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REPORTS OF CASES

DECIDED BETWEEN

AUGUST 9, 1994 and SEPTEMBER 4, 1995

IN THE

Nebraska Court of Appeals

VOLUME III

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1996

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

[1]Until December 14, 1995
[2]Appointed April 20, 1995

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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(Author judge listed first.)

No. A-92-1170: **Koranda v. Koranda.** Affirmed. Sievers, Chief Judge, and Connolly and Hannon, Judges.

No. A-93-122: **Swanson v. Swanson.** Affirmed. Connolly, Irwin, and Miller-Lerman, Judges.

No. A-93-209: **Brown v. Troelstrup.** Affirmed. Irwin and Miller-Lerman, Judges, and Norton, District Judge, Retired.

No. A-93-254: **Cullen v. Bryson Properties XVIII.** Affirmed. Irwin, Connolly, and Miller-Lerman, Judges.

No. A-93-285: **State on behalf of Courtier v. Rydberg.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge. Sievers, Chief Judge, concurs in the result.

No. A-93-339: **Stuthman v. Stuthman.** Affirmed. See Rule 7A(1). Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-93-344: **Eppenbach v. Eppenbach.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-93-346: **The Travelers Ins. Co. v. Nelson.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-93-353: **Roberts v. Weber & Sons, Co.** Reversed and remanded with directions to dismiss. Irwin and Miller-Lerman, Judges, and Norton, District Judge, Retired.

No. A-93-383: **Nelson v. Nelson.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-93-404: **Twiss v. Trautwein.** Affirmed. Connolly, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-93-439: **Sheen v. Duncan.** Affirmed. See Rule 7A(1). Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-93-558: **Darrow v. Darrow.** Affirmed as modified. Irwin, Hannon, and Mues, Judges.

No. A-93-581: **State v. Martin.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-93-593: **Omega Chem. Co. v. Kate, Inc.** Affirmed. Connolly, Judge, and Sievers, Chief Judge, and Irwin, Judge.

No. A-93-604: **Evans v. City of Gering.** Affirmed. Sievers, Chief Judge, and Connolly and Hannon, Judges.

No. A-93-654: **Jacobsen v. Jacobsen.** Affirmed as modified. Sievers, Chief Judge, and Miller-Lerman, Judge, and Howard, District Judge, Retired.

No. A-93-678: **Fitch v. Fitch.** Affirmed. Hannon, Irwin, and Mues, Judges.

No. A-93-718: **Finn v. Kramer.** Affirmed. Sievers, Chief Judge, and Miller-Lerman, Judge, and Warren, District Judge, Retired.

No. A-93-740: **In re Interest of Bringleson.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Connolly, Judge.

No. A-93-787: **McCaslin v. McBride.** Affirmed in part, and in part reversed and remanded. Mues, Hannon, and Irwin, Judges.

No. A-93-805: **Steiner v. Steiner.** Affirmed. Irwin, Hannon, and Mues, Judges.

No. A-93-817: **Kubat v. Kubat.** Dismissed for lack of jurisdiction. Warren, District Judge, Retired, and Sievers, Chief Judge, and Miller-Lerman, Judge.

No. A-93-831: **Sheldon v. Sheldon.** Affirmed. Irwin, Judge, and Sievers, Chief Judge, and Miller-Lerman, Judge.

Nos. A-93-865, A-93-866: **Bavinger Trust v. Hamilton Cty. Bd. of Equal., Kuhns v. Hamilton Cty. Bd. of Equal.** Affirmed. Irwin, Hannon, and Mues, Judges.

No. A-93-888: **Chief Indus. v. Hamilton Cty. Bd. of Equal.** Affirmed. Irwin, Hannon, and Mues, Judges.

No. A-93-1089: **White v. White.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-93-1096: **State v. Lee.** Affirmed. Sievers, Chief Judge, and Connolly and Hannon, Judges.

No. A-94-053: **Taylor v. Farmland Foods.** Affirmed. Mues, Irwin, and Miller-Lerman, Judges.

No. A-94-064: **State v. Solotrovsky.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-095: **State v. McMann.** Sentence vacated, and cause remanded for resentencing. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-099: **In re Interest of Michelle H. et al.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-133: **Bennett v. Fenwick's Ice Cream & Eatery Co.** Affirmed. Sievers, Chief Judge, and Connolly and Hannon, Judges.

No. A-94-165: **Beaman v. Cook Family Foods.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-94-184: **State v. Jones.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-196: **Russell v. Department of Corr. Servs.** Reversed and vacated. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-245: **In re Interest of Potter.** Affirmed. Irwin, Connolly, and Miller-Lerman, Judges.

No. A-94-262: **Allen v. Concrete Indus.** Affirmed. Sievers, Chief Judge, and Hannon and Miller-Lerman, Judges.

No. A-94-337: **Purdy v. Safeway Stores, Inc.** Affirmed. Irwin, Connolly, and Miller-Lerman, Judges.

No. A-94-360: **In re Interest of Reyes.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-397: **Chloupek v. Twelfth Judicial Dist. of Neb. Cent. Mental Health Bd.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-425: **In re Interest of Gordon.** Affirmed. Irwin, Miller-Lerman, and Mues, Judges.

No. A-94-467: **Shriner v. Davis Bros. Constr.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-94-471: **Norine v. Norine.** Affirmed. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-94-494: **Packett v. Northwestern Nat. Ins. Co.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-505: **State v. Davlin.** Affirmed. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

Nos. A-94-581, A-94-582, A-94-583: **In re Interest of Johnson.** Affirmed. Hannon, Irwin, and Mues, Judges.

No. A-94-595: **In re Interest of Kari F.** Affirmed. Mues, Hannon, and Irwin, Judges.

No. A-94-627: **State v. Money.** Reversed and remanded. Hannon, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-629: **State v. Casio.** Reversed and remanded for further proceedings. Mues, Judge, and Sievers, Chief Judge, and Hannon, Judge.

No. A-94-670: **Schrad v. Schrad.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges. Hannon, Judge, dissenting.

Nos. A-94-743, A-94-744: **In re Interest of David B.** Affirmed. Sievers, Chief Judge, and Miller-Lerman, Judge, and Warren, District Judge, Retired.

No. A-94-762: **Gallagher v. Lozier Corp.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-776: **State v. Saucedo.** Remanded for resentencing. Mues, Hannon, and Irwin, Judges.

No. A-94-786: **Balk v. Kemper Ins. Co.** Affirmed. Sievers, Chief Judge, and Miller-Lerman, Judge, and Howard, District Judge, Retired.

No. A-94-788: **State v. DeLeon.** Affirmed. Mues, Hannon, and Irwin, Judges.

No. A-94-804: **In re Interest of Shawnte G. & Devin G.** Affirmed. Sievers, Chief Judge, and Hannon and Mues, Judges.

No. A-94-824: **In re Interest of Jason M.** Affirmed. See Rule 7A(1). Sievers, Chief Judge, and Miller-Lerman, Judge, and Howard, District Judge, Retired.

No. A-94-844: **Bartlett v. University of Neb. Med. Ctr.** Affirmed. Mues, Hannon, and Irwin, Judges.

