Whether § 44-6413(1)(e) applies to the case at bar presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

Dworak's claim against Farmers Insurance was filed more than 4 years after the accident involving Smith. Section 44-6413(1)(e) serves to bar certain claims for uninsured and underinsured

motorist coverage. We first addressed § 44-6413(1)(e) in *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999), where the plaintiff sued his insurer in order to recover uninsured motorist benefits after incurring injuries in an automobile accident. He did not file suit against the tort-feasor, and the suit against his insurer was filed after the expiration of the 4-year statute of limitations applicable to his action against the tort-feasor.

We held that § 44-6413(1)(e) operated as a bar to an action for uninsured motorist benefits where the insured claimant did not commence an action against the tort-feasor within the applicable limitations period. See *Kratochvil v. Motor Club Ins. Assn., supra*. We concluded that § 44-6413(1)(e) controlled the insured's claim and that the district court did not err in finding the claim was precluded because the applicable statute of limitations against the tort-feasor had expired prior to the filing of his action against his insurer.

Farmers Insurance argues that this appeal presents a factual situation that is analogous to that found in *Kratochvil*. Specifically, it claims that the 4-year statute of limitations applicable to Dworak's cause of action against Smith had expired prior to Dworak's filing of the present suit against Farmers Insurance. It contends that the filing of the original action against Smith, which was within the applicable statute of limitations, had no effect because it was subsequently dismissed. As such, it argues that § 44-6413(1)(e) serves as a bar to the present action.

Dworak relies upon *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000), and *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000), in arguing that § 44-6413(1)(e) does not apply to the case at bar. Dworak's reliance is misplaced because *Schrader* and *Snyder* are factually distinguishable. In *Schrader*, prior to the filing of the action against his insurer, but less than 4 years after the accident, Michael Schrader filed suit against the tort-feasor. More than 4 years after the accident occurred, Schrader accepted a settlement offer from the tort-feasor's insurer. Schrader then sought underinsured motorist benefits from his insurer.

Schrader's insurer moved for summary judgment, arguing that Schrader's suit against it was barred pursuant to § 44-6413(1)(e)

because it had been filed more than 4 years after the accident. The district court granted summary judgment.

We reversed and held that § 44-6413(1)(e) was not applicable. We distinguished *Kratochvil* by stating:

> In *Kratochvil*, § 44-6413(1)(e) applied because the statute of limitations on the insured's underlying claim against the uninsured motorist had expired since the insured had not timely filed suit against the uninsured motorist. In the instant case, however, the statute of limitations never expired on Schrader's claim against [the tort-feasor] because Schrader timely filed suit against her.

Schrader v. Farmers Mut. Ins. Co., 259 Neb. at 93, 608 N.W.2d at 199. We held that in such a situation, the proper statute of limitations to apply was the 5-year limit for actions for written contracts pursuant to § 25-205.

In *Snyder*, the insured, Carol Snyder, was injured in an automobile accident and sued the tort-feasor within the 4-year statute of limitations. She then settled her claim against the tort-feasor and made a demand upon her insurer for underinsured motorist benefits provided by her policy. In a letter dated more than 5 years after the accident with the tort-feasor, Snyder's insurer denied the claim. The district court entered judgment in favor of Snyder, and her insurer appealed.

We concluded that § 44-6413(1)(e) did not apply because it was clear that Snyder had commenced her action against the tort-feasor within the 4-year limitations period governing tort actions. As in *Schrader*, we held that the proper statute of limitations was the 5-year limit for written contracts. Addressing the issue of when a cause of action accrues for underinsured motorist benefits, we stated the following:

> [W]e hold that an insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy. . . .
>
> . . . Snyder's cause of action against [the insurer] did not accrue until [the insurer's] claims supervisor denied liability for underinsured motorist benefits . . . .

Snyder v. EMCASCO Ins. Co., 259 Neb. at 629, 611 N.W.2d at 416.

Dworak argues that § 44-6413(1)(e) does not apply to the present case because her original action against Smith was dismissed without prejudice. She claims this would permit the refiling of her suit against Farmers Insurance if and when it breached or failed to perform under its policy. Dworak contends that the appropriate statute of limitations is the 5-year limit applicable to actions on written contracts and that, therefore, the current action was filed in a timely manner. This argument has no merit.

As previously stated, in *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000), and *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000), the insured filed suit against the tort-feasor within the 4-year statute of limitations for actions in tort, therefore complying with § 44-6413(1)(e). For this reason, we held in each case that the limits imposed by § 44-6413(1)(e) did not apply, and we analyzed the suits against the insurers for underinsured motorist benefits under the auspices of the 5-year statute of limitations for actions upon written contracts.

Conversely, in the present case, although Dworak filed suit against Smith within the applicable 4-year statute of limitations, this suit was eventually dismissed for failure to serve summons upon Smith. Neb. Rev. Stat. § 25-217 (Reissue 1995) requires that all actions shall be dismissed without prejudice as to any defendant not served within 6 months from the date the petition was filed. Dworak's original lawsuit was dismissed in accordance with the case progression standards of the district court. However, the effect of a dismissal without prejudice is the same as if the case had been dismissed pursuant to § 25-217.

In *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000), we discussed the effect of dismissing an unserved petition without prejudice pursuant to § 25-217. We stated:

> The inference from the entire expression "shall stand dismissed without prejudice" is twofold: (1) that the dismissal of the action is mandatory and automatic in nature and (2) that notwithstanding the dismissed status of the action, the character of the dismissal is "without prejudice" and *the action may therefore be refiled if not otherwise barred, such as by the statute of limitations.*

(Emphasis supplied.) *Vopalka v. Abraham*, 260 Neb. at 745, 619 N.W.2d at 600. As such, a dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations. Dworak's filing of the suit against Smith and its subsequent dismissal without prejudice did not toll the underlying 4-year statute of limitations. Unlike *Schrader* and *Snyder*, Dworak did not prevent the expiration of the 4-year statute of limitations. Therefore, § 44-6413(1)(e) is applicable to the case at bar.

Dworak's arguments fail to take into account the purpose of § 44-6413(1)(e) and the reason for its enactment. The statute serves as a prerequisite to an insured's suit against the insurer for uninsured or underinsured motorist coverage. The purpose underlying § 44-6413(1)(e) is the protection of the insurer under circumstances where it may have to pay uninsured or underinsured motorist benefits. The statute makes it the responsibility of the insured to preserve the cause of action against the tort-feasor in order to protect the insurer's rights against the tort-feasor. Because the statute of limitations on Dworak's cause of action against Smith expired prior to filing the suit against Dworak's insurer, she failed to comply with § 44-6413(1)(e).

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). 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.*

Even when viewing the evidence in a light most favorable to Dworak, we conclude that the district court properly sustained Farmers Insurance's motion for summary judgment. Section 44-6413(1)(e) applies to this case and bars Dworak's claim pursuant to the Uninsured and Underinsured Motorist Insurance Coverage Act. The district court properly concluded that this case presents no genuine issue as to any material fact and that Farmers Insurance is entitled to judgment as a matter of law.

Dworak argues that the decision of the district court leaves open the possibility for an insured to be placed in a "legal trap and dilemma." See brief for appellant at 18. However, any potential "trap" or "dilemma" may be avoided through compliance with § 44-6413(1)(e). If Dworak had complied with § 44-6413(1)(e) by timely filing her initial suit and serving summons upon Smith, she would have preserved her cause of action against Farmers Insurance for underinsured motorist benefits.

CONCLUSION

For the reasons stated above, the order of the district court granting summary judgment in favor of Farmers Insurance is affirmed.

AFFIRMED.

MARK J. PARKERT, APPELLANT, V.
ERIC H. LINDQUIST, APPELLEE.
693 N.W.2d 529

Filed February 25, 2005. No. S-04-089.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.
3. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
4. **Attorney Fees.** Attorney fees may be recovered only when provided by statute, or where the uniform course of procedure has been to allow recovery.
5. **Contracts: Attorney Fees: Public Policy.** A contract provision requiring that in the event of litigation the prevailing party will be entitled to attorney fees is contrary to public policy and void.
6. **Contracts: Public Policy.** It is not the province of the courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
7. **Contracts: Attorney Fees: Public Policy.** In a nonjudicial proceeding, a contract provision requiring payment of a reasonable attorney fee is not against public policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Afffirmed.

Monte Taylor and Paul E. Peters, of Taylor, Peters & Drews, for appellant.

Steven J. Riekes and Harold M. Zabin, of Marks, Clare & Richards, L.L.C., for appellee.

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

CONNOLLY, J.

Mark J. Parkert appeals the district court's order dismissing his complaint seeking damages for conversion against the appellee, Eric H. Lindquist. Parkert, a trustor under a trust deed, alleged that he was coerced into paying an attorney fee to Lindquist because of a provision in the trust deed and that the provision violated public policy. We determine that in a nonjudicial setting, a contract provision requiring payment of a reasonable attorney fee does not violate public policy. Accordingly, we affirm.

BACKGROUND

Parkert's complaint alleged the following facts: Lindquist is an attorney who represents a number of mortgage lenders in pursuing remedies against delinquent borrowers. Parkert formerly owned a residence in Omaha that was financed by a loan from Wells Fargo Home Mortgage, Inc. (Wells Fargo), and was secured by a deed of trust. In May 2003, he entered into an agreement to sell his home, and before closing, he became delinquent in his payments on the mortgage. One day before closing, a notice of default and an instrument appointing Lindquist the successor trustee under the deed of trust was filed with the register of deeds. At closing, Lindquist, acting as the attorney for Wells Fargo, faxed a payoff letter to the escrow agent stating the payoff amount of the loan to Wells Fargo and directing an additional payment to Lindquist of $775.

After Parkert consulted with an attorney, he refused to pay the fee and made further inquiries. The closing proceeded in Parkert's absence, and he was sent a check for the net proceeds of the sale after deducting settlement charges, including the $775 attorney

fee. In a letter, Lindquist responded to Parkert's inquiries, citing language in the trust deed. Lindquist also sent his itemized invoice to Wells Fargo for $575.67 and a check for $199.33 which represented the difference between the amount withheld at closing and the amount Lindquist charged.

Parkert alleged that Lindquist, by taking his fee from the closing costs when he did the work for Wells Fargo, converted Parkert's money. Parkert also alleged a violation of the Consumer Protection Act and alleged that he was bringing the action as a class action. He sought restitution for himself and members of the class, prejudgment interest, and fees.

Lindquist moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). Lindquist alleged that Parkert defaulted and that the loan had been accelerated. He alleged that the fees were charged by Eric H. Lindquist, P.C., L.L.O., to Wells Fargo for services performed to pursue its remedies when Parkert defaulted on the loan. He further alleged that the trust deed with Wells Fargo provided that if payments were in default and the loan accelerated, Parkert would be obligated to pay reasonable attorney fees. A copy of the deed of trust with the language regarding attorney fees was attached to the motion.

The district court sustained the rule 12(b)(6) motion and dismissed the complaint. Parkert appealed, and we granted his motion to bypass.

ASSIGNMENT OF ERROR

Parkert assigns, rephrased, that the district court erred by dismissing his complaint.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *Id.*

[3] As a practical matter, dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes

allegations that show on the face of the complaint that there is some insuperable bar to relief. *Id.*

ANALYSIS

Parkert contends that a provision in the trust deed requiring the payment of a lender's attorney fees as part of the costs of collection is against public policy. Relying on cases where we disallowed provisions requiring fees to be paid to the opposing party in litigation, he argues that the rule should also extend to nonjudicial proceedings. We disagree.

[4,5] We have stated that the general rule in this jurisdiction is that attorney fees may be recovered only when provided by statute, or where the uniform course of procedure has been to allow recovery. *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). We have additionally held that a contract provision requiring that in the event of litigation the prevailing party will be entitled to attorney fees is contrary to public policy and void. *Id.* See *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). This rule is derived from what is often referred to as the "American rule." The American rule focuses on contractual provisions allowing attorney fees in judicial proceedings. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

Although we have applied the American rule to invalidate contracts providing for fees to prevailing parties in judicial proceedings, we have never applied the rule to nonjudicial proceedings.

[6,7] In determining whether to apply the American rule to nonjudicial proceedings, we recognize a strong policy favoring the parties' freedom to contract. See *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). " 'It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.' " *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 480, 293 N.W.2d 843, 849 (1980). Here no such demand exists. Thus, in the light of a strong policy allowing parties the freedom to contract, we decline to extend the rule to nonjudicial proceedings. Accordingly, we hold that in a nonjudicial proceeding, a contract provision requiring payment of a reasonable attorney fee is not against public policy.

Here, Parkert did not allege that the fee provision is ambiguous, nor has he alleged that the fee was unreasonable. Because the fee was not collected in a judicial proceeding, the contract provision was valid. Thus, Parkert could not state a claim for conversion or violation of the Consumer Protection Act and the district court correctly dismissed. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RONALD J. PALAGI, RESPONDENT.

693 N.W.2d 276

Filed February 25, 2005. No. S-04-1182.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Ronald J. Palagi, was admitted to the practice of law in the State of Nebraska on January 28, 1975, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On October 21, 2004, formal charges were filed against respondent. The formal charges set forth three counts that collectively included charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 2, DR 2-106(A) (charging excessive fee); Canon 5, DR 5-103(B) (improperly advancing or guaranteeing financial assistance to client); and Canon 9, DR 9-102(B)(4) (failing to return property of client), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On January 20, 2005, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly admitted the truth of the allegations that he violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney, and

waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges allege that respondent undertook the representation of Larry and Nancy Humphrey in a wrongful death case and that during the course of that representation, respondent charged the Humphreys separately for a "cost" that should have been treated and included in the agreed fee and, thus excessively charged the Humphreys. More specifically, the conditional admission states that

> respondent included the payment of $2,493.75 made to Ex-Parte Legal Services for research and drafting services provided to respondent in the Humphrey case [as an] out of pocket [cost]. However, since the contract [for services] with the Humphreys did not make this clear, [r]espondent should have resolved any question regarding the charging of costs in favor of the client and treated them as part of the legal services his law firm had agreed to provide for a contingency fee.

The formal charges further allege that respondent failed to deliver to Herbert Tibbs and Robert Brodax, former clients of respondent, their client files after Tibbs and Brodax had each requested the same. Finally, the formal charges allege that respondent advanced certain living expenses to Brodax.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written

> statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the essential relevant facts outlined in the formal charges and knowingly admits that he violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

NEBRASKA LIQUOR DISTRIBUTORS, INC., APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

693 N.W.2d 539

Filed March 4, 2005. No. S-02-616.

1. **Administrative Law: Judgments: 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. ____: ____: ____. 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. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, 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. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
6. **Judicial Notice: Evidence: Appeal and Error.** Judicial notice of a sufficiency of the evidence finding in a previous case cannot stand for a de novo finding in a subsequent case.
7. **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.
8. ____: ____: ____. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
9. **Words and Phrases.** Under the "ejusdem generis" canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.
10. ____. Under the "ejusdem generis" rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.
11. **Liquor Licenses: Words and Phrases.** The interest forbidden by Neb. Rev. Stat. § 53-169.01 (Reissue 2004) is a financial or business interest.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellant.

Jon Bruning, Attorney General, and Milissa D. Johnson-Wiles, and, on brief, Don Stenberg, former Attorney General, and Hobert B. Rupe for appellee.

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

GERRARD, J.

The question presented in this case is what type of "interested relationship" between an alcoholic liquor wholesaler and a manufacturer of alcoholic liquor is prohibited by state law. Neb. Rev. Stat. § 53-169.01 (Reissue 2004) states, in relevant part:

> No manufacturer of alcoholic liquor holding a manufacturer's license . . . and no manufacturer of alcoholic liquor outside this state manufacturing alcoholic liquor, except beer, for distribution and sale within this state shall, directly or indirectly, as owner or part owner, or through a subsidiary or affiliate, or by any officer, director, or employee thereof, or by stock ownership, interlocking directors, trusteeship, loan, mortgage, or lien on any personal or real property, or as guarantor, endorser, or surety, be interested in the ownership, conduct, operation, or management of any alcoholic liquor wholesaler holding an alcoholic liquor wholesale license, except beer, under section 53-123.02.

Nebraska Liquor Distributors, Inc. (NLD), filed an application for a wholesale liquor license with the Nebraska Liquor Control Commission (Commission). The Commission denied the application after it found that Mitchell Johnson (Mitchell), the sole shareholder of NLD, had a business interest in a manufacturer of alcoholic liquor. NLD petitioned the district court for judicial review of the Commission's decision, asserting that there was not a statutorily prohibited relationship between the wholesaler and the manufacturer of alcoholic liquor in the instant case. Upon a hearing, the district court affirmed the Commission's decision. NLD appeals the judgment of the district court. For the reasons that follow, we reverse, and remand with directions to the court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are largely undisputed. On September 6, 2001, NLD applied to the Commission for a class X wholesale liquor license.

Competing liquor wholesalers sent the Commission letters requesting a hearing on NLD's application, alleging that NLD was not eligible for the license under § 53-169.01. The Commission held a hearing, and the State offered NLD's application file into evidence. Over hearsay objections to the competitors' letters contained in the file, the file was received in evidence.

Mitchell testified at the hearing as the sole shareholder for NLD. He testified to certain connections he had with Johnson Brothers Liquor Company (Johnson Brothers), a wholesale liquor company incorporated in Minnesota and doing business in eight states. The Commission received these facts, not because Johnson Brothers is itself a manufacturer of alcohol, alone triggering § 53-169.01, but because Johnson Brothers allegedly has its own business interest in a liquor manufacturer, United States Distilled Products Company (USDP). Mitchell testified that he was formerly the president of Johnson Brothers. In 1995, Mitchell sold all his interest in Johnson Brothers, but at the time of the hearing was still receiving his stock payoff. He resigned as president of Johnson Brothers in January 1997. Mitchell's brother is the present chairman of the board of Johnson Brothers. Mitchell is also a minority stockholder with his brother in another liquor distributing company, Indiana Liquor Distributing Company.

To connect Mitchell's relationship with Johnson Brothers to a business interest in the liquor manufacturer, USDP, the Commission looked to an unpublished Nebraska Court of Appeals decision, *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication). *Johnson Bros. Liquor Co.* reversed a district court's reversal of a Commission decision. The Commission had rejected a wholesale liquor license application filed by Johnson Brothers. The Commission did so on the basis that Johnson Brothers had a business interest in the liquor manufacturer, USDP. The Court of Appeals reinstated the Commission's decision, finding that the district court had applied the incorrect standard of review and that there was sufficient evidence to support the Commission's decision. See *id.*

In addition to the asserted connection through Johnson Brothers, Mitchell has other indirect or remote ties to USDP. Mitchell's nephew is the owner, stockholder, and president of USDP. Mitchell himself owned stock in USDP but sold all his interest in that company more than 15 years ago.

In an order issued in the instant case, the Commission denied NLD's application. The Commission found that NLD had a business interest in Johnson Brothers and that Johnson Brothers had a business interest in USDP. The Commission concluded that NLD therefore had a business interest in USDP. As in *Johnson Bros. Liquor Co.*, this business interest in a liquor manufacturer disqualified the wholesaler, NLD, from acquiring a class X wholesale liquor license in Nebraska pursuant to § 53-169.01.

NLD appealed the Commission's order. Before the district court on appeal, NLD submitted as exhibits the transcript and the bill of exceptions from the Commission hearing. The district court affirmed the decision. After its de novo review, the district court found that Mitchell had a direct interest in Johnson Brothers and an indirect interest in USDP. The court based the finding of a direct interest in Johnson Brothers on Mitchell's familial relationship to a director of Johnson Brothers, on his former dealings with Johnson Brothers, and on the timing of Mitchell's application, coming as it did less than a year after Johnson Brothers' similar application was rejected. To find the indirect interest in USDP, the court relied on the conclusions contained in *Johnson Bros. Liquor Co.*, taking judicial notice of this unpublished Court of Appeals opinion due to its factual connection to the matters in the instant case.

NLD timely appealed the district court's affirmance of the Commission's decision.

ASSIGNMENTS OF ERROR

NLD assigns, renumbered and restated, that the district court erred by (1) considering the letters from competitors over a hearsay objection, (2) not reversing or remanding the case due to the Commission's failure to make specific findings of fact consistent with the findings in the record, and (3) finding any relationship between NLD and USDP which rendered NLD ineligible for the wholesale liquor license.

STANDARD OF REVIEW

[1] 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. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005).

[2] 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.*

[3] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

[4] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

ANALYSIS

Before we determine whether a relationship exists between NLD and USDP which would render NLD ineligible for a wholesale liquor license, it is necessary to briefly consider the evidentiary and procedural issues raised by NLD.

HEARSAY OBJECTION

[5] NLD first assigns that the district court erred by considering letters from competitors over a hearsay objection. The hearsay objection was made at the hearing before the Commission but only indirectly presented to the district court on appeal. More to the point, the alleged error of the district court's considering the letters was assigned but not argued in any way in the brief before this court. NLD only argued that, even including the content of the letters, the evidence was insufficient to deny the application. Errors that are assigned but not argued will not be addressed by

an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

Sufficiency of Commission's Findings of Fact

NLD cites Neb. Rev. Stat. § 84-915 (Reissue 1999) for the proposition that the Commission's decision must be "in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." NLD alleges that the statement in the record at the Commission hearing falls short of this standard.

However, the Commission's written decision clearly meets the standard set forth in § 84-915, whether or not the statement in the record does. In fact, NLD does not allege that the decision in writing lacks the required elements, but, rather, alleges only that it is inconsistent with the statement in the record. Whether or not such an inconsistency exists is immaterial; the written findings of fact and conclusions of law made by the Commission are valid and binding. Section 84-915 requires merely that the writing *or* the statement in the record contain the findings of fact and conclusions of law. Indeed, the written decision does, and thus, this assignment of error is without merit.

Disqualifying Interest

The disposition of this appeal hinges on the interpretation and application of § 53-169.01. As previously noted, no manufacturer of alcoholic liquor (except beer) outside the State of Nebraska shall, either directly or indirectly, be interested in the ownership, conduct, operation, or management of any alcoholic liquor wholesaler holding an alcoholic liquor wholesale license (except beer). See *id.*

We note that while the forbidden interest in § 53-169.01 is worded as that of the manufacturer in the wholesaler and not the interest of the wholesaler in the manufacturer, the obvious intent of the Legislature is to forbid both types of interests. The undue favorable relationship likely to result from the interest is the ill addressed by the statute; it is logically impossible for one company to have a financial interest in another without that interest being reciprocal. USDP is the only liquor manufacturer in which NLD is alleged to have a disqualifying interest. Therefore, the district court's affirmance will be upheld only if a sufficient interest

is established by the record between Mitchell (or his wholly owned NLD) and USDP.

There are three sources of this alleged connection. First, the owner and president of USDP is Mitchell's nephew. Second, Mitchell owned stock in USDP, but he sold all his interest in USDP over 15 years ago. Third, both Mitchell and USDP had connections to Johnson Brothers—a fact which led both the Commission and the district court to conclude that Mitchell and USDP were indirectly interested in each other to a disqualifying degree. To properly analyze this third source, we must consider each of the two connections in turn.

Mitchell's connections to Johnson Brothers are many. The chairman of the board of Johnson Brothers is both Mitchell's brother and a joint shareholder with Mitchell of another liquor distributing company. Mitchell was president of Johnson Brothers until his retirement in January 1997. Mitchell also had stock in Johnson Brothers but sold all of his shares to Johnson Brothers in 1995. Yet, at the time of the Commission hearing, Johnson Brothers was still paying Mitchell the predetermined sum for his shares of stock. Finally, the district court found the timing of Mitchell's application suspicious, coming as it did on the heels of the denial of Johnson Brothers' similar application. We assume without deciding that Mitchell is interested in Johnson Brothers.

The Commission's conclusion regarding Johnson Brothers' connections to USDP appears to be based in large part on the findings in the unpublished Court of Appeals case, *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), which upheld a previous finding of the Commission that Johnson Brothers had a business interest in USDP which disqualified it for a wholesale liquor license. The district court relied heavily on *Johnson Bros. Liquor Co.* to establish the connection between Johnson Brothers and USDP in its affirmance. We must decide whether reliance on that case conforms to the law.

[6] It is provided by statute that judicial notice may be taken of any fact not subject to reasonable dispute, when such fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Rev.

Stat. § 27-201(2)(b) (Reissue 1995). The *Johnson Bros. Liquor Co.* opinion is a source of which the accuracy cannot reasonably be questioned. See *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). However, the ultimate factual finding of *Johnson Bros. Liquor Co.*—that there was sufficient evidence to support the Commission's decision—is not helpful because the applicable standard of review for the district court in the instant case was de novo, not mere sufficiency of the evidence. *Johnson Bros. Liquor Co.* does not stand for a judicial de novo finding that Johnson Brothers had a disqualifying interest in USDP.

It is critical to note the distinction between the standard of review applicable in *Johnson Bros. Liquor Co.* and the case at bar. In *Johnson Bros. Liquor Co.*, the district court was to review the Commission's decision for jurisdiction and sufficiency of the evidence. See, generally, *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001) (describing change in appellate procedure from Commission). After *Johnson Bros. Liquor Co.*, the standard of review changed. The district court in the instant case must review the Commission's decision under the now-applicable Administrative Procedure Act. See *City of Lincoln v. Nebraska Liquor Control Comm., supra.* Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). See Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999).

This is an important difference. In a review for sufficiency of the evidence, an appellate court does not make its own factual findings, but in a true "de novo" review, the court uses assignments of error as a guide to the factual issues in dispute, but makes independent factual determinations based on the record. See, generally, *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995) (explaining differences in standards of review).

Therefore, the ultimate finding of *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), that the district court should have found that the

evidence was (merely) sufficient to support the Commission's finding, cannot stand for a judicial de novo finding that the record actually supports that finding. As a matter of fact, the Court of Appeals in *Johnson Bros. Liquor Co.* reversed the district court decision which, while erroneously applying a de novo standard to the determination of the Commission, found that Johnson Brothers' interest in USDP *did not* disqualify it for the license. Simply stated, since the Court of Appeals did not perform a de novo review of the record in *Johnson Bros. Liquor Co.*, the Court of Appeals' decision in that case does not contain findings of fact that are judicially noticeable.

Many of the other alleged facts in *Johnson Bros. Liquor Co.* are unavailable for judicial notice under § 27-201(2)(b). The Court of Appeals indicated that "[t]he evidence was contradictory and hotly contested," *Johnson Bros. Liquor Co.*, 2000 WL 1725059 at *7, and did not make any findings favoring one version over another. The remaining facts which were not subject to reasonable dispute are unhelpful. Thus, to establish the connection between Johnson Brothers and USDP, the district court was limited to the fact that the USDP president and sole shareholder is the son of Johnson Brothers' chairman of the board—Mitchell's nephew and brother, respectively.

[7,8] We must now apply § 53-169.01 to these facts, determining whether the court's decision that NLD was "interested in the ownership, conduct, operation, or management of" USDP conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. 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. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004). It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. See *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003).

[9-11] The scope of the interest forbidden is wide, prohibiting interests "directly or indirectly" held, and interests established in various indirect ways, for example, "through a subsidiary or affiliate." The list of ways a manufacturer can hold a forbidden

interest in a distributor is substantial, but each one listed indicates an interest of a financial or business nature. Under the "ejusdem generis" canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000). Thus, under the "ejusdem generis" rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. *Id.* Therefore, we hold that the interest forbidden by § 53-169.01 is a financial or business interest.

The interest between Mitchell, or his wholly owned NLD, and USDP, as established by the record, is largely familial. The three connections established by the record are as follows: (1) Mitchell owned USDP stock but sold it 15 years ago, (2) Mitchell is the uncle to the owner and president of USDP, and (3) Mitchell may have a business interest in Johnson Brothers, which has as its chairman of the board the father of USDP's owner and president. While Mitchell may indeed have some generalized familial interest in seeing USDP succeed, the record falls short of establishing that the interest is a financial or business one. We determine that the interest Mitchell and NLD have in USDP, as established by the record, is not indicative of the type of relationship which § 53-169.01 would forbid if NLD were licensed. The judgment of the district court affirming the Commission's order does not conform to the law and is not supported by competent evidence.

CONCLUSION

The record fails to establish that NLD was sufficiently interested in the ownership, conduct, operation, or management of USDP to trigger the prohibition of § 53-169.01. The district court erred in relying on the Court of Appeals' decision in *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), and by affirming the Commission's denial of NLD's application for a wholesale liquor license on the above basis. Because the district court had determined that NLD was ineligible for a wholesale liquor license pursuant to § 53-169.01, it did not review and consider all the

evidence from the Commission hearing in its de novo review. Therefore, it will be necessary to remand the cause to the district court for it to complete its de novo review of the record.

We therefore reverse the judgment of the district court and remand the cause with directions to complete its de novo review of the record prior to entering final judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

H & R BLOCK TAX SERVICES, INC., A MISSOURI CORPORATION, APPELLANT, V. CIRCLE A ENTERPRISES, INC., A NEBRASKA CORPORATION, AND T. JOAN KELSEY, APPELLEES.

693 N.W.2d 548

Filed March 4, 2005. No. S-03-750.

1. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform a covenant not to compete in order to make it enforceable.
3. **Restrictive Covenants: Employer and Employee.** A partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid. First, the restriction must be reasonable in the sense that it is not injurious to the public. Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest. Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted.
4. **Restrictive Covenants.** A covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case.
5. **Restrictive Covenants: Employer and Employee: Goodwill.** In the employment context, the validity of a covenant not to compete aimed at preventing a former employee from unfairly appropriating customer goodwill is no greater than reasonably necessary only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

Larry R. Baumann and Neleigh N. Smith, of Kelley, Scritsmier & Byrne, P.C., for appellant.

George M. Zeilinger for appellees.

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

STEPHAN, J.

This is an appeal from a determination by the district court for Lincoln County that a covenant not to compete included in a franchise agreement between H & R Block Tax Services, Inc. (H & R Block), and Circle A Enterprises, Inc., was unenforceable as a matter of law.

BACKGROUND

On April 2, 1985, T. Joan Kelsey and H & R Block entered into a satellite franchise agreement authorizing Kelsey to operate an H & R Block tax preparation business in Ogallala, Nebraska. On May 19, 1986, Kelsey assigned the agreement to Circle A Enterprises, a corporation of which she was the president. On the same date, Kelsey gave written notice of the assignment to H & R Block, expressly acknowledging that she remained personally liable for the performance of all terms of the franchise agreement.

The franchise agreement provided in relevant part:

> **12. Limitations on Competition and Disclosure.**
>
> (a) Franchisee covenants that: (i) during the term hereof he will not compete, directly or indirectly whether as an owner, stockholder, partner, officer, director or employee, with Block or Block franchisees in the business of preparing tax returns or performing Related Services in or within 45 miles of the Franchise Territory; in the franchise territory granted to any other Block franchisee; or within 45 miles of any office operated by Block; (ii) for a period of one year after the termination of this Agreement or the Transfer or other disposition of this franchise, he will not directly or indirectly, whether as an owner, stockholder, partner, officer, director or employee, solicit by mail, phone or in person, or divert from Block or Block franchisees any person for whom Franchisee prepared a tax return or performed Related Services or Additional Services at any time during

the term of this Agreement for the purpose of rendering of services in connection with the preparation of tax returns or performance of Related Services or Additional Services; and (iii) for a period of one year after the termination of this Agreement or the transfer or other disposition of this franchise, he will not compete directly or indirectly, whether as an owner, stockholder, partner, officer, director or employee, with Block or Block franchisees in the business of preparing tax returns or performing Related Services or Additional Services in or within 45 miles of the Franchise Territory.

(b) Franchisee further covenants that Franchisee will never (i) divulge to or use for the benefit of any person, association or corporation outside of the H&R Block organization, any information or knowledge concerning customers, the methods, promotion advertising or any other systems or methods of operation of Block's business or that of Block's franchisees which Franchisee may have acquired by virtue of his operations under this Agreement; (ii) use any materials regarding Additional Services without payment of the applicable royalty therefor and execution of an addendum regarding such Additional Services; or (iii) do any deliberate act prejudicial or injurious to the goodwill or name of Block. Information furnished to employees shall be reasonably limited to that which directly relates to such employee's duties and assists in the proper performance of such duties.

. . . .

(g) Franchisee will cause each individual employed to prepare tax returns or to supervise the preparation of tax returns to execute an agreement, in the form prescribed by Block, containing substantially the same covenants against competition and disclosure as are set forth in subparagraphs (a) and (b)(i).

The franchise was terminated in the fall of 1999, and Kelsey relocated to North Platte, Nebraska, which is more than 45 miles distant from Ogallala. Kelsey subsequently operated a tax preparation business in North Platte, and in the year 2000, prepared tax returns for a number of clients for whom she had prepared returns while operating the H & R Block franchise. Kelsey testified that she did not solicit these former clients but that if they initiated

contact with her, she prepared their returns. Her records indicate that over 85 percent of her receipts generated in 2000 came from former H & R Block clients.

On January 25, 2001, H & R Block filed this action in which it alleged that Circle A Enterprises and Kelsey breached the terms of the franchise agreement and prayed for damages and an accounting. In their joint answer and counterclaim, Circle A Enterprises and Kelsey alleged that the covenant not to compete set forth in the franchise agreement was "overbroad and unenforceable pursuant to the laws of the State of Nebraska." They denied any breach of the franchise agreement on their part and claimed damages for alleged breaches of the franchise agreement by H & R Block.

Following a bench trial, the district court issued a memorandum opinion and judgment on June 3, 2003. In its order, the court construed subparagraphs 12(a)(ii) and (iii) of the franchise agreement as one integrated covenant not to compete. Relying on *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), the court concluded that the portion of the covenant that restricted Kelsey from preparing tax returns for any client within a 45-mile radius of Ogallala was unreasonable and unenforceable as a matter of law because it was not limited to former H & R Block clients with whom Kelsey actually did business and had personal contact. The district court concluded that although the portion of the covenant that restricted Kelsey from soliciting former H & R Block customers for a period of 1 year was reasonable, the invalid portion of the covenant rendered the entire covenant not to compete invalid and unenforceable. Based upon this determination, the court found that Kelsey could not have violated the provision in subparagraph 12(g) of the franchise agreement requiring her to have all employees sign noncompetition agreements. The court further determined that H & R Block failed to prove an alleged breach of subparagraph 12(b) of the franchise agreement. The court found, however, that H & R Block did prove that Circle A Enterprises and Kelsey breached the agreement by failing to turn over certain documents upon termination of the franchise agreement. However, the court held that H & R Block failed to prove any damages caused by this breach. Finally, the court found against Circle A Enterprises and Kelsey on the counterclaim.

H & R Block filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

H & R Block assigns that the district court erred in (1) finding that the covenant not to compete was totally invalid and void and not severable into parts, (2) finding that the covenant not to compete could not extend to 45 miles in the tax preparation field for 1 year, and (3) determining that it was not a breach of the franchise agreement to fail to have employees sign a noncompetition agreement.

STANDARD OF REVIEW

[1] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004); *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

ANALYSIS

SEVERABILITY

In its first assignment of error, H & R Block asserts that the district court erred in failing to sever any unenforceable covenant not to compete from the remaining enforceable covenants. The district court expressly held that the covenant which prohibited Kelsey from soliciting or diverting H & R Block clients was valid and enforceable for a period of 1 year after termination of the franchise. The court reasoned, however, that because the covenant prohibiting Kelsey from preparing tax returns within 45 miles of Ogallala for a period of 1 year was unenforceable, the valid covenant was rendered invalid as a matter of law.

[2] This court has long held that it is not the function of the courts to reform a covenant not to compete in order to make it enforceable. *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994); *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Philip G. Johnson & Co. v. Salmen*,

211 Neb. 123, 317 N.W.2d 900 (1982). For example, in *CAE Vanguard, Inc. v. Newman*, 246 Neb. at 336, 518 N.W.2d at 654, the terms of a noncompetition agreement signed in conjunction with the sale of stock provided:

> "[Defendant] agrees and covenants that he will not, for a period of five (5) years after the date of this Covenant, and anywhere in the United States, the continent of North America, or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant, (a) directly or indirectly solicit electrochemical metalizing business regarding railroad axles and/or mounted wheel sets . . . ."

The district court reformed the agreement by employing the "blue-pencil" rule and striking the words " 'or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant.' " *Id.* at 337, 518 N.W.2d 654. On appeal, we held that the covenant was not subject to reformation in this manner and that "we must either enforce it as written or not enforce it at all." *Id.* at 339, 518 N.W.2d at 656. We reached such conclusion even though the agreement provided that a court could reform the covenant, noting that "[p]rivate parties may not confer upon the court powers which it does not possess." *Id.*

In *Vlasin v. Len Johnson & Co.*, 235 Neb. at 451-52, 455 N.W.2d at 774, the covenant at issue restricted an employee from entering " 'into the insurance business within a fifty (50) mile radius of the City of Ogallala, Keith County, Nebraska, for a period of three (3) years from and after the date of the termination of this agreement.' " We found the covenant to be unreasonable and refused to reform it, noting that it is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable. See, also, *Philip G. Johnson & Co. v. Salmen, supra* (refusing to reform covenant restricting former partner for period of 3 years from soliciting or accepting work from any client or former client of partnership).

Our jurisprudence thus reflects a consistent refusal to strike or alter the language of an integrated covenant not to compete in order to make it enforceable. Although the covenant at issue in the

instant case is set forth in separate subparagraphs, we nevertheless agree with the district court that subparagraphs 12(a)(ii) and (iii) of the franchise agreement contain only one covenant not to compete, as both subparagraphs impose restrictions on the franchisee's posttermination competition. See *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003). Thus, if any portion of the covenant contained in subparagraphs 12(a)(ii) and (iii) is invalid, the remainder of the covenant is likewise invalid and unenforceable. See, *CAE Vanguard, Inc. v. Newman, supra*; *Brockley v. Lozier Corp., supra*; *Vlasin v. Len Johnson & Co., supra*; *Philip G. Johnson & Co. v. Salmen, supra.*

Nature of Transaction

In order to determine whether the covenant contained in subparagraphs 12(a)(ii) and (iii) is valid and enforceable, we must decide the primary issue in this appeal: Whether a covenant not to compete in a franchise agreement is more akin to a covenant not to compete in a sale of a business agreement or whether it is more akin to a covenant contained in an employment contract. This is an issue of first impression in this jurisdiction.

[3] Regardless of the context, a partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid. First, the restriction must be reasonable in the sense that it is not injurious to the public. *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987). See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest. *Polly v. Ray D. Hilderman & Co., supra.* Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted. *Id.* The only requirement at issue in the instant case is whether the restriction is no greater than reasonably necessary to protect H & R Block's legitimate business interest.

Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than those made in connection with contracts of employment. *Presto-X-Company v. Beller, supra.* The

rationale behind the differential treatment is that in a sale of a business, "[i]t is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits." *Swingle & Co. v. Reynolds*, 140 Neb. 693, 695, 1 N.W.2d 307, 309 (1941).

[4] In the context of the sale of a business,

> " '[T]he restraint of trade that is permissible . . . is no greater than is necessary to attain the desired purpose—the purpose of making good will a transferable asset. It is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the good will for which he pays. The restraint on his own freedom must be reasonable in character and in extent of space and time.' "

Presto-X-Company v. Beller, 253 Neb. at 62, 568 N.W.2d at 239, quoting *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991), and 6A Arthur Linton Corbin, Corbin on Contracts § 1385 (1962). Thus, a covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. *Presto-X-Company v. Beller, supra*. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case. *Id.*

[5] In the employment context, the validity of a covenant not to compete aimed at preventing a former employee from unfairly appropriating customer goodwill is no greater than reasonably necessary "only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and ha[d] personal contact." *Polly v. Ray D. Hilderman & Co.*, 225 Neb. at 668, 407 N.W.2d at 756. We have applied this test strictly. See *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

H & R Block urges us either to treat the franchise agreement as a sale of a business and apply the law applicable in that context or to create a new rule regarding the enforceability of covenants not to compete in franchise agreements. Circle A Enterprises and

Kelsey, however, urge us to analogize the franchise agreement to an employment contract and apply that body of law.