No. A-94-866: **State v. Rediger.** Affirmed. See Rule 7A(1). Irwin, Hannon, and Mues, Judges.

No. A-94-914: **Schumacher v. Schumacher.** Remanded with directions. Miller-Lerman, Judge, and Sievers, Chief Judge, and Inbody, Judge.

No. A-94-933: **Staab v. Marten.** Affirmed as modified. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-94-951: **State v. Tippit.** Affirmed. Hannon, Irwin, and Mues, Judges.

No. A-94-975: **In re Interest of Jared P.** Affirmed as modified. Miller-Lerman, Hannon, and Inbody, Judges.

No. A-94-1007: **State v. Young.** Affirmed. Sievers, Chief Judge, and Irwin and Mues, Judges.

No. A-94-1020: **City of Beatrice v. Balvin.** Affirmed. Irwin, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-94-1074: **State v. Petersen.** Affirmed. Inbody and Miller-Lerman, Judges, and Howard, District Judge, Retired.

No. A-94-1101: **State v. Vanderlinden.** Affirmed. Inbody, Hannon, and Miller-Lerman, Judges.

No. A-94-1225: **Ramirez v. ICI Seed, Inc.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Irwin, Judge.

No. A-94-1241: **State v. Trisdale.** Reversed and remanded with directions. Inbody, Judge, and Sievers, Chief Judge, and Miller-Lerman, Judge.

No. A-95-024: **In re Interest of Morgan.** Affirmed. Irwin, Judge, and Sievers, Chief Judge, and Mues, Judge.

No. A-95-042: **Lemon v. Campbell Soup Co.** Affirmed. Inbody, Hannon, and Miller-Lerman, Judges.

No. A-95-044: **State v. Kohl.** Affirmed. Mues, Judge, and Sievers, Chief Judge, and Irwin, Judge.

No. A-95-046: **State v. Johnson.** Affirmed. Inbody, Hannon, and Miller-Lerman, Judges.

No. A-95-072: **In re Interest of Laurie F.** Appeal dismissed. Inbody, Hannon, and Miller-Lerman, Judges.

No. A-95-370: **Bassinger v. Nebraska Dept. of Corr. Servs.** Affirmed. Sievers, Chief Judge, and Hannon and Miller-Lerman, Judges.

No. A-95-477: **State v. Richey.** Reversed. Inbody, Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-90-1022: **Adelman, Robinson & Associates v. Peony Park.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-091: **Pawnee Fertilizer v. Krikava.** There being no opposition to the motion to dismiss, appeal dismissed.

No. A-92-503: **Thomte v. School Dist. No. 17 of Douglas Cty.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. A-92-687: **Shuck v. Jacob.** By order of the court, order of dismissal in No. A-92-687 is vacated; appeal reinstated. See A-92-687, *Shuck v. Jacob*, 1 Neb. App., Cumulative List of Cases Disposed of Without Opinion.

No. A-92-763: **Rippeteau v. Agristor Fin. Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-1181: **Swanson v. Kiger.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-93-053: **Belt v. Nebraska Dept. of Corr. Servs.** Appeal dismissed as moot.

No. A-93-128: **Wild Rose Cattle Co. v. Osborne.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-182: **Lattimer v. Smith-Casados.** Pursuant to the court's order of June 16, 1995, no cause was shown as to why this matter should not be dismissed as moot, and it is therefore dismissed.

No. A-93-250: **Hay Springs Hous. Auth. v. LaBelle.** On the court's own motion, appeal dismissed as moot.

No. A-93-297: **Whittle v. Whittle.** In view of appellant's failure to respond to the order to show cause, the appeal is dismissed. See *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993).

No. A-93-341: **Houston v. Nebraska Liquor Control Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-424: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-481: **Maddox v. Conrad.** Stipulation allowed; appeal dismissed.

No. A-93-482: **Chaney v. Conrad.** Stipulation allowed; appeal dismissed.

No. A-93-595: **Emerson v. Zagurski.** Motion of appellee for summary affirmance overruled.

No. A-93-614: **Randall v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. A-93-698: **Winter v. Conrad.** Stipulation allowed; appeal dismissed.

No. A-93-730: **State v. Tyler.** Stipulation allowed; appeal dismissed.

No. A-93-731: **State v. Tyler.** Stipulation allowed; appeal dismissed.

No. A-93-732: **State v. Tyler.** Stipulation allowed; appeal dismissed.

No. A-93-733: **State v. Tyler.** Stipulation allowed; appeal dismissed.

No. A-93-737: **Currie v. Chief School Bus Service, Inc.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-779: **Hynek v. Continental Gen. Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-834: **Blaha v. Howells Bank.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-851: **State Law Enforcement Bargaining Council v. State.** Stipulation allowed; appeal dismissed.

No. A-93-957: **Skinner v. Skinner.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-966: **State v. Mallory.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-980: **Allen v. North Loup Scotia Sch. Dist. No. 39-0501.** Appeal dismissed. See Rule 7A(2).

No. A-93-988: **Collection Bureau of Grand Island v. Slangal.** Affirmed. See Rule 7A(1).

No. A-93-994: **Acton v. Valmont Indus.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-93-1017: **Arnold v. Arnold.** Stipulation allowed; appeal dismissed.

No. A-93-1082: **Dougherty v. Gerdes.** No response having been filed to the court's show cause order of July 13, 1995, the appeal is dismissed pursuant to such order.

No. A-93-1085: **Dunker v. Dunker.** Stipulation allowed; appeal dismissed.

No. A-93-1103: **State v. Harris.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-93-1107: **Laporta v. Oltjenbruns.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-1113: **Baer v. Patrician Equities Corp.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. A-93-1124: **2301 Leavenworth, Inc. v. Nebraska Liq. Control Comm.** Appeal dismissed. See Rule 7A(2).

No. A-93-1135: **Hiatt v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-058: **State v. Knoell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-075: **Garey v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. A-94-126: **In re Interest of Yeagley.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-136: **Watson v. Watson.** Stipulation allowed; appeal dismissed.

No. A-94-141: **State v. Gaillard.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-94-154: **Lewis v. Clarke.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-155: **State v. Svoboda.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-168: **State ex rel. Schram v. Martin.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-172: **In re NCK Elec. Coop.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-195: **Oliphant v. City of Lincoln.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-202: **Barrett v. Barrett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-204: **State v. Davis.** Appeal dismissed. See Rule 7A(2).

No. A-94-205: **State v. Bost.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-214: **Russell v. Green.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-220: **Craig v. Craig.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-243: **United Service Auto. Assn. Property & Cas. Ins. v. Whitten.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-94-244: **State v. May.** Appeal dismissed. See Rule 7A(2).

No. A-94-253: **State v. Gatten.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-261: **State v. Barrett.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-278: **Baer v. Patrician Equities Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-287: **Mitchell Irr. Dist. v. Gering Irr. Dist.** Stipulation allowed; appeal dismissed.

No. A-94-294: **State v. Eisenberg.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-298: **Olson v. Dakota County.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-301: **State v. Allen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-303: **State v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-304: **Thorell v. Thorell.** Stipulaton allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-311: **Bregman v. Bregman.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-315: **State v. Plasencio.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-319: **Durfee v. Abramson.** Stipulation allowed; appeal dismissed.