Decisions from other jurisdictions provide some guidance on this point. In *Jiffy Lube Intern., Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683 (D.N.J. 1993), the court held that covenants not to compete in a vehicle service franchise were more analogous to agreements ancillary to the sale of a business than to an employment agreement. The court reasoned that a franchisor and a franchisee are in a more equitable bargaining situation than would be found in a typical employer-employee relationship. In addition, it emphasized that the primary characteristic of a franchise is the license given to the franchisee "to trade upon and exploit the franchisor's good will." *Id.* at 691. The court reasoned that when the franchise is terminated, the goodwill is in some sense returned to the franchisor and that thus, a "reasonably crafted" restrictive covenant is necessary to protect the goodwill after its return. *Id.*

In *McCart v. H & R Block, Inc.*, 470 N.E.2d 756 (Ind. App. 1984), the court held that a tax preparation service franchise very similar to that at issue in the instant case was akin to the sale of a business for purposes of determining whether the franchisor had a protectible interest which justified the use of a covenant not to compete. The court compared the customer affiliation associated with H & R Block's service mark to the goodwill inherent in the sale of a business. The court noted that the franchisee paid for the value of the mark in order to draw upon H & R Block's reputation and attract customers. Because the bargain for use of the mark was a bargain for customers who would be attracted to it, the court found that it was analogous to the goodwill involved in a sale of a business. Based on this analysis, the court concluded that a covenant restricting the franchisee from competition for 2 years within a 50-mile radius was reasonable and enforceable.

A different rationale was applied by the Supreme Court of Kansas in *H & R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972), another case involving an H & R Block franchise. In *Lovelace*, the court reasoned:

> The agreement before us is neither a contract of employment nor one for sale of a business, but rather that which in the modern business world has now come to be known as a franchise. . . .

> . . . Suffice it to say under the contract here defendant operated under plaintiff's name in providing a service in which enterprise plaintiff retained a considerable amount of operational control including the prescribing of office hours, fees to be charged, methods and forms to be used, accounting periods, advertising and promotion and training of personnel, and upon breach of the contract by defendant, title to and possession of books, records, files and client lists vested in plaintiff.
>
> Under these narrow facts we are inclined to the view the contract is more akin to one of employment than to a contract for sale or disposition of a business and sufficiently of that character to make strict construction against the promisee appropriate.

208 Kan. at 545-46, 493 P.2d at 211-12. The court thereafter held that a covenant prohibiting competition anywhere for a period of 5 years was unenforceable because of its unreasonable territorial extent.

A Wisconsin federal court recently addressed the enforceability of a covenant not to compete identical to the one before us now. In *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003), the court did not expressly decide whether the franchise agreement was more analogous to a sale of a business or an employment agreement. Nevertheless, after examining the time, space, purpose, and scope of the restrictions, it determined that the posttermination restrictions on competitive activity were reasonable. This approach is similar to the analysis which this court employs in determining the validity of a restrictive covenant in the context of the sale of a business.

In the instant case, there is evidence that H & R Block provides various goods and services to its franchisees, including training, national and local advertising, copiers, paper, and tax forms. H & R Block's training program generally begins around Labor Day and runs through the beginning of December, with classes held twice a week for 3 hours at a time. In addition, H & R Block offers upper-level tax courses, including training which enables individuals to receive Internal Revenue Service certification. H & R Block provides an annual update on tax changes and material to all franchisees for use in training their employees. Upon

franchise termination, the franchisee is required to return all items provided by H & R Block and copies of all customer tax returns and customer lists.

Although the record indicates that H & R Block retained significant control over its franchisees, it is equally clear that the main purpose of obtaining a franchise from H & R Block is to trade on the reputation and goodwill of its service mark and thereby acquire customers. Based on the evidence and our interpretation of the applicable law, we conclude that the franchise agreement in this case is analogous to a sale of a business for purposes of determining the enforceability of the posttermination covenant not to compete. We therefore apply the analysis outlined in *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997), to determine whether the covenant is enforceable.

ENFORCEABILITY

There is no claim or evidence in this case that the covenant is injurious to the public interest. See, *Presto-X-Company v. Beller, supra*; *Swingle & Co. v. Reynolds*, 140 Neb. 693, 1 N.W.2d 307 (1941). We therefore focus on the issue of whether the covenant is reasonable in both space and time so that the restraint imposed will be no greater than necessary to achieve its legitimate purpose. See, *Presto-X-Company v. Beller, supra*; *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978).

The district court determined from the evidence at trial that "the duration of the covenant not to compete and the geographic limitation of 45 miles from Ogallala, Nebraska are reasonable." We agree. The franchise district manager for H & R Block testified that the 45-mile scope of the covenant was reasonably necessary to protect the integrity of H & R Block's service mark and its customer relationships. While there is evidence of other tax return preparers located within a 45-mile radius of Ogallala, there is no showing that any of them had prior access to the mark and materials incident to an H & R Block franchise. Generally, income tax returns are prepared annually, and thus the 1-year restraint simply limits the former franchisee from soliciting former H & R Block clients within the restricted area for one tax season. The record establishes that a 1-year restriction is reasonably necessary to protect the franchisor's goodwill in its tax

preparation business. See, also, *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003) (determining that 1-year/45-mile scope of covenant not to compete in franchise agreement was reasonable).

Relying on *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), and *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), the district court reasoned that the covenant not to compete in subparagraph 12(a)(iii) was unenforceable because it was not "customer specific" and instead prohibited any competitive activity within 45 miles of Ogallala for 1 year after termination of the franchise. *Polly* and *Boisen* involved covenants not to compete set forth in employment contracts. Because we conclude that this franchise agreement is akin to a sale of a business, the "customer specific" rule articulated in those cases is not applicable. Instead, in the case of a covenant not to compete ancillary to the sale of a business, a restraint is enforceable if it is reasonable in both time and scope. See *Presto-X-Company v. Beller, supra.* Applying that rule to this case and for the reasons set forth above, we conclude that the covenant not to compete set forth in subparagraphs 12(a)(ii) and (iii) of the franchise agreement is reasonable and enforceable.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in finding the covenant not to compete contained in subparagraphs 12(a)(ii) and (iii) of the franchise agreement to be unenforceable as a matter of law. Although the district court conducted a full evidentiary hearing, its final judgment was based entirely on its determination of unenforceability. It therefore made no factual findings as to whether the covenant was violated based on the evidence presented. In view of our independent determination that the covenant is enforceable, it becomes necessary to determine whether Kelsey's actions violated the covenant and, if so, the consequences of the violation. Also, it must be determined whether Kelsey violated subparagraph 12(g) of the franchise agreement by failing to obtain noncompete agreements from her employees. These factual determinations should be made by the district court, and we therefore reverse the

judgment and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., dissenting.

I respectfully dissent from the majority opinion which concludes that the covenant not to compete should be treated as if it were part of a contract for the sale of a business and that the district court erred in finding the covenant to be unenforceable.

We have previously addressed covenants not to compete in both contracts for the sale of a business and employment contracts. Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than they are to honor those promises made in contracts of employment. See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). The rationale is that a seller who obtains money from a buyer as consideration for a covenant not to compete should not be permitted to use that money to compete with the buyer. However, a covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than reasonably necessary to achieve its legitimate purpose. *Id.* The purpose of the restriction is to protect the buyer in the enjoyment of the goodwill which he has purchased in the sale of the business.

In the case of an employer-employee relationship, a covenant not to compete will be enforced only if it restricts a former employee from working for or soliciting the former employer's clients or accounts with whom the employee actually did business and had personal contact. See *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

Here, the covenant not to compete was contained within a franchise agreement. Neb. Rev. Stat. § 87-402(1)(a) (Reissue 1999) of the Franchise Practices Act defines a franchise as

> a written arrangement for a definite or indefinite period, in which a person grants to another person for a franchise fee a license to use a trade name, trademark, service mark, or related characteristics and in which there is a community of

interest in the marketing of goods or services at wholesale or retail or by lease, agreement, or otherwise.

The franchise agreement at issue authorized Kelsey to offer tax preparation services under H & R Block's trade name. H & R Block, however, retained considerable control, including the right to determine office hours and fees and the right to dictate which forms would be used. Upon termination of the agreement, Kelsey was required to return all client lists and copies of client tax returns to H & R Block. Kelsey paid H & R Block for the use of its trade name, but such payment did not carry with it any expectation of ownership that would accompany the sale of a business. See, *McDonald's Corp. v. Markim, Inc.*, 209 Neb. 49, 306 N.W.2d 158 (1981); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972).

The district court determined that the covenant not to compete which prohibited Kelsey from preparing tax returns within a 45-mile radius of Ogallala, Nebraska, was unreasonable, ineffective, unenforceable, and therefore void. The rationale for the court's determination was that a covenant not to compete must not be greater than is reasonably necessary to protect an employer against a former employee's improper and unfair competition, and cannot restrict the former employee from engaging in ordinary competition with his previous employer. See, *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Polly v. Ray D. Hilderman & Co., supra.* The evidence established that there were a significant number of bookkeepers and tax return preparers in competition with H & R Block within a 45-mile radius of Ogallala. Under these circumstances, the court concluded that enforcing the covenant would result in restricting Kelsey from engaging in ordinary competition with H & R Block.

The question presented is whether the covenant not to compete in the franchise agreement between Kelsey and H & R Block is more similar to a covenant not to compete concerning the sale of a business or one entered into in the context of an employer-employee relationship.

When a business is sold, the sales agreement may contain a covenant not to compete if goodwill is a business asset purchased by the buyer. In that situation, the seller agrees not to compete with the buyer and the restraint of trade can be no greater than is

reasonably necessary to obtain the desired result of making goodwill a transferable asset. The restriction upon the seller is only that which is reasonably necessary to protect the buyer's enjoyment of the goodwill purchased. See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997).

When a covenant not to compete is part of a franchise agreement, the situation is quite different. The franchisor may require the franchisee to pay for use of a trade name, and the franchisor may retain considerable control over operation of the business. Upon termination of the franchise, the franchisee is in most instances left with nothing while the franchisor retains the goodwill, the name of the business, and all records and client lists.

A case which illustrates the difference is *H & R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972). H & R Block sought to restrain the defendant from violating a covenant not to compete upon the termination of a franchise agreement. The court made a distinction between covenants contained in employer-employee contracts and covenants relating to the sale of a business. It pointed out that the agreement at issue was neither a contract of employment nor one for the sale of a business, but, instead, was what has now come to be known as a franchise. The court concluded that under the facts presented, the contract was more like an employment agreement than a contract for the sale of a business.

In concluding that the franchise agreement at issue should be considered analogous to the sale of a business for the purpose of determining enforceability of the covenant not to compete, the majority relies upon *Jiffy Lube Intern., Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683 (D.N.J. 1993), and *McCart v. H & R Block, Inc.*, 470 N.E.2d 756 (Ind. App. 1984). In *Jiffy Lube Intern., Inc.*, the court reasoned that upon termination of the franchise, the goodwill was in some sense returned to the franchisor and that, therefore, a reasonably crafted restrictive covenant was necessary to protect the goodwill after its return. I agree that the goodwill is returned, but that does not permit a covenant which will restrict ordinary competition or one that is greater than reasonably necessary. In *McCart*, the court compared customer affiliation associated with H & R Block's service mark to the goodwill inherent in the sale of a business. H & R Block's protectable interest

was the customer recognition of its service mark and the year-to-year affiliation those customers developed with a particular H & R Block office. The court concluded that H & R Block had a protectable interest in its customer affiliation but that it had no right to restrict competition beyond the limits of its protectable interest.

In my opinion, a franchise agreement is akin to an employment contract. The franchisor retains the goodwill and the name of the business. At the end of the agreement, the franchisee, like the employee in an employer-employee relationship, has nothing remaining. Unlike the seller of a business, the franchisor is not paid for a covenant not to compete. The franchisor exercises control and dictates business policies, which is like the role of an employer in an employer-employee relationship. In such an arrangement, a covenant aimed at preventing the unfair appropriation of customer goodwill can be no greater than reasonably necessary to protect the franchisor. It can restrict the franchisee only from working for or soliciting the franchisor's customers or accounts with whom the franchisee actually did business and had personal contact.

Here, the covenant prohibits Kelsey from engaging in ordinary competition with H & R Block within 45 miles of its Ogallala office for a period of 1 year. In my opinion, the district court correctly determined that the covenant was unenforceable as a matter of law because it was not limited to former H & R Block clients with whom Kelsey actually did business and had personal contact.

For these reasons, I would affirm the district court's judgment finding that the covenant not to compete was overly broad and therefore unenforceable.

CONNOLLY, J., joins in this dissent.

DESTINY 98 TD, APPELLEE AND CROSS-APPELLEE, AND BEL FURY INVESTMENTS GROUP, L.L.C., APPELLANT AND CROSS-APPELLEE, V. JOHN J. MIODOWSKI ET AL., APPELLEES, AND EMPIRE TITLE OF NEBRASKA, INC., INTERVENOR-APPELLEE AND CROSS-APPELLANT.

693 N.W.2d 278

Filed March 11, 2005. No. S-03-1393.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
3. **Foreclosure: Tax Sale: Liens: Homesteads: Notice.** The provisions of Neb. Rev. Stat. § 25-1531 (Reissue 1995) requiring notice of homestead exemption rights do not apply to foreclosure of a tax lien represented by a tax sale certificate.
4. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
5. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
6. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
7. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael F. Kivett, James J. Bemis, Jr., and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jay A. Ferguson for intervenor-appellee Empire Title of Nebraska, Inc.

James H. Monahan, of Monahan & Monahan, for appellees John J. Miodowski and Naomi Miodowski.

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

STEPHAN, J.

This appeal presents the issue of whether a party seeking confirmation of a judicial sale in a tax sale certificate foreclosure proceeding is required to give notice of statutory homestead exemption procedures pursuant to Neb. Rev. Stat. § 25-1531 (Reissue 1995). We conclude that there is no such requirement.

BACKGROUND

On March 1, 1999, Destiny 98 TD (Destiny 98) purchased Douglas County treasurer's certificate of tax sale No. 99-01220, representing a tax lien on Lot 7, Block 4, Burlington Place Addition, in Douglas County, Nebraska. On September 11, 2002, Destiny 98 filed an amended petition to foreclose liens represented by various tax sale certificates. John J. Miodowski and "____ Miodowski" were alleged to be the owners of the property and were named as defendants in the third cause of action, which pertained to the real property and tax sale certificate described above. On February 21, 2003, Destiny 98 filed a motion for judgment by default with respect to the third cause of action, alleging that the Miodowskis had been properly served with summons but had failed to respond with a timely responsive pleading. On March 7, the district court entered a default judgment and decree ordering a sheriff's sale of the property. Notice of the sale was published in The Daily Record, a legal newspaper in Douglas County, on June 27 and July 4, 11, and 18, 2003. At the sheriff's sale held on July 29, Bel Fury Investments Group, L.L.C. (Bel Fury), purchased the property for $6,360. On August 21, the district court confirmed the sale of the property and ordered that a sheriff's deed be delivered to Bel Fury. Subsequent to execution and delivery of a sheriff's deed dated September 3, 2003, Bel Fury filed a praecipe for writ of assistance.

Several days thereafter, Empire Title of Nebraska, Inc. (Empire Title), filed an ex parte application seeking to intervene in the proceeding and for other relief. In its application, Empire Title represented that it had served as trustee and closing agent in a refinancing of the Miodowski property in August 2003 and that it believed it had distributed funds to satisfy the tax liens represented by the tax sale certificates in foreclosure, but that through "error, omission or misunderstanding," this may not have occurred. The district court quashed the writ of assistance as it

related to the property in question and scheduled an evidentiary hearing for October 1, 2003. On September 23, the Miodowskis filed an application to set aside the confirmation of the sale and the sheriff's deed based on Destiny 98's failure to provide them with a notice of homestead exemption pursuant to § 25-1531. Upon being granted leave to intervene during the hearing on October 1, Empire Title filed a motion to vacate confirmation of the sale on grounds that "the property was not sold in conformity to the provisions of Chapter 25 [of the Nebraska Revised Statutes] for fair value under the circumstances and conditions of the sale, and subsequent sale would realize a greater amount."

In an order entered on October 8, 2003, the district court ruled that § 25-1531 did not apply to proceedings to foreclose tax sale certificates pursuant to Neb. Rev. Stat. § 77-1902 (Reissue 2003) and denied the relief sought by the Miodowskis and Empire Title. However, after conducting a hearing on October 10, the court changed its ruling and concluded in an order entered on November 10 that § 25-1531 was applicable. The district court therefore vacated its prior order confirming the sale because the Miodowskis had not been given notice of the homestead exemption procedures in accordance with § 25-1531. A notice of redemption prior to confirmation accompanied by the payment of $7,198.86 to the clerk of the district court was then filed on behalf of the Miodowskis. In a separate order entered on November 26, the court denied Bel Fury's oral motion for attorney fees, stating that there was no statutory authority or recognized custom whereupon attorney fees would be allowable. Bel Fury then perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Bel Fury assigns that the district court erred in (1) determining that § 25-1531 and Neb. Rev. Stat. § 40-103 (Reissue 2004) are applicable to the sale of real estate pursuant to the foreclosure of a tax sale certificate under Neb. Rev. Stat. § 77-1901 et seq. (Reissue 2003) and (2) determining that Bel Fury is not entitled to attorney fees.

On cross-appeal, Empire Title assigns that the court committed plain error by failing to find that (1) Destiny 98 did not personally serve the necessary parties with notice of publication of the sheriff's sale as statutorily required and (2) there was a shocking discrepancy in the sale price of the property.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002).

[2] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

ANALYSIS

Notice of Homestead Exemption

It is undisputed that the Miodowskis were not given notice of homestead exemption procedures prior to the district court's original order confirming the sheriff's sale. Thus, we are presented with the narrow legal question of whether such notice was required by the applicable statutes. Under § 77-1902, the holder of a tax sale certificate may foreclose the lien for taxes represented by the certificate. The statute provides generally that the foreclosure proceeding shall be "in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917." Section 77-1912 provides, with respect to a tax foreclosure, that the "sheriff shall sell the real property in the same manner provided by law for a sale on execution." Section 25-1531, which applies to real estate mortgage foreclosures, provides in pertinent part that

> [p]rior to the confirmation of sale pursuant to this section, the party seeking confirmation of sale shall, except in the circumstances described in section 40-103, provide notice to the debtor informing him or her of the homestead exemption procedure available pursuant to Chapter 40, article 1. The notice shall be given by certified mailing at least ten days prior to any hearing on confirmation of sale.

Section 25-1531 further provides that

> [u]pon application to the court by the judgment debtor within sixty days of the confirmation of any sale confirmed pursuant to this section, such sale shall be set aside if the court finds that the party seeking confirmation of sale failed to provide notice to the judgment debtor regarding homestead exemption procedures at least ten days prior to the confirmation of sale as required by this section.

In a tax sale certificate foreclosure proceeding, "final confirmation of sale may be had immediately after the sheriff's sale." § 77-1903(2). Section 77-1913 provides that upon a timely motion to confirm a sheriff's sale in a tax sale foreclosure proceeding, "[t]he court shall . . . examine the proceedings and, if they are found to be correct . . . make and enter an order of confirmation of the sale" and "direct the disposition of the proceeds of the sale and order the sheriff to make and deliver to the purchasers, without further cost to them, a sheriff's deed for any real estate not redeemed," subject to certain conditions not relevant here. Section 77-1917, which confers the right to redeem real property which is subject to a tax foreclosure "at any time after the decree of foreclosure and before the final confirmation of the sale," includes no reference to a homestead exemption.

Bel Fury argues that because the tax foreclosure statutes codified at chapter 77 of the Nebraska Revised Statutes do not require notice of a homestead exemption, there is no such requirement in a proceeding to foreclose a tax sale certificate. On the other hand, the Miodowskis and Empire Title argue that because § 77-1902 directs that a tax sale certificate foreclosure is to be conducted "in the same manner and with like effect as in the foreclosure of a real estate mortgage," except where §§ 77-1903 to 77-1917 specifically provide otherwise, the homestead exemption notice requirement set forth in § 25-1531 is applicable.

Bel Fury's argument that statutory procedures for the foreclosure of a tax sale certificate are "separate and distinct" from those governing mortgage foreclosures and execution sales ignores the plain language of §§ 77-1902 and 77-1912, which language establishes a partial linkage between tax foreclosure and mortgage foreclosure procedures. For example, in *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002),

which was commenced as a tax foreclosure proceeding, we construed § 77-1912 as incorporating the procedure for execution sales set forth in Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000). We similarly noted the linkage between the tax foreclosure statutes and those governing mortgage foreclosures in *County of Scotts Bluff v. Bristol*, 159 Neb. 634, 68 N.W.2d 197 (1955), and *Madison County v. Crippen*, 143 Neb. 474, 10 N.W.2d 260 (1943).

Thus, in order to resolve the question of whether notification of homestead exemption rights must be shown before a court can confirm a sheriff's sale in a tax sale certificate foreclosure, it is necessary to consider when such notice is required in a mortgage foreclosure. A "homestead," as defined by Neb. Rev. Stat. § 40-101 (Reissue 2004), is "exempt from judgment liens and from execution or forced sale, except as provided in sections 40-101 to 40-116." Section 40-103 provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . (2) on debts secured by mortgages or trust deeds upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant." Section 25-1531, pertaining to mortgage foreclosures, requires that the debtor be notified of homestead exemption procedures prior to confirmation of a sheriff's sale "except in the circumstances described in section 40-103." Thus, a notice of homestead exemption rights is required prior to confirmation of sale only in those mortgage foreclosure proceedings where such rights exist.

The tax sale certificate which is the subject of this foreclosure action reflects delinquent city and county taxes against property situated within the city of Omaha. Such taxes are a "first lien on the property taxed until paid or extinguished as provided by law," taking priority over a mortgage or any other liens. Neb. Rev. Stat. § 77-203 (Reissue 2003). Accord, *Alliance RR. Comm. Credit Union v. County of Box Butte*, 243 Neb. 840, 503 N.W.2d 191 (1993); *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945); *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941); *Eddy v. Kimerer*, 61 Neb. 498, 85 N.W. 540 (1901).

[3] Neither the Miodowskis nor Empire Title have provided us with any argument or authority supporting the existence of any homestead exemption right which would affect the confirmation

of a sheriff's sale in a proceeding to foreclose the lien for taxes represented by a tax sale certificate. We conclude that the tax lien is superior to any homestead interest which could be claimed by the Miodowskis, and therefore hold that the provisions of § 25-1531 requiring notice of homestead exemption rights do not apply to foreclosure of a tax lien represented by a tax sale certificate. Accordingly, the district court erred in vacating and setting aside its order confirming the sale entered on August 21, 2003.

Attorney Fees

[4] Bel Fury argues that the district court erred in determining that it was not entitled to recover its attorney fees incurred in this action. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). Here, the district court found no statutory authority or uniform course of procedure which would permit an award of attorney fees. We agree, and conclude that this assignment of error is without merit.

Cross-Appeal

[5,6] In its cross-appeal, Empire Title states that it "does not claim error by the Douglas County District Court on the issues that it addressed," but asserts that if error is found, the district court erred in not setting aside its original order confirming the sale based upon a claimed deficiency with respect to notice of the sheriff's sale and a "shocking discrepancy in sale price." We note that the issues which are the subject of the cross-appeal were not raised by timely appeal from the order confirming the sheriff's sale entered on August 21, 2003. After that order became final, Empire Title, as intervenor, asked the district court to vacate it on grounds that "the property was not sold in conformity to the provisions of Chapter 25, for fair value under the circumstances and conditions of the sale, and subsequent sale would realize a greater amount." We have concluded above that the procedure for vacating an order confirming a sheriff's sale for failure to give notice of homestead exemption as set forth in § 25-1531 does not apply to an action to foreclose a lien for taxes represented by a

tax sale certificate. Thus, the cross-appeal presents the question of whether the district court erred in not vacating the order on one or both of the alternative grounds now urged by Empire Title. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). We review a ruling on a motion to vacate for abuse of discretion. See *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

[7] Empire Title's first argument on cross-appeal is that Destiny 98 failed to comply with the requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995) with respect to mailing published notice of the sheriff's sale to the Miodowskis. Assuming without deciding that Empire Title has standing to raise this issue on appeal, we nevertheless decline to reach it. Neither Empire Title nor the Miodowskis alleged inadequate notice of the sale in their motions to vacate the order of confirmation. Compare, *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002), and *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982) (both asserting inadequacy of notice as basis for setting aside sheriff's sales prior to confirmation and assigning such error on direct appeal from orders confirming sales). Although counsel for Empire Title alluded to this issue in oral argument before the district court, it was not specifically alleged in any pleading or motion filed in the case. We have held that the purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). The same principles apply to a motion requesting that a court exercise its inherent power to vacate a prior judgment. Based upon this record, we conclude that the issue of whether the Miodowskis received adequate notice of the sheriff's sale was not properly raised in the district court as a basis for vacating the order confirming the sale, and we decline Empire Title's request that we reach it as "plain error." Thus, Empire Title's first assignment of error is without merit.

In its second assignment of error, Empire Title contends that the district court should have vacated its order confirming the sale on grounds that there was a "shocking discrepancy" in the sale price of the property. It bases its argument on an appraisal of the subject property at a value of $80,000 and its own "Irrevocable Minimum Offer" to pay at least $12,000 for the property, neither of which were shown to have been before the district court when it confirmed the sheriff's sale on August 21, 2003. In *Kleeb v. Kleeb*, 210 Neb. at 643, 316 N.W.2d at 588, an appeal from an order confirming a partition sale, we considered the significance of two " 'upset' bids," the first made after the sale and prior to confirmation, and the second made during the pendency of the appeal from the order confirming the sale. With respect to the first, we noted that

> [a]n upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.

Id. at 644, 316 N.W.2d at 588. We held that the trial court did not abuse its discretion in confirming the sale notwithstanding notification during the confirmation hearing of a slightly higher bid made by an unknown party. We also declined to remand the matter for a new sale on the basis of the second upset bid, even though it was significantly higher than the sale price. We noted that "[u]pset bids to set aside public sales of property in this situation must end somewhere . . . ." *Id.* at 647, 316 N.W.2d at 589. The same reasoning is even more compelling here, where the order confirming the sheriff's sale had become final before any effort was made to show that the sale price was inadequate. Accordingly, assuming without deciding that Empire Title has standing to raise this issue, we find no merit in its argument that the district court abused its discretion in not vacating the order confirming the sale on the basis of the upset bid and appraisal submitted after the order had become final.

CONCLUSION

We affirm only that part of the judgment of the district court denying Bel Fury's application for attorney fees. We reverse that

part of the judgment which vacated the August 21, 2003, order confirming the sale based upon our determination that the district court erred in concluding that the Miodowskis had a legal right to notice of homestead exemption rights prior to confirmation. Accordingly, the cause is remanded to the district court with directions to reinstate the order confirming the sale and for such further proceedings consistent with this opinion as may be necessary to conclude the foreclosure.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GRAND JURY OF LANCASTER COUNTY. STATE OF NEBRASKA, APPELLEE, V. LANCASTER COUNTY DISTRICT COURT, APPELLEE, AND CELIA MILWOOD, FORMERLY KNOWN AS CELIA SHEPPARD, APPELLANT.

693 N.W.2d 285

Filed March 11, 2005. No. S-04-587.

1. **Juries: Records: Appeal and Error.** The request for the release of grand jury testimony by the State, through the county attorney, presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
3. **Criminal Law: Juries: Records.** To evaluate the propriety of a district court's order regarding the release of grand jury testimony, the analysis must be made by reference to Nebraska statutes rather than to the Federal Rules of Criminal Procedure.
4. **Juries: Records.** Nebraska statutes governing grand juries permit only limited access to grand jury records.
5. ____: ____. Court approval for the release of grand jury proceedings when there has been a "no true bill" is limited under the Nebraska statutes to witnesses and to other courts.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Kirk E. Naylor, Jr., for appellant.

Joseph P. Kelly, Chief Deputy Lancaster County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On March 10, 2004, the State of Nebraska, through the Lancaster County Attorney, filed a motion requesting that the district court for Lancaster County release certain grand jury testimony originally presented in March 1990 to the county attorney and the Lincoln Police Department. The testimony requested was that of the appellant, Celia Milwood, formerly known as Celia Sheppard. The grand jury had been convened to investigate the circumstances surrounding the October 19, 1986, death of Bruce Sheppard, Milwood's deceased husband. An evidentiary hearing was conducted on the State's motion seeking release of Milwood's grand jury testimony. Relying on several exceptions to the secrecy of grand jury proceedings found in the Federal Rules of Criminal Procedure, on April 12, 2004, the district court sustained the State's motion with certain conditions. Milwood appeals from the district court's order.

We conclude that the district court's reliance on the Federal Rules of Criminal Procedure was error. Further, because the Nebraska Legislature has provided for the judicial release of grand jury materials in only limited circumstances, and the case at bar does not present a situation for which release is authorized, we conclude the district court erred as a matter of law when it granted the motion seeking release of Milwood's grand jury testimony. We reverse.

STATEMENT OF FACTS

On October 19, 1986, Sheppard died in his bedroom in Lincoln, Nebraska, of a single gunshot wound to the head. The only other person known to be present in Sheppard's home at the time of his death was his wife, Milwood. During the police investigation of Sheppard's death, Milwood told the police in an unsworn statement that she was in the kitchen when she heard a gunshot. She told investigators she went into the bedroom and found Sheppard on the bed with a gun in his hand. She stated that she took the gun out of his hand and then called police.

The police initially determined that Sheppard had committed suicide. Later, his death certificate was changed to read "undetermined cause." In March 1990, a grand jury was convened in

Lancaster County to determine whether any person committed a crime in connection with Sheppard's death. Milwood testified before the grand jury. The grand jury returned a "no true bill," which this court recently indicated means that at least 12 of the 16 grand jurors found no probable cause to believe that a crime had been committed. See *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). See, also, Neb. Rev. Stat. § 25-1633 (Cum. Supp. 2004); Neb. Rev. Stat. §§ 29-1406(2)(e) and 29-1416 (Reissue 1995). The police department's file on Sheppard's death was closed.

In June 1990, Milwood gave deposition testimony in a civil case. In her deposition, she stated that she was in the bedroom with Sheppard when she saw him place the gun to his head. She stated that she grabbed the gun and that the gun went off.

Some time in 2003, Sheppard's sister contacted the Lincoln Police Department, requesting that the department reopen its investigation into Sheppard's death, based upon what she felt were inconsistencies between Milwood's statement to the police at the time of Sheppard's death and Milwood's later deposition testimony. Gregory Sorensen, a Lincoln police officer, reviewed the police file and the deposition testimony and concluded there was a significant discrepancy between the two statements.

Based upon this discrepancy and other information in the police file, Sorensen sought access to Milwood's grand jury testimony. On January 27, 2004, the county attorney's office filed an ex parte "Motion to Make Certain Records Available," seeking to have Milwood's grand jury testimony read to Sorensen as part of his investigation into Sheppard's death. The motion was denied without prejudice.

On March 10, 2004, the county attorney's office filed a second motion seeking the release of Milwood's testimony. This second motion came on for an evidentiary hearing on April 7. The county attorney and counsel for Milwood appeared. Sorensen was the sole witness to testify at the hearing.

According to Sorensen's testimony, Sorensen wanted to review Milwood's grand jury testimony

> to see how [she] testified before the grand jury. If she testified before the grand jury differently than what she testified in her deposition, obviously she must have perjured herself

> at one place or the other, either in [March] 1990 or when she gave the deposition . . . .
>
> At this point in time, there's definitely two different stories, and I'm wondering which one the grand jury heard. And, if the grand jury heard the initial story where she was in the kitchen when the gunshot went off, as opposed to the grand jury [having heard] that she was in the bedroom at the time the gun went off, I think it could have a significant effect on how the grand jury may [have] decide[d] to rule on whether this death was in fact a homicide.

On April 12, 2004, the district court, relying on the Federal Rules of Criminal Procedure, entered an order permitting the release of Milwood's testimony under certain conditions, including the following:

1. The grand jury court reporter would read Milwood's testimony to Sorensen.
2. Milwood and/or her attorney could be present during the reading.
3. Milwood's testimony would be read only once.
4. Sorensen could take handwritten notes of the testimony. If he took notes, he was required to provide Milwood or her attorney with a copy of those notes. He could also give a copy of the notes to the county attorney. Sorensen could not make any other copies of the notes.
5. Sorensen was prohibited, absent written authorization from the court, from discussing Milwood's testimony with anyone other than the county attorney.
6. Other than as provided in the order, the grand jury court reporter was prohibited from disclosing Milwood's testimony.
7. The disclosure of Milwood's grand jury testimony was not to occur until 30 days after the date of the court's order. In the event of an appeal of the court's order, the disclosure was stayed pending the outcome of the appeal.

Milwood appeals the district court's order permitting the release of her grand jury testimony.

ASSIGNMENT OF ERROR

On appeal, Milwood claims the district court erred in ordering the release of her testimony given before the Lancaster County grand jury in March 1990.

STANDARDS OF REVIEW

[1,2] The request for the release of grand jury testimony by the State, through the county attorney, presents a question of law. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

District Court's Reliance on Rule 6(e) of Federal Rules of Criminal Procedure Was Error.

In its April 12, 2004, order, the district court acknowledged that "Nebraska's grand jury statutes allow only limited access to grand jury records, none of which applies [sic] to the instant case." Notwithstanding the strictures of the Nebraska statutes, the district court, in apparent reliance on *In re Grand Jury of Douglas Cty., supra*, proceeded to analyze the State's motion to release by reference to Fed. R. Crim. P. 6(e), which provides various exceptions, not recited here, to the general rule of secrecy regarding grand jury proceedings. The district court found that the request of the State related, inter alia, to whether there had been a violation of state criminal law and further found that "the interest in secrecy in this case is minimal." The district court concluded that release was proper under the exceptions found in rule 6(e) of the Federal Rules of Criminal Procedure.

On appeal, the State acknowledges that "there is not a Nebraska statute which expressly applies to this case to justify the release of the grand jury testimony of [Milwood]." Brief for appellee at 3. The State, however, asserts that the district court correctly decided the motion under federal standards.

On appeal, Milwood notes that "[t]he limited circumstances under which grand jury records may be released by the court are set forth by statute" and asserts that the district court's reliance on the Federal Rules of Criminal Procedure constituted error. Brief for appellant at 11. We agree with Milwood that Nebraska statutes do not provide for the release of her testimony under the facts of this case and that the district court's order granting the release stemming from its reliance on the Federal Rules of Criminal Procedure was error. Accordingly, we reverse.

The district court's order and the arguments of the parties indicate that both the district court and the State read our decision in *In re Grand Jury of Douglas Cty., supra*, as having adopted the various exceptions to secrecy embodied in rule 6(e) of the Federal Rules of Criminal Procedure. Contrary to this reading, our references in *In re Grand Jury of Douglas Cty.* to the Federal Rules of Criminal Procedure were limited to a recapitulation of the arguments of the parties in *In re Grand Jury of Douglas Cty.* and the district court's pronouncements in that case. Further, although we acknowledged the considerable differences between the federal and state methods of initiating criminal proceedings, we referred to federal authority in *In re Grand Jury of Douglas Cty.* not as an endorsement of rule 6(e) of the Federal Rules of Criminal Procedure, but, rather, as an expression of agreement with remarks in the federal cases extolling in general the virtues of the secrecy of grand jury proceedings. In view of the foregoing, the district court's reliance on the Federal Rules of Criminal Procedure in granting the release was error.

Release of Milwood's Grand Jury Testimony Under Nebraska Statutes Is Error.

[3] To evaluate the propriety of the district court's order of April 12, 2004, our analysis must be made by reference to Nebraska statutes rather than to the Federal Rules of Criminal Procedure. Thus, we turn to the Nebraska statutes pertaining to grand jury proceedings to determine whether the release of the grand jury testimony can be made to the county attorney in this case when a no true bill was returned.

[4] A review of the Nebraska statutes governing grand juries reveals only limited access to grand jury records. See Neb. Rev. Stat. § 29-1401 et seq. (Reissue 1995 & Cum. Supp. 2004). Section 29-1407.01(1) provides in part: "No release or destruction of the notes or transcripts [of grand jury proceedings] shall occur without prior court approval." Elsewhere in the statutes, the circumstances for "release" are indicated.

Section 29-1407.01(2) provides: "Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto."

Section 29-1420(2) provides: "A district judge under whose direction a grand jury has been impaneled may, upon good cause shown, transfer to a court of competent jurisdiction in another county or jurisdiction any evidence gathered by the grand jury that offenses have been committed in such other county or jurisdiction."

For the sake of completeness, we note that release is addressed elsewhere in § 29-1420. Section 29-1420(1) describes the circumstances for the release of a grand jury report, but the grand jury in this case did not prepare a report, but, rather, returned a no true bill and nothing more. See, similarly, *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). Thus, § 29-1420(1) is not applicable.

[5] Given the foregoing statutes, it is clear that court approval for the release of grand jury proceedings when there has been a no true bill is limited by statute to witnesses and to other courts. See §§ 29-1407.01(2) and 29-1420(2). The instant case does not present either of the situations described above, and therefore, the release of Milwood's testimony to the county attorney was not consistent with Nebraska statutes and was error.

As indicated earlier in this opinion, the State urges this court to affirm the April 12, 2004, order of release because release would facilitate the investigation into the circumstances of Sheppard's death. We have recently observed that "[t]he failure of the grand jury to return an indictment does not prevent the County Attorney from proceeding independently." *In re Grand Jury of Douglas Cty.*, 263 Neb. at 988, 644 N.W.2d at 863. In this regard, we note that § 29-1402 provides that "[t]he convening of a grand jury shall in no way limit the right of prosecution on information or complaint during the time the grand jury is in session." Further, and more on point for present purposes, § 29-1416(2) provides:

> Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

The statutes clearly provide that although a no true bill was originally returned, upon the discovery of additional evidence

and a proper showing to the court, an additional grand jury inquiry can be initiated. The statutes do not evince an impediment to the continued investigation which the State seeks to pursue in this case. Given case law and the relevant statutory provisions, and notwithstanding the secrecy of grand jury proceedings generally, the ability of the office of the county attorney to pursue an investigation following the return of a no true bill is not prevented by Nebraska statutes.

The State's request for the release of Milwood's grand jury testimony presents a question of law, which we resolve independently of the conclusion reached by the district court. See *In re Grand Jury of Douglas Cty., supra.* Given our foregoing analysis, we conclude the district court erred in granting the State's request for the release of Milwood's grand jury testimony.

CONCLUSION

Based on Nebraska statutes governing grand jury proceedings, we conclude that the district court erred in granting the release of Milwood's grand jury testimony to the county attorney. The judgment of the district court is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
ARTHUR LEE GALES, JR., APPELLANT.
694 N.W.2d 124

Filed March 18, 2005. No. S-04-015.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Appeal and Error.** Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
3. ____. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
4. **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.

5. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
6. **Statutes: Constitutional Law: 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 and will not be endorsed by the courts.
7. ____: ____: ____. An ex post facto analysis applies when a statutory amendment changes the punishment of a crime.
8. **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 also presumed.
9. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.
10. **Death Penalty.** There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.
11. **Constitutional Law: Due Process: Death Penalty.** While the Eighth Amendment does not require a court to engage in a proportionality review, where a state creates a right to proportionality review, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied.
12. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
13. **Criminal Law: Due Process: Notice.** In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself.
14. **Constitutional Law: Death Penalty: Prosecuting Attorneys.** The U.S. Constitution does not require limitations to be placed on prosecutorial discretion in the context of capital sentencing.
15. **Criminal Law: Prosecuting Attorneys.** In our criminal justice system, the State retains broad discretion as to whom to prosecute and what charge to file.
16. ____: ____. To the extent that a prosecutor's discretion is subject to constitutional constraints, it is in the fact that a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.
17. **Criminal Law: Courts: Prosecuting Attorneys: Presumptions: Evidence.** The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary.
18. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
19. **Death Penalty.** Imposition of the death penalty is not, per se, cruel and unusual punishment.

20. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
21. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
22. **Criminal Law: Trial: Juries: Appeal and Error.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
23. ____: ____: ____: ____. To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
24. **Juror Qualifications: Appeal and Error.** The extent to which parties may examine jurors as to their qualifications rests in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
25. **Trial: Juries.** Except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine an individual juror out of the presence of all the other potential jurors.
26. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
27. **Prior Convictions: Judgments: Sentences: Proof.** In order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment.
28. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
29. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstances must be proved beyond a reasonable doubt.
30. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.
31. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
32. **Homicide: Death Penalty: Supreme Court.** The Nebraska Supreme Court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. This circumstance includes a pitiless crime which is unnecessarily torturous to the victim.
33. **Homicide: Death Penalty: Words and Phrases.** The term "especially heinous, atrocious, or cruel" is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain existed for any prolonged period of time. This class includes murders involving torture, sadism, or sexual abuse.

34. **Aggravating and Mitigating Circumstances.** The two prongs of aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2004) describe, in the disjunctive, two separate circumstances which may operate in conjunction with or independently of one another.
35. **Jury Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
36. **Trial.** The general conduct of the trial rests within the discretion of the trial court.
37. ____. The general rule is that the party with the burden of proof is entitled to open and close argument.
38. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
39. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate.
40. ____: ____. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
41. **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.
42. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
43. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
44. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death on appeal, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
45. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence.
46. **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.