No. A-94-320: **Schwarzrock v. Hoffman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-321: **State v. Drohman.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-323: **Hansen v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-324: **Norris v. Nebraska Boiler Co.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-331: **Baca v. Metropolitan Utilities Dist.** Stipulation allowed; appeal dismissed.

No. A-94-335: **Taylor v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-341: **State v. Seamann.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-347: **State v. Purcell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-352: **State v. Zemunski.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-353: **Neville v. City of Plattsmouth.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-357: **State v. Clemens.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-358: **State v. Dewey.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-363: **State v. Boganowski.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-380: **Father Flanagan's Boys Home v. Department of Soc. Servs.** Stipulation allowed; appeal dismissed.

No. A-94-385: **State v. Krussell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-387: **Heckman v. Clarke.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-388: **Gerdes v. Roberts.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-389: **State v. Thomas.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-390: **State v. DeLeon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-410: **VanCleave v. VanCleave.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-411: **State v. Medina.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-413: **State v. Krafczik.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-415: **State v. Drugsvold.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-422: **Leiding v. Leiding.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-423: **Indian Center, Inc. v. Yellow Boy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-427: **American Volunteer Prod. v. Department of Labor.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-94-429: **Cole v. McCall.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-433: **State v. Heiderman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-436: **Doxon v. Doxon.** Motion of appellee for summary affirmance sustained; jugment affirmed. See Rule 7B(2).

No. A-94-443: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-446: **Lanphear v. Nebraska Dept. of Soc. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-450: **State v. Nauden.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-451: **State v. Jasper.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-456: **State v. Reed-Burbach.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-457: **State v. Perry.** Appeal dismissed. See Rule 7A(2).

No. A-94-460: **Mowitz v. Abramson.** Stipulation allowed; appeal dismissed.

No. A-94-461: **Steiner v. Abramson.** Stipulation allowed; appeal dismissed.

No. A-94-465: **In re Interest of Brown.** Affirmed. See Rule 7A(1).

No. A-94-470: **State v. Carrera.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-476: **Johnson v. Penta Communications.** Stipulation allowed; appeal dismissed without prejudice; each party to pay own costs.

No. A-94-478: **State v. Gaston.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-479: **Antoniak v. Antoniak.** Appeal dismissed. See Rule 7A(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1992); *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981); and *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979).

No. A-94-483: **State v. Guernsey.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-484: **State v. Sullivan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-486: **Rada v. Rada.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-493: **State v. Portner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-496: **Robinson v. Nebraska Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-499: **State v. Slangal.** Appeal dismissed. See Rule 7A(2).

No. A-94-502: **State v. Mason.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-508: **Adams v. Adams.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-94-512: **State v. Lein.** Affirmed as modified.

No. A-94-520: **State v. Gould.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-529: **Ems v. Ems.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-532: **Boyle v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-533: **Boyle v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-534: **Rada v. Rada.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-535: **State v. Mattson.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-94-537: **Green v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-538: **State v. Grier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-541: **State v. Bennett.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-543: **State v. Wagner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-552: **Yager v. Martinez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-554: **Dinklage v. Balka.** Stipulation allowed; appeal dismissed.

No. A-94-555: **State v. Murrish.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-556: **State v. Schneberger.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-557: **Dickey v. Production Credit Assn. of the Midlands.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-94-562: **State v. Dillon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-565: **Watkins v. Nebraska Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-568: **Gutgsell v. Gutgsell.** Stipulation allowed; appeal dismissed.

No. A-94-570: **State v. Washington.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-572: **Harmon Cable Communications v. Scope Cable Television.** Stipulation allowed; appeal dismissed with prejudice.

No. A-94-573: **West v. Conrad.** Stipulation allowed; appeal dismissed.

No. A-94-574: **Meyer v. Conrad.** Stipulation allowed; appeal dismissed.

No. A-94-576: **State v. Rada.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-584: **Conder v. Conder.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-585: **Rufenacht v. Rufenacht.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-586: **State v. Hernandez.** Appeal dismissed. See Rule 7A(2).

No. A-94-590: **Petersen v. Primary Care Physicians, P.C.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-592: **Raglund v. Nebraska Dept. of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-593: **Sherman Cty. Bank v. McKeon.** Stipulation allowed; appeal dismissed.

No. A-94-594: **State v. Policky.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-603: **State v. Livings.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-616: **Shepard v. Clarke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-622: **Brown v. Butler Holdings.** Appeal dismissed. See Rule 7A(2) and *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980).

No. A-94-630: **State v. Stout.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-632: **State v. Arias.** Appeal dismissed. See Rule 7A(2).

No. A-94-633: **State v. Blanco.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-636: **Steele v. Fuchs Machinery.** Stipulation allowed; appeal dismissed.

No. A-94-638: **Gasseling v. Gasseling.** Appeal dismissed for failure to comply with show cause order of January 11, 1995.

No. A-94-639: **In re Application of MCI Telecommunications Corp.** Stipulation allowed; appeal dismissed.

No. A-94-640: **Run, Inc. v. City of Omaha.** Appeal dismissed. See Rule 7A(2); Neb Rev. Stat. § 25-1905 (Cum. Supp. 1992); and *Brown v. Board of Education*, 231 Neb. 108, 435 N.W.2d 184 (1989).

No. A-94-641: **Home Fed. Sav. & Loan Assn. v. Darr Ave. Partnership.** Stipulation allowed; appeal dismissed.

No. A-94-646: **In re Estate of Carroll.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-647: **State v. Rolenc.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. A-94-648: **State v. Mueller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-654: **State v. Ladeaux.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-657: **Bihler v. Wallpaper of Omaha, Inc.** Appeal dismissed without prejudice to parties obtaining release of bond from district court.

No. A-94-661: **State v. Constantine.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-664: **Davis v. Davis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-666: **Becker v. Nebraska Accountability & Disclosure Comm.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rules 7A and 7B.

No. A-94-667: **Durand v. Foster.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-668: **Kelley v. Fitzgerald.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-94-672: **State v. Bensing.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-673: **State v. Condon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-675: **State v. Gutierrez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-678: **State ex rel. Anderson v. Glasser.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-94-679: **Roffman v. Travelers Companies.** Appeal dismissed for lack of jurisdiction on the part of the district court and this court and cause remanded to the district court with directions to vacate the judgment and dismiss the petition.

No. A-94-680: **State v. Garber.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-682: **Davis v. Davis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-684: **State v. Penner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-685: **In re Estate of Simonsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-686: **State v. Hurtado.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-687: **State v. Hodges.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-690: **Patterson v. Zitterkopf.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-704: **In re Interest of Castillo.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-705: **State v. Kendall.** Affirmed. See Rule 7A(1).

No. A-94-707: **Holdredge Fed. Credit Union v. Hansen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-709: **Bissel v. Fellows.** Stipulation allowed; appeal dismissed with prejudice.

No. A-94-717: **State v. Pohl.** Appeal dismissed. See Rule 7A(2).

No. A-94-718: **State v. Pohl.** Appeal dismissed. See Rule 7A(2).