47. **Constitutional Law: Juries: Aggravating and Mitigating Circumstances.** An aggravating circumstance must be found by a jury beyond a reasonable doubt in order to satisfy the Sixth Amendment.
48. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
49. **Supreme Court: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of the case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in the case is no greater than those imposed in other cases with the same or similar circumstances.
50. **Supreme Court: Jurisdiction: Statutes.** The jurisdiction conferred upon the Nebraska Supreme Court by the Constitution may not be increased or extended by legislative enactment.
51. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can be reasonably done.
52. **Constitutional Law: Statutes: Appeal and Error.** It is the duty of an appellate court to give a statute an interpretation which meets constitutional requirements, if it can.
53. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.
54. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
55. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
56. **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.
57. **Supreme Court.** The Nebraska Supreme Court is the final arbiter of Nebraska law.
58. **Statutes: Supreme Court: Sentences: Death Penalty.** Nebraska's capital sentencing statutes create a two-tier sentencing process and differentiate between the role performed by the sentencing panel and the role of the Nebraska Supreme Court in reviewing that sentence.
59. **Supreme Court: Sentences: Death Penalty: Appeal and Error.** The Nebraska Supreme Court's proportionality review in capital cases is conducted independently from the sentencing panel's proportionality review and the Nebraska Supreme Court's appellate review of the sentencing decision made by the trial court.
60. **Statutes: Supreme Court: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** While the Nebraska statutes do not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating circumstances as a

basis for resentencing a defendant, they expressly authorize and require the Nebraska Supreme Court to conduct an independent review of the proportionality of the defendant's sentence.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Susan M. Bazis, of Bazis Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, Solicitor General, and Kimberly A. Klein for appellee.

James R. Mowbray and Jerry L. Soucie, for amicus curiae Nebraska Commission on Public Advocacy.

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

GERRARD, J.

I. NATURE OF CASE

Arthur Lee Gales, Jr., was convicted pursuant to jury verdict of two counts of first degree murder and one count of attempted second degree murder in the district court. Gales was sentenced to consecutive sentences of death on each count of first degree murder and a sentence of imprisonment for a period of not less than 50 nor more than 50 years on the count of attempted second degree murder. On appeal, this court was required, by the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), to vacate Gales' death sentences and remand the first degree murder causes for resentencing. See *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003) (*Gales I*). Upon remand, a three-judge panel of the district court again sentenced Gales to death on each count of first degree murder. The instant appeal is Gales' automatic direct appeal to this court from his resentencing. See Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2004). For the reasons that follow, we affirm the judgment of the district court.

II. BACKGROUND

A three-count information was filed against Gales on May 22, 2001. Count I charged Gales with first degree murder based on an allegation that on or about November 12, 2000, he purposely and

with deliberate and premeditated malice or during the perpetration of a first degree sexual assault killed Latara Chandler. Count II charged first degree murder based upon an allegation that on or about November 12, Gales purposely and with deliberate and premeditated malice killed Tramar Chandler. Count III charged Gales with attempted second degree murder, alleging that on or about November 12, he intentionally, but without premeditation, attempted to kill Judy Chandler.

Gales entered pleas of not guilty to all charges. Evidence at trial revealed that Gales had been at Judy's apartment in Omaha, Nebraska, on November 11, 2000, with Judy and her children, Latara and Tramar. Judy was found near 15th and Grace Streets in Omaha on the morning of November 12. She had been severely beaten. After Judy was identified, police went to Judy's apartment to check on the children and discovered 13-year-old Latara's body, nude from the waist down, in a bedroom. Seven-year-old Tramar's body was found lying in a bathtub. Autopsies indicated that Latara was killed by manual strangulation and that Tramar died from drowning and manual strangulation. The pathologist testified that each child had suffered at least 4 minutes of compression of the neck before death. Latara had been sexually assaulted.

The State's theory of the case was that Gales and Judy left Judy's children at her apartment on the evening of November 11, 2000, and that Gales later severely beat Judy and left her for dead. The State contended that Gales realized the children were potential witnesses who could place him with Judy that evening; therefore, he went back to the apartment and killed them. The State presented DNA evidence which linked Gales to both crime scenes and excluded other potential suspects. The DNA evidence particularly linked Gales to the sexual assault of Latara. Gales did not testify or offer evidence at trial and did not dispute the State's general theory of how the children were killed; instead, his defense was that he was not the person who assaulted Judy and killed the children. However, Gales is not, for purposes of this appeal, challenging the factual basis for his convictions.

On August 27, 2001, the jury returned a verdict finding Gales guilty of two counts of first degree murder and one count of attempted second degree murder. A sentencing hearing was

conducted by the judge who presided over the trial. The court found certain aggravating circumstances to exist, and based upon those findings, Gales was sentenced to death for each of the first degree murder convictions. See *Gales I*. However, in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the U.S. Supreme Court held with respect to Arizona's capital sentencing procedures that the Sixth Amendment precluded a sentencing judge, sitting without a jury, from finding an aggravating circumstance necessary for imposition of the death penalty. Because *Ring* was decided during the pendency of Gales' direct appeal, we were required to review his death sentences in accordance with the constitutional principle announced in *Ring*. See *Gales I*. Because Nebraska's judge-based capital sentencing procedures were functionally identical to Arizona's, we vacated Gales' death sentences. *Gales I*.

While *Gales I* was under submission to this court, the Nebraska Legislature enacted 2002 Neb. Laws, L.B. 1, of the 97th Legislature, Third Special Session, in order to satisfy *Ring*. For reasons that will be examined in more detail below, we concluded that the provisions of L.B. 1 would apply to Gales' new penalty phase proceeding.

Upon remand, the State filed a notice of aggravating circumstances, indicating its intent to produce evidence that

(1) Gales was previously convicted of a crime involving the use of violence to the person;

(2) each murder was committed in an effort to conceal the identity of the perpetrator of the crime of second degree murder;

(3) at the time each murder was committed, Gales also committed another murder; and

(4) the murder of Latara was especially heinous, atrocious, or cruel.

Following jury selection procedures that will be addressed in more detail below, a jury was impaneled and evidence adduced. The jury unanimously found each of the statutory aggravating circumstances set forth above to exist. The jury was discharged; a three-judge sentencing panel of the district court was convened to preside over a mitigation hearing and received evidence of mitigation and sentence excessiveness or disproportionality. The sentencing panel found no statutory mitigating circumstances to

be present in this case and considered two nonstatutory mitigating circumstances proffered by Gales: Gales' strong relationship with members of his family and his ability to adapt to life in prison. However, the panel concluded that the nonstatutory mitigating circumstances were not of sufficient weight to approach or exceed the weight which the panel gave to the aggravating circumstances applicable to each murder, and concluded that the sentence of death should be imposed on Gales for each of the murders of which he had been convicted. The panel concluded that the imposition of a sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Consequently, the panel imposed two sentences of death on Gales.

Other factual details will be set forth below as relevant to our discussion of the issues presented in this appeal.

III. ANALYSIS

Gales assigns that the court erred in imposing the death penalty for a number of reasons. Because Gales assigns a great many errors, we have for the sake of clarity consolidated, restated, and reordered Gales' assignments of error. Those assignments of error, and the appropriate standards of review, are set forth below in the individual sections of our analysis.

1. Applicability of L.B. 1

(a) Assignments of Error

(1) L.B. 1 is an ex post facto law that cannot be applied retroactively to Gales' case;

(2) the Nebraska death penalty statutes in effect at the time of the murders were unconstitutional and void pursuant to the principle announced in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); and

(3) L.B. 1 is ineffective because it does not require aggravating circumstances to be alleged in the information.

(b) Standard of Review

[1] The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales assigns several errors with respect to the applicability of L.B. 1 to his resentencing. We discussed the general provisions of L.B. 1 in our decision in *Gales I.*

> Generally, L.B. 1 makes two significant changes in Nebraska's capital sentencing procedure. First, it provides for an "aggravation hearing" following a determination of guilt in a first degree murder case, at which a jury determines whether aggravating circumstances alleged by the State exist, unless such determination by a jury is waived by the defendant. L.B. 1, § 11. Second, it removes the option of sentencing by the trial judge and requires sentencing by a panel of three judges. *Id.*, § 12. L.B. 1 does not change the statutory definitions of aggravating and mitigating circumstances or the manner in which they are to be balanced. *Id.*, §§ 14 and 15.

Gales I, 265 Neb. at 627, 658 N.W.2d at 626.

[2-5] Gales challenges the applicability of L.B. 1's sentencing procedures to his resentencing. Gales also challenges several specific provisions of L.B. 1. However, we have previously considered and rejected several of these arguments, most pertinently in our decision in *Gales I.* Consequently, it is relevant that matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004). Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Id.* 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. *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999). Furthermore, it is well established that the doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

These principles, compelling adherence to our prior resolution of issues, will prove dispositive of several of Gales' claims.

(i) Ex Post Facto Law

[6,7] Gales first argues that L.B. 1 was an impermissible ex post facto law, because, according to Gales, L.B. 1 transformed the statutory aggravating circumstances from sentencing factors into elements of "capital felony murder." Brief for appellant at 9. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. *Gales I.* 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 and will not be endorsed by the courts. *Id.* This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id.*

In *Gales I*, we considered and rejected Gales' ex post facto argument. We held that L.B. 1's provisions for jury determination of aggravating circumstances affected a procedural change in the law which applied to all proceedings which occurred after the effective date of the amendment. See *id.* We specifically concluded that application of those provisions would not violate ex post facto principles. See *id.* Accord *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005). This holding represents the law of the case and precludes Gales' claim. Gales presents no argument persuading us to reconsider our prior determination on this issue.

Thus, we reject Gales' first assignment of error. Furthermore, it appears from our examination of the briefs that Gales' second assignment of error, although somewhat confusing, is based in the same underlying legal theory as his first assignment of error. We also reject Gales' second assignment of error.

(ii) Allegation of Aggravating Circumstances

In his next assignment of error, Gales claims that L.B. 1 is "ineffective" because it does not require aggravating circumstances to be alleged in the information, without which the defendant has not been charged with a crime. We first note that although Gales' situation is somewhat different because L.B. 1 was enacted

during the pendency of his first direct appeal, Gales' characterization of Nebraska law is incorrect.

> Any information charging a violation of section 28-303 [murder in the first degree] and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are provided in section 29-2523. The notice of aggravation shall be filed as provided in section 29-1602. It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.

Neb. Rev. Stat. § 29-1603(2)(a) (Cum. Supp. 2004).

Second, to the extent that Gales' argument can be construed to complain about the fact that aggravating circumstances were not alleged in his charging information, we addressed that complaint in *Gales I*. We noted that the filing of a notice of aggravation was a new procedure established by L.B. 1 and concluded that because the pretrial and trial "steps" of Gales' litigation were completed and became final at a time when the law did not require the State to file a notice of aggravation in order to seek the death penalty, this new procedural requirement was not applicable to Gales. *Gales I*. This determination is the law of the case, and we decline to reconsider it.

Finally, we note that Gales was aware, from our opinion in *Gales I*, of precisely which aggravating circumstances would be at issue in the penalty phase proceedings of his resentencing and that the State filed a notice of aggravating circumstances prior to resentencing even though it was not required, under our opinion in *Gales I*, to do so. Thus, to the extent Gales is arguing that he was not afforded the notice necessary to allow him to prepare a defense, we find such argument to be without merit. See *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998) (rejecting argument that defendant had insufficient notice of aggravating factors).

2. Constitutional Challenges to Capital Sentencing Procedures

(a) Assignment of Error

Nebraska's capital sentencing provisions, Neb. Rev. Stat. § 29-2519 et seq. (Reissue 1995 & Cum. Supp. 2004), are overly

broad and violate Gales' rights to due process and equal protection in that those provisions:

(1) set forth no criteria for the selection of the three-judge panel;

(2) set forth no procedures to be followed by the three-judge panel;

(3) do not permit the defendant to select and voir dire the sentencing panel;

(4) do not require jury input into sentencing;

(5) do not permit the jury to determine mitigating factors, as required by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002);

(6) limit the mitigating circumstances which can be presented by a defendant because there are no standards regarding the mechanism and burdens of proof for mitigating circumstances;

(7) provide no notice to the defendant of which cases the sentencing panel will consider in its proportionality review; and

(8) do not regulate prosecutorial discretion.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales advances several arguments challenging the constitutionality of the Nebraska capital sentencing provisions. These arguments are variously, if not consistently, based on the 8th or 14th Amendment to the U.S. Constitution.

(i) Three-Judge Panel

[8] Gales argues that the Nebraska capital sentencing procedures are unconstitutional because they

> do not specifically provide for the method for the Chief Judge [sic] of the Nebraska Supreme Court to select panel members; and panel members do not appear to be selected at random or by any visible or any articulated objective constitutional method, and the selection of panel members appears to be arbitrary and capricious.

Brief for appellant at 16. This argument is without merit. Section 29-2521 specifically provides that the panel of judges, including the judge who presided at the trial of guilt, shall be "named at random by the Chief Justice of the Supreme Court." We have previously stated that the statutory sentencing procedure provides appropriate standards for impaneling a three-judge panel. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Furthermore, 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 also presumed. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). There was no evidence presented that the Chief Justice did anything other than randomly choose the names of the sentencing panel as required by § 29-2521.

Given the statutory requirement of a random selection of the panel, our holdings in *Bjorklund* and *Ryan*, the presumption of regularity which attaches to official acts, and the absence of any evidence which would serve to rebut that presumption, we find no merit to Gales' argument.

Gales further argues that his right to equal protection is violated because there are no statutory provisions or criteria governing the procedures to be followed by a three-judge panel. Gales does not explain precisely how his right to equal protection of the laws is implicated by this fact. However, we rejected an argument similar to Gales' in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). In that case, the defendant claimed that the lack of procedures for a three-judge panel violated Neb. Const. art. V, § 19, which requires uniformity in the force and effect of the proceedings, judgments, and decrees of the courts. We rejected this argument, stating that the statutes were not rendered unconstitutional because the district courts were given some discretion in sentencing proceedings. "Discretion indicates that proceedings will be inconsistent, but does not indicate that proceedings will lack uniformity in a constitutional sense." *Lotter*, 255 Neb. at 512, 586 N.W.2d at 630. To the extent that such proceedings lack uniformity due to the exercise of the district courts' discretion, the appropriate challenge is whether the discretion used by the district court in the case at issue amounted to abuse. *Id.*

Although a different constitutional provision is invoked in the instant case, we see no meaningful basis to distinguish our analysis from that in *Lotter*, particularly when Gales' argument in this case consists of little more than a citation to the Equal Protection Clause. Therefore, we find no merit in Gales' argument.

Gales also argues that the statutes are unconstitutional because they do not afford him the right to select and voir dire the members of the sentencing panel. Gales offers no authority for the rather remarkable proposition that a defendant has a constitutional right to select his or her sentencing judge, nor are we aware of any; in fact, the weight of the authority is to the contrary. Gales is essentially claiming a right to engage in "judge-shopping," which has been characterized as " 'conduct which abuses the judicial process.' " See *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998), quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). The random assignment system is intended to comport with due process, by preventing any person from choosing the judge to whom an action is to be assigned. Cf. *Cuzzort v. State*, 271 Ga. 464, 519 S.E.2d 687 (1999).

In short, the law clearly provides that selection of the members of the three-judge sentencing panel will be random, and there is no basis in this case to overcome the presumption that the selection of Gales' panel comported with this requirement. Gales' constitutional rights are not violated by a random assignment of judges. We reject Gales' arguments with respect to the composition and procedures of the sentencing panel.

(ii) Jury Input Into Sentencing

Gales next argues that the capital sentencing procedures are unconstitutional because they do not provide for any jury input into the issue of what sentence should be imposed upon a defendant convicted of a capital crime. He also contends that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), requires a jury to determine mitigating circumstances.

In his appeal in *Gales I*, however, Gales argued that because *Ring* conferred a right to a jury determination of whether aggravating circumstances exist, we should also determine, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.

2d 435 (2000), that a jury must also conduct the weighing function of capital sentencing. We rejected that argument, stating that

> we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.

Gales I, 265 Neb. at 628-29, 658 N.W.2d at 626-27. Cf. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (Sixth Amendment prohibits judicial factfinding that enables judge to increase sentences, but not judicial factfinding to reduce sentences).

Gales presents no basis for us to reconsider our decision in *Gales I*, and the U.S. Supreme Court's rearticulation in *Booker* of the *Apprendi/Ring* principles we discussed in *Gales I* only reinforces our original conclusion. Consequently, we reject Gales' argument.

(iii) Limitation of Evidence of Mitigating Circumstances

[9,10] Gales contends that the capital sentencing statutes are unconstitutional "in that they limit the mitigating circumstances which can be presented by a defendant, because there are no standards regarding the mechanism and burdens of proof for mitigating circumstance[s]." Brief for appellant at 17. To meet

constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). But there is no perfect procedure for deciding in which cases governmental authority should be used to impose death. *Id.* We conclude that appropriate standards for the submission and consideration of mitigating circumstances have been established by statute and this court's case law.

Section 29-2521(3) provides that

> [w]hen a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520, the panel of judges shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality. *Evidence may be presented as to any matter that the presiding judge deems relevant to (a) mitigation, including, but not limited to, the mitigating circumstances set forth in section 29-2523*, and (b) sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522. Any such evidence which the presiding judge deems to have probative value may be received. The state and the defendant and his or her counsel shall be permitted to present argument for or against sentence of death. The presiding judge shall set forth the general order of procedure at the outset of the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

(Emphasis supplied.) Furthermore, this court has stated that while there is no burden of proof with respect to mitigating circumstances, and the defendant may present evidence which is probative of the existence of a statutory or nonstatutory mitigating circumstance, the risk of nonproduction and nonpersuasion is on the defendant. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Nebraska's death penalty sentencing procedures allow the defendant a constitutionally sufficient opportunity to adduce evidence relevant to mitigation.

(iv) Notice of Cases Considered in Proportionality Review

[11] Gales argues that the death penalty sentencing statutes are unconstitutional because there is no notice requirement providing the defendant with information as to which cases the sentencing panel will review and analyze as part of its proportionality review. While the Eighth Amendment does not require a court to engage in a proportionality review, see *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), where a state creates a right to proportionality review, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied. See *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994).

[12] But Gales does not argue—nor would the record support an argument—that he did not have sufficient notice of what the sentencing panel considered in this case. Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). Here, the sentencing order indicates that the sentencing panel's proportionality review was based upon this court's published opinions in capital cases, see *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), and exhibits 150 through 155, which were introduced by Gales at his first sentencing. That the sentencing panel would consider other cases in which the death penalty had been imposed was clear from our opinion in *Bjorklund*; to the extent that Gales believed other evidence was relevant to the proportionality of his sentences, he had the opportunity to present that evidence.

[13] In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). The record shows that in this case, Gales received notice and an opportunity to be heard on the proportionality of his sentences. Consequently, the record provides

Gales with no basis to challenge the constitutional adequacy of the statutory scheme.

(v) Regulation of Prosecutorial Discretion

[14-16] Gales argues that the death penalty sentencing procedures are unconstitutional because they do not regulate the exercise of prosecutorial discretion. But the U.S. Supreme Court has rejected the argument that the U.S. Constitution requires limitations to be placed on prosecutorial discretion in the context of capital sentencing. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). See, also, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). In our criminal justice system, the State retains broad discretion as to whom to prosecute and what charge to file. See *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). Instead, to the extent that a prosecutor's discretion is subject to constitutional constraints, it is in the fact that a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). In that regard, Gales claims:

> In support thereof, there have been a number of murder cases in Nebraska with evidence of similar, and in some cases more "aggravating circumstances" than others which have, by way of plea agreements, resulted in convictions other than first degree murder and therefore no sentence of death. Further, there have been numerous first degree murder convictions in Nebraska in which, by plea agreement or otherwise, the prosecution has refrained (for a variety of reasons, on information and belief including but not limited to projected costs for a death penalty case) from seeking the death penalty or refrained from offering any evidence as to aggravating circumstances at the sentencing phase of a defendant's trial.

Brief for appellant at 17.

[17] The purpose of setting forth Gales' appellate argument, in its entirety, is to illustrate the degree to which it depends on assertions of fact that are unsupported by evidence. Gales has simply

failed to present any record that would justify a conclusion that prosecutorial discretion has been abused. Gales' allegations are not only unsubstantiated, but even if supported by evidence, would not establish that the State has exercised prosecutorial discretion for reasons forbidden by the Constitution. See *Armstrong, supra*. The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. *Id.* In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary. *Id.* Such evidence is completely lacking here; thus, Gales' constitutional claim fails. See *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986).