No. A-94-723: **Tyler v. Rasmussen.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-725: **State v. Domingo.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-736: **Hauschild v. City of Papillion.** Appeal dismissed. See Rule 7A(2).

No. A-94-739: **State v. Hiatt.** Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-94-740: **Gateway Management v. Rada.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-746: **Cooke v. Cooke.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-752: **State v. Gatten.** Stipulation allowed; appeal dismissed.

No. A-94-757: **Keithley v. Dept. of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-94-761: **State v. Riley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-764: **Kensell v. Adams Land & Cattle Co.** Stipulation allowed; appeal dismissed.

No. A-94-765: **Waite v. Regional West Medical Ctr.** Appeal dismissed. See Rule 7A(2).

No. A-94-766: **Waite v. Carpenter.** Appeal dismissed. See Rule 7A(2).

No. A-94-767: **Gates v. Cornell-Crosby.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-768: **Trotter v. Turner.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-770: **Brandt v. American Family Mut. Ins. Co.** Stipulation allowed; appeal dismissed.

No. A-94-772: **Judt v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-773: **Danhauer v. Danhauer.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-774: **General Serv. Bureau v. Berg.** Appeal dismissed. See Rule 7A(2).

No. A-94-775: **State v. Howell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-782: **State v. Lawson.** Appeal dismissed. See Rule 7A(2).

No. A-94-791: **State v. Hauser.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-792: **State v. Kyriss.** Appeal dismissed. See Rule 7A(2).

No. A-94-796: **Collection Bureau of Grand Island v. Anderson.** Appeal dismissed. See Rule 7A(2).

No. A-94-799: **Todco Barricade Co. v. Nebraska Dept. of Revenue.** Stipulation allowed; appeal dismissed without prejudice at cost of appellant.

No. A-94-800: **State v. Erdkamp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-803: **In re Interest of Martinez.** Appeal dismissed. See Rule 7A(2).

No. A-94-809: **Vajgrt v. Vajgrt.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-94-812: **In re Interest of Weber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-814: **EMC Mortgage Corp. v. Southern California Inst., Inc.** Appellee's motion for summary dismissal granted as regards appellants' first assigned error. As regards the issue of appellants' second assigned error, the motion to vacate, the decision of the district court is affirmed. See Rule 7A(1).

No. A-94-815: **Kittridge v. Kolar.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-94-818: **State v. Schuster.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-819: **Knudson Management Co. v. Long.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs; trial court authorized to release funds pursuant to stipulation.

No. A-94-820: **Knudson Management Co. v. Gray.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs; trial court authorized to release funds pursuant to stipulation.

No. A-94-823: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-830: **Loehr v. Loehr.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-836: **State v. Geissinger.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-837: **Graham v. Presidents' Row Ltd. Partnership.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-838: **Rol v. Rol.** Appeal dismissed. See Rule 7A(2).

No. A-94-841: **Godwin v. Chadd.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-849: **State v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-850: **State v. Nice.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-857: **Trammell v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-860: **Koziol v. Kemp.** Stipulation allowed; appeal dismissed.

No. A-94-862: **Larkin v. Abramson.** Stipulation allowed; appeal dismissed.

No. A-94-868: **Lesiak v. Lesiak.** Stipulation allowed; appeal dismissed.

No. A-94-872: **Rose v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-873: **United Nebraska Bank v. Burnett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-878: **State v. Bailey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-882: **State v. Critel.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-889: **State v. Lloyd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-890: **In re Interest of Stemple.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-893: **State v. Taylor.** Appeal dismissed. See Rule 7A(2).

No. A-94-894: **State v. Pullin.** Appeal dismissed. See Rule 7A(2).

No. A-94-899: **State v. Doerschlag.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-900: **State v. Lara.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-901: **State v. Carpenter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-903: **State v. Hiatt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-904: **State v. Selman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-905: **Haun v. Haun.** Stipulation allowed; appeal dismissed.

No. A-94-906: **McCarthy v. Wardian.** Stipulation allowed; appeal dismissed with prejudice.

No. A-94-907: **In re Interest of Brosius.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-909: **Thacker v. Allen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-911: **Vieyra v. Vieyra.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-915: **State v. Kramer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-920: **Sate v. Shannon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-922: **State v. Rien.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-924: **State v. Branting.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-925: **Linebarger v. Ames Ave. Corp.** Appeal dismissed. See Rule 7A(2).

No. A-94-929: **State v. Gotschall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-930: **State v. Gotschall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-931: **State v. Lawson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-932: **City of Lincoln v. Nebraska Liquor Control Comm.** Motion of appellant to dismiss appeal sustained; apeal dismissed.

No. A-94-933: **Staab v. Marten.** Appeal dismissed. See Rule 7A(2).

No. A-94-934: **Milligan v. Abramson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-936: **Taylor v. Taylor.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-938: **State v. Vaughn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-947: **Negus v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-948: **Wiston XIV Ltd. Partnership v. Douglas Cty. Housing Auth.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-950: **Wenck v. Wenck.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-953: **State v. Allen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-954: **State v. Crudup.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-956: **State v. Santos.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-958: **Allen v. Allen.** Stipulation allowed; appeal dismissed without prejudice.

No. A-94-959: **Cline v. Hiatt Farms, Inc.** Appellees' motion for summary dismissal for lack of jurisdiction is granted under Rule 7B(1) on the ground that the orders appealed from are interlocutory and therefore are not final.

No. A-94-961: **State v. Snyder.** Appeal dismissed. See Rule 7A(2).

No. A-94-963: **State v. Frazier.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-965: **Armbruster v. Brus.** Stipulation allowed; appeal dismissed.

No. A-94-966: **Armbruster v. Brus.** Stipulation allowed; appeal dismissed.

No. A-94-968: **Hauserman v. Board of Adjustment of City of Minden.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-969: **Davis v. Bowzer.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-94-972: **In re Interest of Johannes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-979: **In re Interest of Baker.** Stipulation allowed; appeal dismissed.

No. A-94-987: **Francis v. Francis.** Stipulation allowed; previously filed motions withdrawn; appeal dismissed; each party to pay own costs.

No. A-94-993: **Leenerts v. City of Omaha.** Appeal dismissed. See Rule 7A(2).

No. A-94-1001: **State v. Czarnick.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1004: **Farm Credit Bank of Omaha v. H. J. Ruf Land & Cattle Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1005: **State v. LaDeaux.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1008: **Becker v. Ramirez.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1012: **Netsell v. Father Flanagan's Boys' Home.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1014: **State v. Christensen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1016: **State v. Cortez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1017: **State v. Pitzer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1019: **State v. Scott.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1025: **In re Application of Nelson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1029: **Finke v. Finke.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-1030: **Hoffmaster v. Hoffmaster.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1033: **In re Interest of Brosius.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-1035: **State v. Hoppy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1040: **State v. Barfield.** Appeal dismissed. See Rule 7A(2).

No. A-94-1041: **State v. Shaddy.** Appeal dismissed. See Rule 7A(2).

No. A-94-1045: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1049: **State v. Vellek.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1050: **State v. Frederick.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1051: **State v. Lamary.** Appeal dismissed. See Rule 7A(2).