3. Unconstitutional Vagueness

(a) Assignments of Error

(1) The Nebraska death penalty statutes are facially unconstitutional because they are vague;

(2) the aggravating circumstance that the defendant was previously convicted of "a crime involving the use or threat of violence to the person" is unconstitutionally vague;

(3) the aggravating circumstance that "[t]he murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime" is unconstitutionally vague;

(4) the aggravating circumstance that the murder was "especially heinous, atrocious, [or] cruel" is unconstitutionally vague; and

(5) the aggravating circumstance that "[a]t the time the murder was committed, the offender also committed another murder" is unconstitutionally vague.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales' assignments of error allege that the Nebraska death penalty statutes are unconstitutionally vague and that each of the

aggravating circumstances found to have been proved in this case is unconstitutionally vague. However, Gales' appellate brief offers little in the way of argument for any of these claims. For instance, in support of the first assignment of error listed in this section, Gales' argument consists of a list of the constitutional provisions that § 29-2519 et seq. allegedly violates. Gales does not offer any propositions of law, or articulate any constitutional standards, to substantiate these claims, nor, with the sole exception of a reference to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), does Gales cite any relevant legal authority.

We assume, given this lack of specificity, that Gales' assignment of error is simply intended to be a restatement of the constitutional arguments that Gales argued more specifically elsewhere in his brief. Nonetheless, to the extent that Gales' assignment of error is intended to raise any issues beyond the more specific constitutional claims we discuss elsewhere in this opinion, we decline to address them, as they have not been properly raised. Gales presents us with no basis to reconsider our well-established holding that Nebraska's death penalty statutes are neither vague nor overbroad. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

Similarly, with respect to the alleged unconstitutional vagueness of each of the aggravating circumstances found to exist in this case, Gales' argument is limited to a nearly identical list of the constitutional provisions allegedly violated. We first note that while Gales lists a number of constitutional provisions, his assignments of error simply claim that the aggravating circumstances are "unconstitutionally vague," which in the context of capital sentencing, implicates the Eighth Amendment's requirement that they "furnish principled guidance for the choice between death and a lesser penalty." See *Richmond v. Lewis*, 506 U.S. 40, 46, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992).

Second, we have previously rejected constitutional challenges to each of the aggravating circumstances Gales challenges in this appeal. As relevant, the aggravating circumstances at issue in this case are as follows:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person . . . ;

> (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;
>
> . . . .
>
> (d) The murder was especially heinous, atrocious, [or] cruel . . . ;
>
> (e) At the time the murder was committed, the offender also committed another murder . . . .

§ 29-2523(1). Each of these aggravating factors has been held constitutional in response to an argument of unconstitutional vagueness. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000) (effort to conceal identity of perpetrator; especially heinous, atrocious, or cruel); *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984) (previous conviction of crime involving use or threat of violence to person), citing *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977) (another murder), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). In the absence of any particular argument explaining the alleged vagueness of each of these terms, we decline to reconsider our established holdings rejecting Gales' arguments.

We also note, with respect to aggravating circumstance (1)(b), that Gales' argument is directed at the alleged vagueness of the phrase "apparent effort" to conceal the commission of a crime or conceal the identity of the perpetrator. Compare § 29-2523 (Reissue 1995). Gales complains that there is no clear definition of what constitutes an "apparent effort." However, the current wording of aggravating circumstance (1)(b), quoted above, does not contain the word "apparent." See § 29-2523 (Cum. Supp. 2004). The word "apparent" was removed from the statute effective July 15, 1998, well before the murders of Latara and Tramar. See, 1998 Neb. Laws, L.B. 422; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

The alleged vagueness of aggravating circumstance (1)(d) will be addressed below in more depth, as it relates to our analysis of Gales' challenge to the jury instruction based on that aggravating circumstance. At this point, however, it suffices to state that we find each of Gales' assignments of error alleging the vagueness of Nebraska's capital sentencing statutes to be without merit.

4. CRUEL AND UNUSUAL PUNISHMENT

(a) Assignment of Error

The Nebraska death penalty statutes subject a defendant to cruel and unusual punishment.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales contends that inflicting the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. Gales first claims that the death penalty "is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Nebraska." Brief for appellant at 27. Again, there is little in the way of evidence or argument to substantiate this claim, and to the extent that this claim is not subsumed in his other arguments, we decline to consider it.

[18,19] Gales also makes several contentions that, characterized generally, attack the death penalty as being unsound public policy. For instance, Gales contends that the death penalty is irrational, induces violence, and does not deter crime. But it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Our responsibility, in this context, is to ensure that the Legislature has, in promulgating public policy, acted within constitutional boundaries. It is well established that imposition of the death penalty is not, per se, cruel and unusual punishment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Cf. *Jones v. United States*, 527 U.S. 373, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999). See, also, *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003) (Nebraska Constitution does not require more than Eighth Amendment to U.S. Constitution with reference to cruel and unusual punishment), *cert. denied* 541 U.S. 910, 124 S. Ct. 1618, 158 L. Ed. 2d 257 (2004).

Gales also argues that death by electrocution is cruel and unusual punishment. As in *State v. Mata*, 266 Neb. 668, 668 N.W.2d

448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005), we note recent events at the U.S. Supreme Court that cast substantial doubt upon whether that Court will continue to regard electrocution as consistent with the Eighth Amendment. See *id.*, citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Bryan v. Moore*, 528 U.S. 960, 120 S. Ct. 394, 145 L. Ed. 2d 306 (1999) (granting certiorari on question), *cert. dismissed as improvidently granted* 528 U.S. 1133, 120 S. Ct. 1003, 145 L. Ed. 2d 927 (2000) (dismissing certiorari due to legislative enactment of lethal injection); *Campbell v. Wood*, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994) (Blackmun, J., dissenting from denial of certiorari; Stevens and Ginsburg, JJ., voting to grant stay of execution); and *Poyner v. Murray*, 508 U.S. 931, 113 S. Ct. 2397, 124 L. Ed. 2d 299 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., respecting denial of petition for writ of certiorari). See, also, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

In the present case, however, Gales has presented no evidence that would warrant reconsideration of our prior decisions holding that death by electrocution as administered in this state is not cruel and unusual punishment. See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), *cert. denied* 542 U.S. 939, 124 S. Ct. 2904, 159 L. Ed. 2d 815 (2004), citing *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). In the absence of such a record, we continue to adhere to those holdings. We find Gales' assignment of error to be without merit.

5. Retroactivity of *Ring v. Arizona*

(a) Assignment of Error

Gales' death sentence should be vacated because of *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *reversed sub nom. Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

(b) Analysis

In *Summerlin v. Stewart*, the Ninth Circuit held that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), applied retroactively to final judgments that were the subject of collateral review on postconviction appeal from death sentences. But that holding was reversed by the U.S. Supreme

Court in *Schriro v. Summerlin, supra*, which held that *Ring* did not apply retroactively. See, also, *Lotter, supra*.

That having been said, we find Gales' argument is somewhat confusing, given that *Ring* clearly applies to his case, as we determined in *Gales I*, and that his case is not on collateral review. Gales appears to be arguing that if *Ring* applied retroactively, defendants who collaterally attacked their death sentences would have those sentences commuted; thus, argues Gales, it would be unfair to sentence him to death when others, whose convictions had become final, were sentenced to life imprisonment.

Gales' argument fails for several reasons. First, his assumption that retroactive application of *Ring* would result in the commutation of sentences, as opposed to resentencing proceedings, is without support. Second, taken to its logical extreme, Gales' argument would amount to a revocation of the death penalty, as there is no principled basis to distinguish between Gales and any other defendant charged after *Ring* who could be sentenced to death while others' death sentences were commuted. There is simply no support for the contention that the decision to afford an individual defendant mercy violates the U.S. Constitution. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). In any event, however, Gales' argument fails at its most basic premise. The U.S. Supreme Court's decision in *Schriro v. Summerlin, supra*, forecloses Gales' claim.

6. Motion for Continuance

(a) Assignment of Error

The district court erred in denying Gales' request for a continuance.

(b) Standard of Review

[20,21] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

(c) Analysis

On October 1, 2003, Gales filed a motion to continue the aggravation hearing. The motion was heard on October 16, at which time, the district court overruled the motion. The court explained its reasoning at length.

> First of all, the record reveals that defense counsel was appointed for this sentencing determination hearing — or this penalty phase of the case on August the 22nd of 2003, approximately two months prior to the actual commencement of the sentencing hearing. And on August 25th of 2003, the notice of the penalty phase hearing was sent to then the Douglas County Attorney's Office, as well as to Defendant's counsel.
>
> I would say that I know that [defense counsel] has been working very hard to get prepared on this case. For example, I know that you have reviewed the presentence investigation report several times. You have been up to my chambers to the court reporter's office to examine trial exhibits and various bills of exceptions from the trial. . . . The bill of exceptions is and it has been available, but, frankly, much of the trial evidence isn't relevant to the penalty phase hearing.
>
> The aggravators that are being alleged to exist are — and these are the four — and if you recall from the supreme court opinion, it's very limited, and even some of the aggravators have been subdivided down to just the specific prong of the aggravator that I had originally found at the original sentencing hearing, so it's not a wide-open situation. . . .
>
> . . . .
>
> In addition to the motion to continue and as far as counsel's preparation is concerned, frankly, it's quite impressive. I note that you filed ten motions in addition to the motion to continue . . . .
>
> . . . [I]t's apparent to me that you are more than adequately prepared and ready to enter into this sentencing phase.
>
> Finally, the crimes [Gales] has been convicted of occurred in November of 2000. He was convicted in August of 2001 and sentenced originally in November of 2001 and it is now almost November of 2003 and he is still awaiting sentencing for crimes he was convicted of over two years

> ago. I don't believe it's fair to [Gales], the State of Nebraska, or to the victims' family to delay this any longer, and so I am going to overrule your motion . . . .

Given the district court's well-reasoned basis for denying Gales' motion for a continuance, we find no abuse of the court's discretion. Gales argues that to be prepared for the aggravation hearing, his counsel needed more time to review all the available information. Yet in his appellate brief, Gales does not identify any specific way in which he was prejudiced by the court's denial of his motion. Presumably, before preparing Gales' appellate brief, Gales' counsel would have had sufficient time to examine the evidence thoroughly and locate any critical information that was missed prior to the aggravation hearing. The fact that no prejudice has been explained lends support to our determination that the district court did not abuse its discretion in assessing counsel's preparedness for the aggravation hearing.

7. Jury Sequestration

(a) Assignment of Error

The jury was not sequestered from the time it was impaneled until the case was submitted.

(b) Standard of Review

[22] Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

(c) Analysis

Prior to voir dire, Gales filed a motion to sequester the jurors from the time the jury was impaneled until a decision was reached. The district court denied the motion in part, and ordered that the jurors be sequestered only after the case was submitted to them. Gales claims this was error.

[23] But to warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant. *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Here, no such prejudice is shown. The jurors in this case were, immediately after they were sworn, admonished not to discuss the case among themselves or anyone else when court was not in session, and not to read, view,

or listen to any news reports regarding the case. The court went well beyond the admonition set forth in NJI2d Crim. 1.0(7), and it explained to the jury at length the reasons for the admonition and the possible consequences if the admonition was not respected. At each recess prior to submission of the case to the jury, the jurors were reminded not to discuss the case with anyone or view any news reports about the case.

Gales presents no evidence rebutting the presumption that the jurors followed the instructions they were given. See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). See, also, *Bjorklund, supra*. In addition, the sole basis on which Gales argues he was prejudiced was that the jury might have learned that in his previous sentencing, the judge sentenced him to death. We will deal with this issue in the context of Gales' next two assignments of error, but at this point, it suffices to say that Gales' argument does not establish he was prejudiced by the district court's refusal to sequester the jury prior to submission of the case.

8. Voir Dire and Motion to Quash Penalty Phase Hearing

(a) Assignments of Error

(1) The members of the venire were not individually questioned on their knowledge of Gales' previous sentence and the issue of rape, and

(2) the aggravation hearing was fundamentally unfair because the jurors "probably" knew that Gales had previously been sentenced to death.

(b) Standard of Review

[24] The extent to which parties may examine jurors as to their qualifications rests in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

(c) Analysis

(i) Individual Questioning

Prior to jury selection, Gales filed a motion to individually question the jurors during jury selection. Specifically, at the hearing on the motion, Gales sought to individually question the

members of the venire with respect to Gales' previous sentencing and the issue of rape. The court overruled the motion, explaining:

> I am going to overrule the motion, but insofar as potential jurors' opinions or reservations about the death penalty that would prevent or substantially impair their ability to act as a juror or any personal knowledge, that — and this would take into account your concern about whether or not they had heard about a prior sentence being given to . . . Gales — that the issue of a potential juror who has either formed or expressed an opinion as to what punishment [Gales] should receive, then those potential jurors would be questioned individually and out of the presence of the other jurors.
>
> And the way I intend to do that is if it's not covered by counsel, I may well just take over that part of the jury selection process myself, get it down to the point where we're asking the jurors just if they have an opinion one way or another to raise their hand and then all of those people will be questioned individually.

The court specifically instructed the parties not to discuss Gales' prior death sentences with the venire. Later, during voir dire, Gales' counsel again raised the issue of prehearing publicity with the court. The court responded by noting that it had asked the potential jurors about their knowledge of the case and that Gales could follow that up in voir dire if he chose. When Gales' counsel asked specifically about examining the potential jurors to see if they knew anything about Gales' previous sentences, the court stated:

> Well, if they do, then I suppose if you ask them about the case, you better be very, very careful that they don't blurt something out in front of the rest of the jurors that might potentially taint them, but I think I indicated at our pretrial motion hearing the other day that should that happen, that, frankly, I think we put this responsibility in the hands of the jurors, and so while we try to treat them with kid gloves and we try to insulate them as much as possible from any outside influence, it is what it is. The case was sent back, and so the fact is it is as if . . . Gales were just convicted yesterday. He has no sentence. Regardless of what may have happened in the past, there simply is no sentence right now, and if I have

> to, I will admonish them on that, but I don't think that we need to get to that point because I think they are mature enough that if you tell them these are the parameters and you are supposed to decide the case within these parameters and that's why — actually, I was going to tell them initially that he was convicted on August 27th of 2001 and I changed that to previously, because I don't think at this point it has anything to do with the case and I almost feel like we would be kind of stirring something up by getting into that, but I will leave that up to you. *If you feel that that's something you want to try to pursue with them, certainly feel free to do so, but just be careful that you don't ask a question that would elicit some type of answer about any previous sentence he might have had* because he simply does not have a sentence at this point. That's why we're here.

(Emphasis supplied.) Gales ultimately did not ask the potential jurors if they were aware of Gales' prior sentences.

[25] It is helpful, at the outset, to be specific about precisely what issue is presented here. The question decided by the district court was whether Gales would be permitted to sequester and *individually* question the members of the venire regarding Gales' prior sentences and the issue of rape. However, except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine an individual juror out of the presence of all the other potential jurors. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). Gales has failed to explain why individual questioning was necessary or show how he was prejudiced by the district court's denial of his motion.

In *McHenry, supra*, the defendant, who was being retried, argued that the court should have permitted sequestration and individual questioning of jurors so that he could question each juror about pretrial publicity without exposing the other potential jurors to that publicity. However, we rejected that argument, stating that

> we find that the circumstances of the voir dire do not demonstrate how [the defendant] was prejudiced. The prospective jurors were admonished by the court on numerous occasions concerning pretrial publicity and the irrelevance

> of the fact that the case was a retrial. The panel was questioned several times as to whether any of the members thought that they could determine [the defendant's] guilt based solely on the evidence presented at trial. The judge specifically instructed the panel that if any panel member had further concerns, he or she should contact the bailiff so that the court, along with the parties, could individually hear and address the concerns. In each case, when a panel member stated that he or she could not put aside pretrial publicity, the member was dismissed for cause. [The defendant] has not shown how further indepth questioning of sequestered jurors would have revealed anything more than was ascertained during the jury selection. Therefore, [the defendant] has not established that his rights were prejudiced by the failure of the district court to sequester the panel to permit individual questioning.

Id. at 627, 550 N.W.2d at 374. See, also, *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

Similarly, in this case, the members of the venire were told that if there was any question asked that they did not want to answer publicly, they could do it privately in the judge's chambers. Seven of the potential jurors were questioned separately for various reasons, and each of the five of those potential jurors who indicated an inability to be fair and impartial in deciding the case was immediately excused for cause. The members of the venire were specifically asked, by the court, whether they recalled reading or hearing about the case, and none of the jurors indicated that their knowledge of the case, if any, would preclude them from being fair and impartial.

With respect to the issue of rape, the venire was specifically asked if anything about the allegation of sexual assault would cause any of the potential jurors to say that they could not be fair and impartial, and none of the potential jurors indicated any reservations. The potential jurors were repeatedly asked about their ability to be fair and impartial and to decide the case based solely on the evidence presented at the hearing. Gales had the opportunity to ask the members of the venire about their knowledge of the case and whether it would affect their ability to be fair and impartial. As in *State v. McHenry*, 250 Neb. 614, 550

N.W.2d 364 (1996), Gales has not established that his rights were prejudiced by the district court's denial of his motion to sequester and individually question the members of the venire. See, also, *Bradley, supra*. Thus, we find no abuse of discretion.

(ii) Fairness of Aggravation Hearing

Gales also argues that because the jury "probably" knew about Gales' prior death sentences, the aggravation hearing was fundamentally unfair. The U.S. Supreme Court addressed a similar issue in *Romano v. Oklahoma*, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). In that case, the defendant had been charged with two separate murders: that of Roger Sarfaty, committed in 1985, and that of Lloyd Thompson in 1986. The defendant was first convicted and sentenced to death for the Thompson murder, and then tried for the Sarfaty murder in a separate proceeding. During the sentencing phase of the trial for the Sarfaty murder, the prosecution introduced a copy of the judgment and sentence for the Thompson murder, thus revealing to the jury that the defendant had already been sentenced to death.

The defendant was convicted and sentenced to death for the Sarfaty murder, and on direct appeal from that judgment, he argued that the trial court had erred in admitting evidence of the conviction and sentence for the Thompson murder. The Oklahoma Court of Criminal Appeals agreed that evidence of the Thompson judgment was irrelevant, but concluded the irrelevant evidence had not so infected the sentencing determination as to make the determination to impose the death penalty a violation of due process. See *Romano v. State*, 847 P.2d 368 (Okla. Crim. App. 1993), *affirmed, Romano v. Oklahoma, supra*.

The U.S. Supreme Court affirmed the decision of the Oklahoma court. *Romano v. Oklahoma, supra*. The Court stated:

> The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. . . . Under this standard of review, we agree with the Oklahoma Court of Criminal Appeals that the admission of this evidence did not deprive petitioner of a fair sentencing proceeding.

> The evidence that petitioner received a death sentence for murdering Thompson was deemed irrelevant by the Oklahoma Court of Criminal Appeals. . . . However, if the jurors followed the trial court's instructions, which we presume they did . . . this evidence should have had little—if any—effect on their deliberations. Those instructions clearly and properly described the jurors' paramount role in determining petitioner's sentence, and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove. Regardless of the evidence as to petitioner's death sentence in the Thompson case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. . . . In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner's sentence in the Thompson murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case.

(Citations omitted.) *Id.* at 12-13.

The instant case is distinguished by the fact that here, the jury was (according to Gales) aware of prior, vacated sentences of death for the same murders, rather than another death sentence arising from a different crime. However, the reasoning of the U.S. Supreme Court in *Romano v. Oklahoma*, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994), is equally applicable to such a situation. See, *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000); *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *affirmed* 71 F.3d 1404 (8th Cir. 1995); *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998); *People v. Ramos*, 15 Cal. 4th 1133, 938 P.2d 950, 64 Cal. Rptr. 2d 892 (1997).

As in *Romano v. Oklahoma, supra*, the jury instructions in this case (as will be analyzed below) accurately stated the jurors' role in determining Gales' sentences, set forth the correct burden of proof, and limited the jurors' deliberations to the four aggravating factors the State sought to prove. And, as in *Romano v. Oklahoma*, 512 U.S. at 13, these instructions "did not offer the jurors any means by which to give effect" to any knowledge of Gales' prior sentences.