No. A-94-1053: **Havlat v. Abramson.** Stipulation allowed; appeal dismissed.

No. A-94-1055: **State v. Odell.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1057: **Mangold v. Mangold.** Stipulation allowed; appeal dismissed without prejudice.

No. A-94-1059: **State v. Carr.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1060: **State v. Martinez.** Stipulation allowed; appeal dismissed.

No. A-94-1063: **Garner v. H & R W Irr. Dist.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-1066: **Wacker v. Wacker.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-94-1072: **State v. Bennett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1073: **State v. Skoda.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1075: **State v. Jenkins.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1078: **State v. Todd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1079: **Wehrmann v. Wehrmann.** Appeal dismissed. See Rule 7A(2).

No. A-94-1082: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1084: **State v. Schultz.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1086: **State v. Nugent.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1092: **State v. Morgan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1095: **State v. Booth.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1099: **State v. Snodgrass.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1105: **Hamann v. Ellerby.** Stipulation allowed; appeal dismissed.

No. A-94-1106: **In re Interest of Bishop.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1108: **Wiedel v. Wiedel.** Stipulation allowed; appeal dismissed.

No. A-94-1114: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1116: **Omaha Tribe v. Department of Water Resources.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1119: **First Westroads Bank v. Johnson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1120: **Cunningham v. Prime Mover, Inc.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-1123: **Prudential Ins. Co. of Am. v. Tully's for Men.** Appeal dismissed. See Rule 7A(2).

No. A-94-1124: **State v. Hicks.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1125: **State v. Rogers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1126: **State v. Niebur.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1127: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

Nos. A-94-1130 through A-94-1138: **State v. Burlison.** By order of the court, appeals dismissed for failure to file briefs.

No. A-94-1141: **State v. Carpenter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1143: **Thorne v. Omaha Pub. Power Dist.** Appeal dismissed for lack of an appealable order.

No. A-94-1144: **State v. Billups.** Affirmed. See Rule 7A(1).

No. A-94-1145: **State v. Mutchler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1146: **State v. Benish.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1150: **State v. Gillen.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1152: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1153: **State v. Nauenburg.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1156: **State v. Bartlett.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1157: **State v. Barrett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1159: **Adams v. County Judge.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1163: **State v. Humphries.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1167: **BH & L Enter. v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1171: **State v. Geffs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1172: **Sterett v. Sterett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1180: **State v. Osler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1181: **State v. Wilson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1182: **State v. Allison.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1183: **J I Case Credit Corp. v. Burnett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1184: **State v. Morton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1185: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1186: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1187: **State v. Ellis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1188: **State v. Austin.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-1189: **State v. Austin.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-1190: **State v. Austin.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-1191: **State v. Geffs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1193: **State v. Brozovsky.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1200: **State v. Allee.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1201: **State v. Allee.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1206: **Sedko Interests, Inc. v. Midland Bank.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1211: **State v. Powles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1213: **In re Interest of Cunningham.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-1226: **Campbell v. Department of Soc. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-1235: **State v. Kuenning.** Appeal dismissed. See Rule 7A(2).

No. A-94-1236: **State v. Fort.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1246: **State v. Mohr.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1248: **State v. Shaddy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-1250: **TCF Mortgage Corp. v. Herzog.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-002: **State v. Huerta.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-004: **State v. Parker.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-005: **State v. Hinton.** Appeal dismissed. See Rule 7A(2).

No. A-95-007: **Bigley v. Kawasaki Motors Corp. U.S.A.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-008: **State v. Flournoy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-009: **Guidinger v. Trojan.** Appeal dismissed. See Rule 7A(2).

No. A-95-012: **Taylor v. Dodge Cty. Bd. of Adjustment.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-016: **State v. Brandle.** Affirmed. See Rule 7A(1), Rule 9E, and Neb. Rev. Stat. § 25-21,159 (Reissue 1989).

No. A-95-018: **State v. Baker.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-022: **Dyer v. Box Butte Gen. Hosp.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-023: **In re Interest of Wray.** Appeal dismissed. See Rule 7A(2).

No. A-95-031: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-032: **State v. Baker.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-035: **Kulwicki v. Kulwicki.** Stipulation allowed; appeal dismissed.

No. A-95-037: **Keown v. Clark.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-038: **In re Interest of Newman.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-039: **In re Interest of Phillippi.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-041: **Aschoff v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. A-95-043: **McMurray v. Department of Soc. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-049: **State v. Hubbard.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-050: **Wagner v. Wagner.** Appellant's motion for reconsideration of the court's denial of a writ of mandamus is denied. Under Rule 7A(1) no error of law appears, and a detailed opinion would not be of value. Affirmed.

No. A-95-055: **Little v. Nebraska Diamond, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-057: **In re Interest of Chambers.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-058: **State v. Hartman.** Appeal dismissed. See Rule 7A(2).

No. A-95-059: **State v. Mulinix.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-060: **State v. Whatley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-062: **State v. Ladd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-065: **Pfefferle v. Pfefferle.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-95-069: **State v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-073: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-074: **Hassett v. Omaha Dev. Corp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-075: **Hazen v. Hazen.** Stipulation allowed; appeal dismissed.

No. A-95-077: **In re Interest of Troxel.** Appeal dismissed. See Rule 7A(2).

No. A-95-082: **In re Interest of Philippi.** Appeal dismissed. See Rule 7A(2).

No. A-95-083: **In re Interest of Putnam.** Appeal dismissed. See Rule 7A(2).

No. A-95-084: **Janecek v. Nebraska Power Review Bd.** Motions of appellees for summary dismissal sustained. See Rule 7B(1).

No. A-95-084: **Janecek v. Nebraska Power Review Bd.** By order of the court, with regard to appellees Coordsen, Schropfer, Krasnowsky, and Johnson, appeal dismissed. See Rule 7A(2).

No. A-95-085: **State v. Delin.** Affirmed. See Rule 7A(1).

No. A-95-088: **Otto v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-091: **Penix v. Makinen.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-094: **Thorell v. Thorell.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-103: **Dittrich v. Department of Corr. Servs.** Affirmed. See Rule 7A(1).

No. A-95-104: **State v. Faeller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-110: **State v. Velazquez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-115: **State v. Beasley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-120: **In re Interest of Belmont.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-122: **State v. Branch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-126: **R. L. Nelsen Co. v. Bianchi.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-127: **Two Springs Dev. Corp. v. East-Lube Land Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-129: **Zutavern v. Sierks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-131: **Kenter v. Beef America Operating Co.** Stipulation allowed; appeal dismissed.

No. A-95-136: **Czaplewski v. Czaplewski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-138: **Newman v. Hinky-Dinky Omaha-Lincoln, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-140: **State v. Lyalls.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-142: **In re Interest of Hunt.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-143: **In re Interest of Shockey.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-151: **State v. Parker.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-158: **Wilkinson v. Wilkinson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-95-160: **Wray v. Wray.** Affirmed. See Rule 7A(1).

No. A-95-161: **State v. Simon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-170: **State v. Porter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-172: **State v. Gonzales-Gomez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-175: **State v. Harris.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-176: **Department of Soc. Servs. on behalf of Black v. Adamson.** Appeal dismissed. See Rule 7A(2).