In other words, even if some of the jurors were aware that Gales had previously been sentenced to death, there is no evidence to overcome the presumption that they faithfully followed the instructions they were given. See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). In fact, this case presents stronger facts than *Romano v. Oklahoma* in some respects. In this case, the district court acted correctly in seeking to keep irrelevant information about Gales' prior sentences from being revealed to potential jurors who were not already aware of it. Furthermore, the jurors in this case, if they were aware of Gales' prior death sentences at all, would have been aware of Gales' prior sentences *before* jury selection, yet they still indicated during voir dire that they could be fair and impartial. See *Stafford v. Saffle*, 34 F.3d 1557 (10th Cir. 1994). As noted above, Gales has not presented evidence to overcome our reliance on these assurances. See *id.*

In sum, Gales has not demonstrated that he was prejudiced by the district court's refusal to permit sequestration and individual questioning of the potential jurors on the issues of rape and Gales' prior sentences. This conclusion is reinforced by our determination that the jurors' awareness, if any, of Gales' prior death sentences did not render the sentencing proceeding fundamentally unfair, pursuant to the reasoning articulated in *Romano v. Oklahoma, supra*. Gales' sole argument for how he was prejudiced by the district court's refusal to sequester the potential jurors is based on the alleged prejudice from their knowledge of his prior sentences. The fact that any awareness of his prior sentences was itself not unduly prejudicial provides another basis for rejecting his argument regarding voir dire.

9. Evidence of Prior Convictions

(a) Assignment of Error

Evidence of Gales' prior convictions from Florida was not properly authenticated.

(b) Standard of Review

[26] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

(c) Analysis

As previously noted, § 29-2523(1)(a) provides that it is an aggravating circumstance, for capital sentencing purposes, if "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person . . . ." In this case, the State sought to prove that aggravating circumstance by introducing evidence of Gales' Florida convictions, from 1987, for armed robbery and armed sexual battery. See Fla. Stat. Ann. §§ 812.13 (West 2000) (robbery) and 794.011 (West Cum. Supp. 2005) (sexual battery). Gales contends that the evidence of his Florida convictions, contained in exhibit 229, was not properly authenticated and should not have been admitted into evidence.

Gales relies upon *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002), in which the Nebraska Court of Appeals determined that an Iowa conviction for driving under the influence of alcohol (DUI) was admissible for sentence enhancement purposes in a Nebraska DUI prosecution, because the first page of the exhibit containing evidence of the Iowa conviction bore the seal of the court and the signatures of the judge and the clerk of the court. Gales argues that the Florida convictions in this case were not properly authenticated because "[t]he prior used in this case was not signed by a judge . . . ." Brief for appellant at 34. But our review of exhibit 229 reveals that it satisfies the Nebraska evidentiary requirements applied in *Miller, supra*.

Neb. Evid. R. 901 provides, generally, that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Neb. Evid. R. 902 further provides that certain documents are self-authenticating; that is, no extrinsic evidence of authenticity as a condition precedent to admissibility is required. The *Miller* court relied upon *Dugan v. Jensen*, 229 Neb. 672, 673-74, 428 N.W.2d 504, 505 (1988), in which we explained that rule 902

> does not require authentication of a document bearing a seal and a signature purporting to be an attestation, a document purporting to bear the signature in his official capacity of an officer who has no seal if a public officer having a seal certifies under seal that the previous officer signing has

> the official capacity to sign, or a copy of an official record certified as correct by the custodian by certificate complying with either of the previous two subdivisions.

[27] We further explained, in *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995), that in order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment. In that case, we held one record of a prior DUI conviction to be properly authenticated when it contained a journal entry signed by the judge, was stamped with the court's seal, and was certified by the court clerk as a true copy of the original document on file with the court. In contrast, we found the record of a second DUI conviction to be inadequate where it contained no journal entry signed by the judge and, thus, did not reflect the judicial act of rendering judgment. See *id.* See, also, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987).

Exhibit 229 amply satisfies the foregoing rules. It consists of the record of a case brought against "Arthur Lee Gales, Jr.," in the circuit court for Alachua County, Florida. It appears to be what, in Nebraska practice, would be referred to as a transcript of judgment. It bears the seal, and is signed by the deputy clerk, of that court. Each of the filings contained in the record is file stamped and separately authenticated by the clerk of the court. The record contains a judgment of conviction, signed by the circuit court judge, convicting Gales, pursuant to a plea agreement, of armed sexual battery and strong armed robbery in violation of the previously cited Florida statutes. The judgment of conviction contains Gales' fingerprints. The record also contains a sentencing order, signed by the circuit court judge, sentencing Gales to 12 years' imprisonment on the charge of sexual battery and 12 years' imprisonment for the robbery, with the sentences to be served concurrently. The record reflects that Gales was represented by counsel at the time of his plea agreement, convictions, and sentencing.

In short, we conclude that exhibit 229 is sufficiently self-authenticating and was properly admitted into evidence for purposes of proving Gales' previous conviction of a crime involving

the use or threat of violence to the person. Gales' assignment of error is without merit.

10. Jury Instructions

(a) Assignments of Error

(1) The district court refused to amend instruction No. 2 to indicate that aggravating circumstances were nothing more than accusations that the State must prove beyond a reasonable doubt;

(2) the district court did not give Gales' suggested paragraph for instruction No. 2 stating that the fact that Gales had been convicted of two murders did not, standing alone, establish that Gales had murdered more than one person during the same criminal transaction;

(3) the wording of instruction No. 2 required the jury to find that Latara's murder was especially heinous, atrocious, or cruel if it believed that she was sexually assaulted; and

(4) the jury should have been instructed to unanimously find that the murder was either especially heinous, atrocious, or cruel, and have each one separately listed on the verdict form.

(b) Standard of Review

[28] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). See, also, *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

(c) Analysis

(i) Reasonable Doubt

[29] Gales argues that instruction No. 2 did not instruct the jury that aggravating circumstances were simply accusations and that the State must prove them beyond a reasonable doubt. Aggravating circumstances must be proved beyond a reasonable doubt. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). However, instruction No. 2 stated in part:

> Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences. Aggravating circumstances are reasons why the defendant should be sentenced to death. The State has the

> burden of proving the truth of an aggravating circumstance by evidence beyond a reasonable doubt. If you have a reasonable doubt as to whether an aggravating circumstance is true, or you cannot unanimously agree beyond a reasonable doubt that an aggravating circumstance is true, you must find it to be not true.

The jury had also been instructed before the sentencing hearing that the State's burden was to prove aggravating circumstances beyond a reasonable doubt. The jury was instructed to the same effect in the instructions relating to each aggravating circumstance and again after the aggravating circumstances were explained. The verdict form required the jury to determine whether each aggravating circumstance had been found beyond a reasonable doubt. In addition, the jury was instructed that the "[s]tatements, arguments, and questions of the lawyers for the [S]tate and the defendant" were not evidence from which they were to find the facts.

[30,31] 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. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). When the instructions are read as a whole, the jury was more than amply instructed that the State was required to prove, from the evidence adduced, the existence of aggravating circumstances beyond a reasonable doubt.

(ii) Multiple Murders During Same Criminal Transaction

The jury was instructed that in order to find the aggravating circumstance of "murder committed at the time the offender also committed another murder," it must find the essential element that "[t]he offender murdered more than one person during the same criminal transaction." Gales argues that the jury should have been instructed that Gales' convictions for two murders did not, standing alone, establish this aggravating circumstance. However, the

substance of Gales' instruction is implicit in the instruction that was given, which directed the jury to find this aggravating circumstance only if more than one person was murdered "during the same criminal transaction." This was a correct statement of the law, see *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990); was not misleading; and adequately covered the issues supported by the pleadings and evidence. See *Pruett, supra*. Therefore, we find no reversible error with respect to this instruction.

(iii) Especially Heinous, Atrocious, or Cruel

Finally, the jury was instructed that in order to find that the murder of Latara was especially heinous, atrocious, or cruel, it must find the essential element that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." Gales' counsel objected and stated:

> I think the reason that the Court has provided this instruction the way it has is the Court previously found that sexual abuse was the reason they found that the murder was especially heinous, atrocious, or cruel. The problem that I have with that is the instruction appears that if they just find that Latara Chandler was sexually abused, that that alone makes it especially heinous, atrocious, or cruel, and I would argue to this Court that based on the findings of the case law in the State of Nebraska, on the basis of that, that there is more than just the sexual assault. It's the facts and circumstances leading up and during and after the sexual assault that occurred that goes into that, and by this instruction, the jury isn't going to be instructed to take that into account to determine if the sexual abuse is, in fact, heinous, atrocious, and cruel.

[32,33] This court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). This circumstance includes a pitiless crime which is unnecessarily torturous to the victim. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991). Thus, the term "especially heinous,

atrocious, or cruel" is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain existed for any prolonged period of time. See, *Ryan, supra*; *Reeves, supra*; *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). This class includes murders involving torture, sadism, or sexual abuse. *Ryan, supra*; *Reeves, supra*. In other words, this prong must be looked upon through the eyes of the victim. *Ryan, supra*. In *Ryan*, 248 Neb. at 447-48, 534 N.W.2d at 793-94, we explained:

> The U.S. Supreme Court has held the words "heinous," "atrocious," and "cruel" to be unconstitutionally vague in an Oklahoma sentencing statute which is very comparable to Nebraska's § 29-2523(1)(d). See *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). See, also, *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (holding Georgia's " 'outrageously or wantonly vile, horrible or inhuman' " aggravating circumstance to be unconstitutional because the Georgia court failed to limit the statute in such a way as to provide a principled distinction between death penalty and non-death-penalty cases).
>
> In both *Maynard* and *Godfrey*, the defendant was sentenced to death by a jury which had been instructed in only the bare language of the sentencing statute or in language which was similarly vague.
>
> Likewise, the U.S. Court of Appeals for the Eighth Circuit has found the text of Nebraska's aggravating circumstance (1)(d), standing alone, to be constitutionally insufficient. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh'g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). However, "a state supreme court may salvage a facially-vague statute by construing it to provide the sentencing body with objective criteria for applying the statute." *Moore v. Clarke*, 904 F.2d at 1229. The Eighth Circuit, in several recent cases, has looked beyond the text of § 29-2523(1)(d) to determine whether (1)(d) has been limited and defined by this court in such a way as to provide sentencing bodies in

> Nebraska with objective criteria for the application of that aggravating circumstance.
>
> The Eighth Circuit has held that the first prong of aggravating circumstance (1)(d) of § 29-2523, narrowed by this court's decisions defining the phrase "especially heinous, atrocious, cruel" to mean unnecessarily torturous to the victim, satisfies the constitutional requirements of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Godfrey v. Georgia, supra*; and *Maynard v. Cartwright, supra*. See *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990).

Therefore, we concluded that the first prong of aggravating circumstance (1)(d) was facially constitutional to the extent that it had been narrowed and defined by this court. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). See, also, *Bell v. Cone*, 543 U.S. 447, 450, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (reversing grant of writ of habeas corpus, based on presumption that Tennessee Supreme Court cured error in jury instruction by applying narrowing construction of " 'heinous, atrocious, or cruel' " aggravator). Furthermore, the Eighth Circuit has specifically approved our identification of sexual abuse as an objective identifier of the existence of the first prong of aggravating circumstance (1)(d).

> We conclude that sexual abuse was an objective element that satisfied and appropriately limited the definition of aggravating circumstance (1)(d) under the law of Nebraska . . . . We are further satisfied that a finding of sexual abuse is an objective factor that appropriately and constitutionally narrows the definition of the "especially heinous" phrase.

Williams v. Clarke, 40 F.3d 1529, 1537 (8th Cir. 1994).

In this case, as previously noted, the jury was instructed that in order to find that the murder of Latara was especially heinous, atrocious, or cruel, it must find that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." With respect to the phrase "sexual abuse," the court's instruction was constitutionally sound and consistent

with Nebraska law as explained in *Ryan, supra*. Neither Gales' objection at trial, nor his appellate brief, take issue with the district court's use of the phrase "serious mental anguish," and whether that phrase is consistent with prior Nebraska law is not before us in this appeal. We note, however, that the phrase " '[m]ental anguish includ[ing] a victim's uncertainty as to his ultimate fate' " has been held not to be unconstitutionally vague. See *Tuilaepa v. California*, 512 U.S. 967, 974, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), quoting *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

[34,35] Gales also contends that the verdict form with respect to this aggravating circumstance should have provided that the jury must unanimously agree the crime was either especially heinous, atrocious, or cruel, and have each one listed separately on the verdict form. We have stated that the two prongs of aggravating circumstance (1)(d) describe, in the disjunctive, two separate circumstances which may operate in conjunction with or independently of one another. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). However, we have never indicated that the words "heinous," "atrocious," and "cruel" operate disjunctively; rather, as previously stated, we have considered and construed the phrase as a whole, and Gales presents no argument explaining why our previous decisions are incorrect on that point. An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). Gales' proposed instruction was not a correct statement of the law, and the district court did not err in rejecting it.

11. Rebuttal Argument in Aggravation Hearing

(a) Assignment of Error

The State should not have been allowed rebuttal argument during the aggravation hearing.

(b) Standard of Review

[36] The general conduct of the trial rests within the discretion of the trial court. *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992).

(c) Analysis

Gales argues that the district court erred in permitting the State, in closing arguments of the aggravation hearing, to have a rebuttal argument. Section 29-2520(4)(d) simply provides that "[a]fter the presentation and receipt of evidence at the aggravation hearing, the state and the defendant or his or her counsel may present arguments before the jury as to the existence or nonexistence of the alleged aggravating circumstances." Gales contends that since § 29-2520(4)(d) does not specifically allow the State rebuttal, the district court erred in permitting it.

[37] However, Neb. Rev. Stat. § 29-2016(6) (Reissue 1995), which generally governs trial procedure in criminal cases, provides that "when the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury." This is consistent with the general rule that the party with the burden of proof is entitled to open and close argument. See *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). We find no abuse of discretion in the district court's decision to apply § 29-2016(6) to the aggravation hearing.

12. Ineffective Assistance of Counsel

(a) Assignments of Error

(1) Gales received ineffective assistance of counsel at his original trial because trial counsel

(a) stipulated to Judy's deposition testimony,

(b) did not call Gales' wife as an alibi witness, and

(c) did not allow Gales to testify, and

(2) Gales' counsel on his first direct appeal was ineffective for not assigning any trial errors.

(b) Standard of Review

[38] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated

in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Benzel, ante* p. 1, 689 N.W.2d 852 (2004).

(c) Analysis

Having just articulated the standard of review, however, we observe that the record contains no findings by the district court to review. This is because the issue of ineffective assistance of counsel was not presented to the district court.

Since the allegations of ineffective assistance of counsel now advanced by Gales were not pertinent to the district court's task in resentencing Gales following our decision in *Gales I*, it is not surprising that the parties and the district court would not consider the issue. But because of this, we conclude that the record is insufficient for us to resolve Gales' arguments.

[39,40] This appeal was taken from a resentencing proceeding held pursuant to the mandate issued by this court pursuant to our opinion in *Gales I*. When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). Here, our opinion in *Gales I*, 265 Neb. at 636, 658 N.W.2d at 632, vacated Gales' death sentences on both counts of first degree murder and remanded the causes to the district court "with directions to conduct a new penalty phase hearing and to resentence Gales on those counts." The allegations of ineffective assistance of counsel now raised by Gales were beyond the scope of the district court's jurisdiction pursuant to our mandate in *Gales I*, and consequently, the allegations are also inappropriate for us to address in this appeal.

[41] 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. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004). Because the issues raised by Gales

were beyond the scope of this resentencing proceeding and we conclude that the matter necessitates an evidentiary hearing, we will not address Gales' ineffective assistance of counsel claims.

[42] The evident reason for Gales' argument in this appeal is that in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). However, because the record before us does not allow us to properly evaluate Gales' claims, we decline to consider them in this proceeding.

13. Sufficiency of Evidence

(a) Assignment of Error

[43] Gales argues that his motion for a new aggravation hearing should have been granted because there was insufficient evidence that Latara's murder was especially heinous, atrocious, or cruel. In addition, in a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

(b) Standard of Review

[44] We have stated that in reviewing a sentence of death on appeal, we conduct a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. *Id.* However, our decisions have not specifically explained our standard of review with respect to the trier of fact's finding that a particular aggravating circumstance was proved. That issue is particularly pertinent in this case, as this is the first direct appeal to be taken from a sentence imposed pursuant to the jury findings required by L.B. 1.

[45,46] Generally, in reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. *State v. Canady*,

263 Neb. 552, 641 N.W.2d 43 (2002). 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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

The question is whether findings of aggravating circumstances, as factual findings now made by a jury, are subject to this standard of review. The overwhelming majority of jurisdictions to have considered the issue have applied this familiar standard of appellate review, or a similarly deferential standard, to a fact finder's determination of the existence of aggravating circumstances. See, *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004); *Washington v. State*, 808 N.E.2d 617 (Ind. 2004); *State v. Edwards*, 116 S.W.3d 511 (Mo. 2003) (en banc), *cert. denied* 540 U.S. 1186, 124 S. Ct. 1417, 158 L. Ed. 2d 92 (2004); *Olsen v. State*, 67 P.3d 536 (Wyo. 2003); *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002); *State v. Honie*, 57 P.3d 977 (Utah 2002); *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001); *Abshier v. State*, 28 P.3d 579 (Okla. Crim. App. 2001); *People v. Hart*, 20 Cal. 4th 546, 976 P.2d 683, 85 Cal. Rptr. 2d 132 (1999); *State v. Johnson*, 291 Mont. 501, 969 P.2d 925 (1998); *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998); *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997); *Com. v. Lee*, 541 Pa. 260, 662 A.2d 645 (1995); *State v. Ross*, 230 Conn. 183, 646 A.2d 1318 (1994); *Barnes v. State*, 876 S.W.2d 316 (Tex. Crim. App. 1994) (en banc); *Canape v. State*, 109 Nev. 864, 859 P.2d 1023 (1993). Cf. *State v. Ball*, 824 So. 2d 1089 (La. 2002). See, also, *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (applying standard of review to federal habeas review of state court's finding of aggravating circumstances). But see, *People v. Dunlap*, 975 P.2d 723 (Colo. 1999) (en banc); *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998) (conducting statutorily required independent reviews).

This application of the standard of review for a criminal conviction to findings of aggravating circumstances is sensible and consistent with our established law. First, unlike the ultimate sentencing determination made by the sentencing panel, a finding of

the existence of an aggravating circumstance is a factual finding, and factual findings are generally affirmed where there is sufficient evidence to support them. It would make little sense to treat the jury's finding of an aggravating circumstance differently than the other findings of fact with which the jury is entrusted. See, generally, *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989).

[47] Moreover, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), stands for the proposition that an aggravating circumstance must be found by a jury beyond a reasonable doubt in order to satisfy the Sixth Amendment. We do not read *Ring* as requiring an appellate court to apply any particular standard of review to such a finding. Nonetheless, proper regard for the Sixth Amendment principle articulated in *Ring* suggests that we should treat the jury's findings of aggravating circumstances with the same degree of respect we give its findings of the elements of first degree murder.

[48] Consequently, we hold that when reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt. See *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). However, as previously stated, when considering the sentencing panel's weighing of the aggravating and mitigating circumstances, and the sentencing panel's determination that the mitigating circumstances found did not approach or exceed the weight to be given to the aggravating circumstances, this court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

(c) Analysis

Gales' primary argument is based upon *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In that case, the defendant was convicted of first degree murder and

sentenced to death based upon his confession that he had murdered his victim and then performed sexual acts on her. On appeal, the defendant challenged the district court's finding that the murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." See § 29-2523(1)(d).

This court concluded that aggravating circumstance (1)(d) was not present on the facts of that case. The court noted that according to the defendant's confession, he strangled the victim and then committed sexual acts on her after she was either unconscious or dead. The court stated that in order for aggravating circumstance (1)(d) to be present, the method of killing must "entail something more than the ordinary circumstances which attend any death-dealing violence." *Hunt*, 220 Neb. at 725, 371 N.W.2d at 721. Since the victim in *Hunt* was not conscious when the defendant committed his sexual acts, the court concluded that "[a]lthough the method by which defendant achieved sexual gratification may be accurately described as exceptionally heinous and atrocious, and as manifesting exceptional depravity by ordinary standards of morality and intelligence, the murder itself, given the inherent nature of a killing, cannot." *Id.* at 726, 371 N.W.2d at 721.

Gales argues that pursuant to *Hunt, supra*, the murder of Latara was not especially heinous, atrocious, or cruel. However, as will be explained below, the circumstances of *Hunt* are distinguishable from those present in this case. The record here contains sufficient evidence to support the jury's finding that Latara's murder was especially heinous, atrocious, or cruel.

Dr. Jerry Jones, a coroner's pathologist, testified at the aggravation hearing regarding the results of the autopsy he performed on Latara. Jones testified that Latara died of asphyxiation caused by manual strangulation, specifically, pressure to the neck. Jones was unable to exclude the possibility of rape. Jones testified that a person may lose consciousness from manual strangulation in "perhaps 10 to 15 seconds," but that pressure on the neck for 4 to 5 minutes was required for death to result. Jones opined that hemorrhaging present on Latara's neck was "produced by pressure to the neck and probably also by struggle of the individual to the pressure applied to the neck." A condom was found in the

bathroom of Judy's apartment and genetic material was found on the condom that DNA testing showed to be consistent with the known genetic profiles of Latara and Gales.

One inference from the evidence presented at the aggravation hearing—the inference advocated by Gales—is that Latara was strangled, lost consciousness after 10 to 15 seconds, and was sexually assaulted after she lost consciousness. It is based on this inference that Gales argues for the application of *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). However, that is not the only inference supported by the evidence. The record also supports a finding that Latara was sexually assaulted by Gales, struggled against her attacker, and was rendered unconscious by pressure to the neck during or after the sexual assault. We are required to give the benefit of this reasonable inference to the State. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

As previously discussed, we have narrowed the phrase "especially heinous, atrocious, or cruel" to include murders involving torture, sadism, or sexual abuse. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991). See, also, *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994). We have already concluded that the jury was properly instructed that Latara's murder was especially heinous, atrocious, or cruel if Gales inflicted "serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death." Taken in the light most favorable to the State, the evidence was sufficient for the jury to find beyond a reasonable doubt that Latara's murder was especially heinous, atrocious, or cruel.

We also conclude that the record supports the sentencing panel's determination that the mitigating circumstances found did not approach or exceed the weight to be given to the aggravating circumstances found in this case. The mitigating factors found to be present—Gales' relationship with his family and his ability to adapt to life in prison—are not compelling and do not approach the weight to be given to the aggravating circumstances that the jury found. On our de novo review of the record, we find that the evidence is sufficient to support imposition of the death penalty.

14. Proportionality Review

(a) Comparison to Other Cases

[49] Pursuant to § 29-2521.03, this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires us to compare the aggravating and mitigating circumstances of this case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in this case is no greater than those imposed in other cases with the same or similar circumstances. See, *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

In this case, as we have already noted, the aggravating circumstances are severe, and the mitigating circumstances are far from compelling. We have reviewed our relevant decisions on direct appeal from other cases in which aggravating and mitigating circumstances were found and the death penalty was imposed by the district court. See, e.g., *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005); *Dunster, supra*; *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *overruled on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Bjorklund, supra*; *Lotter, supra*; *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v.*

Reeves, 234 Neb. 711, 453 N.W.2d 359 (1990); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, Palmer, supra*; *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds, Palmer, supra*.

We take particular note of the circumstances presented in *Joubert, supra*, in which the defendant was convicted of the murders of two children and sentenced to death based upon aggravating circumstances (1)(a), (b), and (d), and *Williams, supra*, in which the defendant was convicted of two murders and one sexual assault and sentenced to death based upon the same aggravating circumstances found to exist in this case with respect to Latara. Having reviewed the relevant cases, we find that the imposition of sentences in this case is proportional to that in the same or similar circumstances.

(b) Federal Due Process

We are aware of the decision in *Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), in which the U.S. District Court for the District of Nebraska held that our method of appellate proportionality review violates the U.S. Constitution. We have respect for our colleague on the federal bench. However, we disagree with the determinations of Nebraska law upon which the court's analysis was based. Because this appeal requires us to engage in the same process of proportionality review that the court held unconstitutional, it is our responsibility to respond to the court's analysis.

Proportionality review is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). It exists in Nebraska by virtue of § 29-2521.01 et seq., which direct this court to conduct a proportionality review in each appeal in which a death sentence is imposed. The U.S. District Court's holding was premised on the principle, previously cited in this opinion, that where a state creates a right, such as a defendant's right to proportionality review of his or her sentence, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied. *Palmer v. Clarke, supra*, citing *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994). The court held that our

process of appellate proportionality review violates that principle in three ways. First, the court held that we erred in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), when we "effectively rewrote the [proportionality review] statute to require comparison to other death sentences rather than to other 'criminal homicides' or at least to all other first degree murders." (Emphasis omitted.) *Palmer v. Clarke*, 293 F. Supp. 2d at 1041-42. Second, the court held that we denied the defendant in *State v. Palmer, supra*, his constitutional right to a two-tiered review process in our application of a different comparison in our proportionality review than the sentencing panel had used. Finally, the court held that our proportionality review was an exercise in appellate resentencing that was not permitted by state law. We will address each of these points in turn.

(i) Interpretation of Proportionality Review Statutes

[50] First, we revisit our decision in *State v. Palmer, supra*, which the U.S. District Court found to be erroneous. That decision relied, in large measure, upon our earlier decision in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), in which we held that a literal application of § 29-2521.01 et seq. would violate the separation of powers provisions of the Nebraska Constitution. We explained that the limits of the jurisdiction conferred upon us by the constitution may not be increased or extended by legislative enactment. *Id.* We determined that applied literally, § 29-2521.01 et seq. would require us to gather evidence and examine prosecutorial discretion, which are executive and not judicial functions. We further determined that the statutes, literally applied, would intrude on the judicial function. Therefore, we construed the statutes to require an appellate comparison of only those cases in which a defendant had been convicted of first degree murder. See *Moore, supra*.

In *State v. Palmer, supra*, we further limited the scope of our review. We determined that a literal reading of the statutes would effectively repeal the death penalty, which we understood to be against the Legislature's intent. In order to effectuate the Legislature's intent, within the constitutional limitations identified in *Moore, supra*, we concluded that our proportionality review should include only those cases in which the death penalty was imposed. *State v. Palmer, supra*.

[51-56] The principles of statutory interpretation which led us to that conclusion are well established. A penal statute must be construed so as to meet constitutional requirements if such can be reasonably done. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999). It is the duty of this court to give a statute an interpretation which meets constitutional requirements, if it can. *State v. Manley*, 189 Neb. 415, 202 N.W.2d 831 (1972). Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *State v. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992). In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). 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. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001).

[57] In other words, our holdings in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), and *Moore, supra*, were based upon this court's rules of statutory interpretation, undertaken in a good-faith attempt to effectuate the intent of the Legislature and remain consistent with the requirements of our state Constitution. Those holdings are certainly not immune from criticism, and we respect our federal colleague's principled disagreement with our exposition of state law. But *it is* a matter of state law we are discussing, and we are the final arbiter of Nebraska law. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). "By performing an exhaustive review of Nebraska statutory law in an attempt to show the Nebraska Supreme Court the inadequacy of its interpretation of its own authority under its own law, the district court exceeded the bounds of federal court authority." *Id.* at 1427, citing *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (it is not province of federal courts to reexamine state court determinations of state law questions).

Consequently, we also respectfully disagree with the U.S. District Court's conclusion that our alleged error in *State v. Palmer, supra*, amounted to a violation of the federal Due Process Clause. The court's reasoning was that our interpretation of state law arbitrarily denied the defendant a state-created right. But state law can only afford a defendant an appellate proportionality review that is consistent with the requirements of the Nebraska Constitution. The scope of the due process liberty interest created by state law is, as a question of state law, defined by this court. Proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The Due Process Clause, as relevant here, only requires that defendants receive the process they are due under Nebraska law, as we have explained it. Some members of this court have expressed concerns about our holding in *State v. Palmer, supra*. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (Connolly, J., concurring; Gerrard, J., concurring, joined by Stephan, J.). But there is no question that our holding in *State v. Palmer, supra*, is the law.

(ii) Two-Tiered Review

The U.S. District Court further held that the defendant's right to due process was violated when we applied a different proportionality review than was applied by the sentencing court. The court found that the defendant "had a statutory right to: (1) have the sentencing panel conduct a proportionality review, and (2) have the determination of that sentencing panel reviewed in the Nebraska Supreme Court." *Palmer v. Clarke*, 293 F. Supp. 2d 1011, 1043 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The court concluded that our "[use of] a different universe of defendants" denied the defendant the benefit of the "two-tiered" scheme of the statutes. *Id.* The court's conclusion, however, is based on a misunderstanding of the requirements of Nebraska law.

[58,59] The court was correct insofar as Nebraska's capital sentencing statutes create a two-tier sentencing process and differentiate between the role performed by the sentencing panel and the role of this court in reviewing that sentence. See *State v.*

Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000). But the proportionality review performed by this court is not part of that process. Instead, this court's proportionality review in capital cases is conducted independently from the sentencing panel's proportionality review and our appellate review of the sentencing decision made by the trial court.

This conclusion is derived from an examination of the sentencing scheme set forth in § 29-2520 et seq., which is in relevant part unchanged from the sentencing scheme in effect at the time that *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), was decided. Section 29-2521(3) provides that the sentencing panel shall receive evidence, from the parties, regarding "sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522." Accord § 29-2520(4)(h). The sentencing panel is to consider in imposing sentence, pursuant to § 29-2522,

> (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) *Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.*

(Emphasis supplied.)

In short, these provisions charge the sentencing court with conducting a proportionality review as part of determining whether the death sentence should be imposed. We may, of course, examine that determination on appeal.

This court's proportionality review, on the other hand, occurs pursuant to § 29-2521.03, which directs us to, "upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances." The statutory scheme clearly contemplates that this court should conduct an independent review of the proportionality of a death sentence, not merely an appellate review of the proportionality determination made by the sentencing court. While the sentencing court conducts a proportionality review that can be appealed to this court,

the statutes clearly charge this court with conducting its own independent proportionality review.

Consequently, we disagree with the U.S. District Court's conclusion that the defendant's due process rights were violated by our consideration of different cases from those that may have been considered by the sentencing court. The court was correct in stating that the defendant had the right to a two-tiered sentencing procedure in which this court reviews the determination of the sentencing panel. But the defendant *also* has a right to an independent proportionality review conducted by this court, the scope of which is discussed above. This court's consideration of different evidence in its independent proportionality review does not implicate the two-tiered appellate process we described in *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). This court's independent proportionality review did not deprive the defendant of due process; to the contrary, principles of due process required us to conduct an independent proportionality review to the extent available under our authoritative interpretation of Nebraska law.

(iii) Appellate Resentencing

Finally, in a closely related analysis, the U.S. District Court concluded that our independent proportionality review " 'effectively resentenced' " the defendant. *Palmer v. Clarke*, 293 F. Supp. 2d 1011, 1044 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because the Nebraska statutes do not authorize appellate reweighing and resentencing, see *Reeves, supra*, the court found this to be another basis for its conclusion that the defendant's due process rights were violated.

[60] But while the Nebraska statutes do not authorize this court to reweigh aggravating and mitigating circumstances as a basis for resentencing a defendant, they do expressly authorize—in fact, require—this court to conduct an independent review of the proportionality of the defendant's sentence. This court did not act as an "unreviewable sentencing panel," see *Palmer v. Clarke*, 293 F. Supp. 2d at 1044; rather, we both reviewed the sentencing court's determination *and* conducted the independent proportionality review required by state law.

In short, in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), as in the instant case, this court "undertook its proportionality review in good faith" and found that the defendant's sentence was proportional to the sentences imposed in similar cases. See *Walton v. Arizona*, 497 U.S. 639, 656, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Accord, e.g., *LaRette v. Delo*, 44 F.3d 681 (8th Cir. 1995); *Personal Restraint of Benn*, 134 Wash. 2d 868, 952 P.2d 116 (1998). The U.S. Constitution does not require the federal courts to look behind that conclusion. See *id.*

IV. CONCLUSION

For the foregoing reasons, we reject each of Gales' assignments of error. We have independently reviewed Gales' sentences and find that the aggravating and mitigating circumstances support the imposition of the death penalty and that the imposition of sentence was not disproportionate to that in similar cases. We affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
DONNA J. RABOURN, APPELLEE.
693 N.W.2d 291

Filed March 18, 2005. No. S-04-405.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.

6. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
7. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.
8. ____: ____. A statute may be invalidated on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
9. ____: ____. In order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
10. ____: ____. When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
11. **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.

Appeal from the District Court for Platte County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Exception sustained, and cause remanded with directions.

Jon Bruning, Attorney General, and J. Kirk Brown, Solicitor General, for appellant.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellee.

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

STEPHAN, J.

The issue presented in this criminal appeal is whether portions of Nebraska's Abstracters Act, Neb. Rev. Stat. §§ 76-535 to 76-558 (Reissue 1996 & Cum. Supp. 2000), are overbroad and therefore unconstitutional. The county and district courts for Platte County so held, and the State has timely perfected this appeal pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004).

FACTS

On March 20, 2003, a complaint was filed against Donna J. Rabourn in the county court for Platte County alleging that she had committed a Class III misdemeanor by unlawfully failing to comply with the Abstracters Act and illegally engaging in the business of abstracting. The complaint was subsequently amended to specifically allege that Rabourn, "on or about the 21st day of November, 2001 through the 22nd day of February, 2002," failed to comply with the Abstracters Act and "illegally engaged in the business of abstracting" by "preparing reports of title to real property without an abstractor's license."

Rabourn filed a motion to quash the complaint, asserting that the Abstracters Act was void for vagueness and facially overbroad. After conducting a hearing, the county court issued an order on July 22, 2003, in which it concluded that the Abstracters Act was unconstitutionally overbroad only in the use of the term " 'Report of Title' " and therefore sustained Rabourn's motion to quash. The court did not reach the issue of whether the Abstracters Act was void for vagueness, other than to note that "it is questionable that [Rabourn] has established standing to challenge the statute for vagueness." The State appealed this ruling to the district court, which affirmed.

ASSIGNMENT OF ERROR

In its sole assignment of error, the State asserts, restated, that the lower courts erred in concluding that the Abstracters Act is unconstitutionally overbroad on its face.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Hogan v. Garden County*, 268 Neb. 631, 686

N.W.2d 356 (2004); *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

ANALYSIS

[3] Rabourn asserts that the Abstracters Act infringes on the right to freedom of speech protected by both the U.S. and Nebraska Constitutions. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002); *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). Accordingly, we apply the same analysis to the state and federal constitutional claims.

During the time period referenced in the operative complaint, the Abstracters Act was codified in the 1996 reissue of the Nebraska Revised Statutes. Section 76-537 provided in relevant part:

> As used in the Abstracters Act, unless the context otherwise requires:
>
> (1) Abstract of title shall mean a compilation in orderly arrangement of the materials and facts of record affecting the title to a specific piece of land, issued under a certificate certifying to the matters contained in such compilation;
>
> . . . .
>
> (3) Business of abstracting shall mean the making, compiling, and selling of abstracts of title or any part thereof or preparing written reports of title to real property;
>
> . . . .
>
> (8) Registered abstracter shall mean an individual, registered under the Abstracters Act, holding an operative certificate of registration who for a fee or other valuable consideration compiles or certifies abstracts of title or any part thereof to real property in any county within this state or who prepares reports of title; and
>
> (9) Report of title shall mean any type of summary of facts of record affecting the title to a specific piece of land which does not purport to constitute an opinion as to the state of the title and which is prepared by a person other than an attorney licensed to practice law in the State of Nebraska.

> Report of title shall not include a title insurance commitment or policy or information or opinions given by a register of deeds in response to inquiries from the public.

Section 76-538 provided: "Any person . . . engaged in the business of abstracting shall be required to be licensed as required by the Abstracters Act." Section 76-558 provided in part: "Any individual or business entity engaged in the business of abstracting in this state without having complied with the Abstracters Act shall be guilty of a Class III misdemeanor." For the sake of completeness, we note that the Abstracters Act is now codified in the 2003 reissue of the Nebraska Revised Statutes and includes certain amendments, enacted in 2002, which are not relevant to the issue before us here. See 2002 Neb. Laws, L.B. 1071. We will refer to the Abstracters Act as it existed during the time period stated in the operative complaint.

[4-9] Familiar general principles govern our consideration of whether the statutes in question are unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *State v. Van, supra*; *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002). A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002). A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Id.*; *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a

realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. *Id.* The requirement that the overbreadth be substantial arose from the recognition that the application of the overbreadth doctrine is "'"'manifestly strong medicine.'"'" *State v. Hookstra*, 263 Neb. at 122, 638 N.W.2d at 834, quoting *State v. Kipf, supra*, and *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

Rabourn contends that the Abstracters Act, as it relates to the preparation of reports of title, is unconstitutionally overbroad because it criminalizes the preparation of any written summary of facts of record pertaining to real property, regardless of whether the summary purports to constitute an opinion as to the state of title and regardless of whether a fee is charged. Rabourn contends that neither § 76-538, § 76-537(3), nor § 76-537(9) requires that a report of title be done "'for a fee or other valuable consideration'" in order to come within the statutory definition of the "business of abstracting." Brief for appellee at 6. As an example of the claimed overbreadth, Rabourn argues that an unlicensed person who examines and prepares a summary of public records pertaining to real property as a favor to a relative would commit a criminal offense under the Abstracters Act as written. The State, on the other hand, argues that the Abstracters Act legitimately regulates only the "'business'" of abstracting, which it claims involves the preparation of reports of title gathered from public records and provided to members of the public for a fee or other valuable consideration. Brief for appellant at 10.

Generally, the "business of abstracting titles to real estate is affected with a public interest" such that a state may utilize its police power to regulate those who engage in such business for the protection of the public. 1 Am. Jur. 2d *Abstracts of Title* § 5 at 368 (1994). In enacting the Abstracters Act, the Nebraska Legislature expressly stated that its purpose was "to safeguard the welfare and property of citizens of this state and to insure that abstracters serving the public meet minimum standards of proficiency and competency." § 76-536. To that end, the Abstracters Act regulates the "business of abstracting," § 76-538, by requiring that any person or entity engaged in such business be "licensed as required by the Abstracters Act," *id.*, and by further

providing that an "individual or business entity engaged in the business of abstracting in this state without having complied with the Abstracters Act shall be guilty of a Class III misdemeanor," § 76-558.

Generally, the term "business" denotes "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Black's Law Dictionary 211 (8th ed. 2004). However, the issue presented in this case arises from the fact that in § 76-537(3), the Legislature specifically defined the phrase "[b]usiness of abstracting" as used in the Abstracters Act as "the making, compiling, and selling of abstracts of title or any part thereof *or* preparing written reports of title to real property." (Emphasis supplied.) Also, § 76-537(8) defines "[r]egistered abstracter" for purposes of the Abstracters Act as one "who for a fee or other valuable consideration compiles or certifies abstracts of title or any part thereof . . . *or* who prepares reports of title." (Emphasis supplied.) The emphasized conjunctive "or" in each of these statutory provisions, together with the absence of any specific reference to fees or valuable consideration with respect to "reports of title," lends support to Rabourn's interpretation that the "business of abstracting" includes both the preparation and certification of abstracts for a fee and the preparation of title reports regardless of whether done in exchange for some form of compensation. While grammatically defensible, this interpretation is inconsistent with the Legislature's use of the word "business" in describing what it sought to regulate and its stated purpose of safeguarding the welfare and property of the citizenry. Thus, we conclude that an ambiguity exists in the statutory language defining the phrase "business of abstracting" as used in the Abstracters Act.

[10,11] As noted, the unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996). Although we construe penal statutes strictly, we nonetheless give them 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. See, *State v. Hynek*, 263 Neb.

310, 640 N.W.2d 1 (2002); *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *Id.* Also, 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. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003); *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

Historically, the doctrine of facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. *State v. Hookstra, supra.* We conclude that the statutory definition of the "business of abstracting" as used in the Abstracters Act is reasonably amenable to a limiting construction which is consistent with legislative intent while preventing unconstitutional overbreadth. Accordingly, we hold that "preparing written reports of title to real property" constitutes the "business of abstracting" for purposes of the Abstracters Act only when done in exchange for a fee or other valuable consideration. See § 76-537(3) and (8). So construed, the Abstracters Act is not unconstitutionally overbroad on its face.

CONCLUSION

For the reasons stated herein, we conclude that the district court erred in affirming the judgment of the county court sustaining Rabourn's motion to quash and dismissing the complaint. We therefore sustain the State's exception. Because jeopardy had not attached prior to the entry of the judgment of the county court, our disposition of this appeal permits the cause to proceed as set forth in Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004). See *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000). Accordingly, we remand the cause to the district court with directions to reverse the judgment of the county court and remand for further proceedings consistent with this opinion.

EXCEPTION SUSTAINED, AND CAUSE REMANDED WITH DIRECTIONS.