No. A-95-180: **State v. Beller.** Appellant moves for a remand. The State has not opposed the motion. Appellant's motion to remand for a new trial is granted. See, *Terry v. Duff*, 246 Neb. 11, 516 N.W.2d 591 (1994); *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967).

No. A-95-183: **State v. Slapnicka.** Appeal dismissed. See Rule 7A(2).

No. A-95-186: **Houston v. Houston.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-187: **State v. Cayaditto.** Affirmed. See Rule 7A(1).

No. A-95-192: **State v. Chilson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-195: **State v. Sass.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-208: **State v. Schlund.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-211: **State v. Gilliland.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-216: **State v. Houle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-220: **Wray v. Dahm.** Appeal dismissed. See Rule 7A(2).

No. A-95-223: **Hansen v. Hansen.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-95-229: **State v. Saenz.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-95-230: **State v. Foster.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-231: **In re Interest of Frederick.** Appeal dismissed. See Rule 7A(2).

No. A-95-234: **Madonna Rehabilitation Hosp. v. Foksowicz.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-235: **Hairl v. Centennial Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-238: **State v. Huettner.** Stipulation allowed; appeal dismissed.

No. A-95-244: **State v. May.** Appeal dismissed. See Rule 7A(2).

No. A-95-250: **Yerkes v. Mark Hopkins Homes, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-95-251: **Peterson v. Peterson.** No response having been filed to the court's order to show cause, case is dismissed as moot.

No. A-95-253: **State v. Gibson.** Stipulation allowed; appeal dismissed.

No. A-95-255: **In re Interest of Blake.** Stipulation allowed; appeal dismissed.

No. A-95-258: **Simon v. Stopher.** Stipulation allowed; appeal dismissed.

No. A-95-261: **State v. Brown.** Appeal dismissed. See Rule 7A(2).

No. A-95-262: **State v. Cayaditto.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-263: **In re Interest of Roenfeldt.** Stipulation allowed; appeal dismissed.

No. A-95-266: **Malecha v. Arthur.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-269: **Max v. Max.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-272: **State v. Polfus.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-279: **In re Interest of Shimp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-280: **In re Interest of Shimp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-286: **State v. Valadez-Segovia.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-290: **Lewis v. Omaha Supportive Living.** Appeal dismissed. See Rule 7A(2).

No. A-95-296: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-297: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-301: **State v. Blair.** Appeal dismissed due to insufficient poverty affidavit. See Rule 7A(2).

No. A-95-302: **State v. Conner.** Appeal dismissed. See Rule 7A(2).

No. A-95-304: **State v. Gonzalez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-305: **Miller v. Miller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-307: **State v. Hardesty.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-308: **State v. Hardesty.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-313: **State v. Maloney.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-315: **Hansen v. Nebraska Pub. Employees Retirement Sys.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-325: **McDonald v. McDonald.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-331: **Stephens v. Belfiore.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-340: **State v. Guiterrez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-341: **State v. Cantu.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-347: **Orean v. Smith.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-350: **State v. Farber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A- 95-351: **Partaka v. Thurber.** Supplemental motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-359: **Oddo v. Oakbrook Partnership.** Appeal dismissed without prejudice. See Rule 7A(2) and *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972).

No. A-95-363: **Nelson v. Nelson.** Motion of appellee for summary dismissal sustained. See Rule 7A(2).

No. A-95-364: **State v. Picket Pin.** Reversed and remanded for further proceedings.

No. A-95-368: **State v. Chumley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-378: **Damian v. Damian.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-379: **State v. Lang.** Stipulation allowed; appeal dismissed.

No. A-95-381: **Pursley v. Pursley.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-382: **Bessey v. Bessey.** Stipulation allowed; appeal dismissed.

No. A-95-386: **State v. Pfundt.** By order of the court, appeal dismissed for failure to file briefs.

No. A-95-387: **In re Interest of Kizzire.** Appeal dismissed. See Rule 7A(2).

No. A-95-392: **Hrbek v. Knox Cty. Sch. Dist. No. 583.** Stipulation allowed; appeal dismissed.

No. A-95-395: **Walker v. Miller.** By order for the court, appeal dismissed for failure to file briefs.

No. A-95-408: **Wedding Info. Network v. Bundek.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-421: **State v. Carrera.** Appeal dismissed. See Rule 7A(2).

No. A-95-433: **In re Interest of Day.** Appeal dismissed. See Rule 7A(2).

No. A-95-434: **In re Interest of Day.** Appeal dismissed. See Rule 7A(2).

No. A-95-437: **Chavez v. Chavez.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-95-451: **Quaife v. Quaife.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-453: **State v. Shelly.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-461: **Friends-Tait v. Tait.** Stipulation allowed; appeal dismissed.

No. A-95-472: **Eckman v. B & R Stores.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-473: **Eckman v. BPS Guard Servs.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-95-483: **Robertson v. School Dist. No. 17.** Motion of appellee for summary dismissal sustained. See Rule 7B(1). District court order overruling motion for attorney fees vacated. See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

No. A-95-500: **O'Hanlon v. O'Hanlon Constr. Co.** Stipulation allowed; appeal dismissed.

No. A-95-501: **Walker v. Hartford Fire Ins. Co.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-504: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-521: **State v. Husak.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-539: **In re Interest of Smith.** Stipulation allowed; appeal dismissed.

No. A-95-545: **State v. Meyers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-546: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-95-548: **Shaw v. Sutton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-551: **In re Interest of Jaso.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-552: **State v. Bordovsky.** Appeal dismissed. See Rule 7A(2).

No. A-95-556: **Axline v. Axline.** Appeal dismissed; poverty affidavit defective and therefore insufficient to perfect jurisdiction. See Rule 7A(2).

No. A-95-563: **State v. Vice.** Appeal dismissed. See Rule 7A(2).

No. A-95-572: **State v. Owen.** Appeal dismissed. See Rule 7A(2). Appeal filed out of time on the 33d day.

No. A-95-597: **Nelsen v. AMI Saint Joseph Hosp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-606: **Jennings v. Cotten.** Appeal dismissed. See Rule 7A(2).

No. A-95-608: **Tess v. Lawyers Title Ins. Corp.** Appeal dismissed. See Rule 7A(2).

No. A-95-620: **King v. City of Scottsbluff.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-95-635: **Bowman v. York Cold Storage Co.** Appeal dismissed. See Rule 7A(2).

No. A-95-636: **Bowman v. City of York.** Appeal dismissed. See Rule 7A(2).

No. A-95-662: **Cotton v. Thomas.** Appeal dismissed. See Rule 7A(2).

No. A-95-664: **Woodmen of the World Life Ins. Soc. v. Yelich.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-667: **State v. Johnston.** Appeal dismissed. See Rule 7A(2).

No. A-95-671: **State v. Carter.** Appeal dismissed. See Rule 7A(2).

No. A-95-684: **In re Interest of Litz.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-685: **In re Interest of Litz.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-95-705: **State v. Kackley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-725: **State v. Gray.** Appeal dismissed. See Rule 7A(2).

No. A-95-753: **State v. Murray.** Appeal dismissed. See Rule 7A(2).

No. A-95-765: **State v. Thorn.** Appeal dismissed. See Rule 7A(2).

No. A-95-767: **State v. Olson.** Appeal dismissed. See Rule 7A(2).

No. A-95-768: **State v. Aubert.** Appeal dismissed. See Rule 7A(2).

No. A-95-778: **Peterson v. Peterson.** No response having been filed to the court's order to show cause, case is dismissed as moot.

No. A-95-784: **Kitt v. Department of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-95-804: **State v. Barfield.** Appeal dismissed. See Rule 7A(2).

No. A-95-846: **Pratt v. Houston.** Appeal dismissed. See Rule 7A(2).

No. A-95-847: **Pratt v. Clarke.** Appeal dismissed. See Rule 7A(2).

No. A-95-848: **Pratt v. Bartee.** Appeal dismissed. See Rule 7A(2).

No. A-95-849: **Pratt v. Nebraska Parole Bd.** Appeal dismissed. See Rule 7A(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-92-154: **York Equip., Inc. v. Ashwill**, 2 Neb. App. 374 (1993). Petition of appellee for further review dismissed on July 7, 1995, for failure to file brief.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellant for further review overruled on September 14, 1994.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellee for further review overruled on September 14, 1994.

No. S-92-392: **Freeman v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review dismissed on January 25, 1995, as having been improvidently granted. See S-92-392, *Freeman v. Central States Health & Life Co.*, 2 Neb. App., List of Cases on Petition for Further Review.

No. S-92-393: **Schmidt v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review dismissed on January 25, 1995, as having been improvidently granted. See S-92-393, *Schmidt v. Central States Health & Life Co.*, 2 Neb. App., List of Cases on Petition for Further Review.

No. A-92-407: **Hennek v. Lexington State Bank**, 94 NCA No. 30. Petition of appellant for further review overruled on September 21, 1994.

No. A-92-542: **Dowd v. City of Omaha**, 2 Neb. App. 958 (1994). Petition of appellee for further review denied on August 24, 1994.

No. S-92-708: **Simon v. Wilkinson Agency**, 2 Neb. App. 877 (1994). Petition of appellants for further review sustained on August 24, 1994.

No. S-92-811: **Thiltges v. Thiltges**, 94 NCA No. 24. Petition of appellant for further review sustained on August 24, 1994.

No. A-92-857: **In re Guardianship & Conservatorship of Piller**, 94 NCA No. 17. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-858: **Gage v. Hodge**, 94 NCA No. 29. Petition of appellant for further review overruled on September 14, 1994.

No. S-92-951: **Eggers v. Rittscher**, 94 NCA No. 20. Petition of appellant for further review sustained on September 28, 1994.

No. A-92-964: **Federal Deposit Ins. Corp. v. Slangal**. Petition of appellant for further review overruled on August 24, 1994.

No. A-92-965: **S.I.D. No. 210 v. City of Omaha**, 94 NCA No. 50. Petition of appellant for further review overruled on March 15, 1995.

No. S-92-975: **Ruch v. Conrad**, 94 NCA No. 25. Petition of appellant for further review sustained on October 13, 1994.

No. A-92-990: **In re Conservatorship of Kerrey**, 94 NCA No. 35. Petition of appellant for further review overruled on October 13, 1994.

Nos. A-92-1020, A-92-1021: **Reader v. Hoffman**, 94 NCA No. 36. Petition of appellant for further review overruled on October 26, 1994.

No. A-92-1064: **Carman v. Ravenna Bank**, 94 NCA No. 26. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-1071: **In re Estate of Ziegenbein**, 2 Neb. App. 923 (1994). Petition of appellant for further review overruled on November 16, 1994.

No. A-92-1073: **American Economy Ins. Co. v. Modern Eye Wear**, 94 NCA No. 26. Petition of appellant for further review overruled on September 28, 1994.

No. A-92-1092: **Sostad v. Batie**, 94 NCA No. 34. Petition of appellant for further review overruled on November 9, 1994.

No. A-92-1117: **Reedy v. City of Omaha**, 94 NCA No. 49. Petition of appellant for further review overruled on February 23, 1995.

No. A-92-1182: **Glebe v. City of Omaha**, 94 NCA No. 32. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-031: **Toulousaine de Distrib. v. Tri-State Seed & Grain**, 2 Neb. App. 937 (1994). Petition of appellee for further review dismissed on March 22, 1995, as having been improvidently granted.

No. S-93-031: **Toulousaine de Distrib. v. Tri-State Seed & Grain**, 2 Neb. App. 937 (1994). Petition of appellee for further review sustained on September 1, 1994.

No. A-93-059: **General Siding & Roofing v. Katskee & Henatsch**, 94 NCA No. 42. Petition of appellee for further review overruled on December 21, 1994.

No. S-93-072: **Eberspacher v. Hulme**, 94 NCA No. 51. Petition of appellee for further review sustained on February 23, 1995.

No. A-93-077: **Wells v. Wells**, 3 Neb. App. 117 (1994). Petition of appellant for further review overruled on May 11, 1995.

No. A-93-078: **Wear v. American Fire & Cas. Co.**, 94 NCA No. 26. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-079: **Lara v. Employers Mut. Cas. Co.**, 94 NCA No. 40. Petition of appellant for further review overruled on January 19, 1995.

No. A-93-079: **Lara v. Employers Mut. Cas. Co.**, 94 NCA No. 40. Petition of appellee for further review overruled on January 19, 1995.

No. A-93-097: **Carpenter v. Cullan**, 95 NCA No. 6. Petition of appellee for further review overruled on April 12, 1995.

No. A-93-127: **Hafer v. Hafer**, 3 Neb. App. 129 (1994). Petition of appellee for further review overruled on December 29, 1994.

No. S-93-129: **State ex rel. Scherer v. Madison Cty. Comrs.**, 94 NCA No. 27. Petition of appellants for further review sustained on August 31, 1994.

No. A-93-132: **Georgetowne Square v. United States F. & G. Co.**, 3 Neb. App. 49 (1994). Petition of appellee for further review overruled on December 14, 1994.

No. A-93-140: **Carlson v. Two Rivers Auto, Inc.**, 94 NCA No. 49. Petition of appellee for further review overruled on January 25, 1995.

No. A-93-148: **Collection Bureau v. Burkhardt**, 94 NCA No. 41. Petition of appellant for further review overruled on February 15, 1995.

No. A-93-151: **Benak v. Benak**, 94 NCA No. 48. Petition of appellant for further review overruled on January 25, 1995.

No. A-93-197: **In re Estate of Wittmuss**, 95 NCA No. 7. Petition of appellant for further review overruled on March 29, 1995.

No. A-93-198: **In re Estate of Owen**, 94 NCA No. 33. Petition of appellant for further review overruled on November 30, 1994.

No. A-93-199: **Chalupa v. Chalupa**, 94 NCA No. 31. Petition of appellees for further review overruled on October 13, 1994.

No. A-93-200: **Mejstrik v. Mejstrik**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. A-93-217: **Halstead v. Halstead**, 94 NCA No. 34. Petition of appellant for further review overruled on November 30, 1994.

No. S-93-233: **Motor Club Ins. Assn. v. Bartunek**, 3 Neb. App. 292 (1995). Petition of appellant for further review sustained on July 6, 1995.

No. A-93-250: **Hay Springs Hous. Auth. v. LaBelle**. Petition of appellant for further review overruled on December 30, 1994.

No. A-93-253: **Tomlin v. Tomlin**, 94 NCA No. 49. Petition of appellee for further review overruled on April 26, 1995.

No. A-93-254: **Cullen v. Bryson Properties XVIII**. Petition of appellant for further review overruled on February 1, 1995.

No. A-93-282: **In re Estate of Dudek**, 94 NCA No. 30. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-336: **Smidt v. Smidt**, 95 NCA No. 12. Petition of appellant for further review overruled on June 21, 1995.

No. A-93-346: **The Travelers Ins. Co. v. Nelson**. Petition of appellant for further review overruled on February 1, 1995.

No. A-93-349: **Kroese v. Ferret Exploration of Neb.**, 94 NCA No. 31. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-353: **Roberts v. Weber & Sons, Co.** Petition of appellee for further review sustained on February 23, 1995.

No. A-93-379: **Herald v. Blue Cross Blue Shield of Neb.**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. A-93-382: **In re Interest of Robert D. et al.**, 94 NCA No. 26. Petition of appellants for further review overruled on August 24, 1994.

No. A-93-388: **State v. McMurray**. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-404: **Twiss v. Trautwein**. Petition of appellant for further review sustained on October 26, 1994.

Nos. A-93-455 through A-93-458: **State v. Daniels**. Petition of appellant for further review overruled on October 13, 1994.

No. A-93-521: **State v. McGurk**, 3 Neb. App. 778 (1995). Petition of appellant for further review overruled on July 19, 1995.

No. A-93-541: **Kaspar v. Kaspar**, 95 NCA No. 14. Petition of appellee for further review overruled on May 24, 1995.

No. A-93-573: **Northland Transp., Inc. v. McElhose**, 3 Neb. App. 650 (1995). Petition of appellant for further review overruled on June 1, 1995.

No. A-93-580: **State v. Nauslar**, 94 NCA No. 24. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-595: **Emerson v. Zagurski**, 3 Neb. App. 658 (1995). Petition of appellee for further review overruled on May 22, 1995, as being filed out of time.

Nos. A-93-600, A-93-601: **Scheibe v. Brogan**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. A-93-604: **Evans v. City of Gering**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-654: **Jacobsen v. Jacobsen**. Petition of appellant for further review overruled on May 11, 1995.

No. S-93-670: **Melcher v. Bank of Madison**, 3 Neb. App. 665 (1995). Petition of appellee for further review sustained on May 24, 1995.

No. A-93-674: **Paris v. Crawford State Bank**, 94 NCA No. 23. Petitions of appellants for further review overruled on August 24, 1994.

No. A-93-696: **Allen v. Nebraska Dept. of Corr. Servs.**, 95 NCA No. 12. Petition of appellant for further review overruled on May 24, 1995.

No. A-93-713: **State v. Rodriguez**, 94 NCA No. 23. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-717: **State v. Ziemba**, 94 NCA No. 21. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-718: **Finn v. Kramer**. Petition of appellant for further review overruled on June 21, 1995.

No. A-93-737: **Currie v. Chief School Bus Service, Inc.** Petition of appellant for further review overruled on March 22, 1995.

No. A-93-740: **In re Interest of Bringleson**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-746: **State v. Anderson**, 94 NCA No. 16. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-750: **In re Estate of Springer**, 95 NCA No. 20. Petition of appellant for further review overruled on June 14, 1995.

No. S-93-755: **State v. Sorenson**, 2 Neb. App. 998 (1994). Petition of appellant for further review sustained on October 13, 1994.

No. A-93-774: **State v. Rosales**, 3 Neb. App. 26 (1994). Petition of appellant for further review overruled on October 26, 1994.

No. A-93-789: **Tunender v. Niobrara Valley Elec. Membership Corp.**, 95 NCA No. 24. Petition of appellant for further review overruled on July 19, 1995.

No. A-93-805: **Steiner v. Steiner**. Petition of appellant for further review overruled on June 14, 1995.

No. S-93-817: **Kubat v. Kubat**. Petition of appellant for further review sustained on June 14, 1995.

No. A-93-818: **Ballentyne v. Blair**, 95 NCA No. 20. Petition of appellant for further review overruled on July 6, 1995.

No. A-93-831: **Sheldon v. Sheldon**. Petition of appellant for further review overruled on April 26, 1995.

No. A-93-840: **State v. Eadie**. Petition of appellant for further review overruled on September 28, 1994.

No. A-93-853: **State v. Vann**, 2 Neb. App. 946 (1994). Petition of appellant for further review overruled on August 24, 1994.

No. A-93-862: **State v. Rayes**, 94 NCA No. 24. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-869: **In re Interest of Michaelia N. et al.**, 94 NCA No. 43. Petition of appellant for further review overruled on January 5, 1995.

No. A-93-877: **Wildcat Enter. v. Fifer**, 95 NCA No. 21. Petition of appellant for further review overruled on July 6, 1995.

No. A-93-885: **State v. Bartlett**, 3 Neb. App. 218 (1994). Petition of appellee for further review overruled on January 25, 1995.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellant for further review sustained on November 9, 1994.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellee Hull for further review sustained on November 9, 1994.

No. A-93-911: **State v. Bundy**, 94 NCA No. 43. Petition of appellant for further review overruled on December 21, 1994.

No. A-93-916: **In re Interest of Mark B.**, 94 NCA No. 22. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-945: **State ex rel. Albers v. Stute**, 95 NCA No. 25. Petition of appellant for further review overruled on August 22, 1995.

No. A-93-952: **State v. Jameson**, 94 NCA No. 45. Petitions of appellant for further review overruled on January 19, 1995.

No. A-93-974: **In re Interest of Crystal W.H.**, 94 NCA No. 38. Petition of appellee guardian ad litem for further review overruled on November 16, 1994.

No. A-93-975: **State v. Scott**, 94 NCA No. 29. Petition of appellee for further review overruled on September 14, 1994.

No. A-93-985: **In re Interest of Amanda M.**, 94 NCA No. 25. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1001: **State v. Joseph**, 94 NCA No. 40. Petition of appellant for further review overruled on January 19, 1995.

No. A-93-1013: **State v. Estrada**, 94 NCA No. 27. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1033: **State v. Hendrix**, 94 NCA No. 39. Petition of appellant for further review overruled on November 30, 1994.

No. S-93-1044: **State v. Cox**, 3 Neb. App. 80 (1994). Petition of appellant for further review sustained on November 30, 1994.

No. A-93-1053: **State v. Aldana**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. A-93-1075: **Fass v. Fass**, 94 NCA No. 42. Petition of appellant for further review overruled on December 2, 1994, as incomplete.

No. A-93-1078: **State v. Cates**, 94 NCA No. 39. Petition of appellant for further review overruled on November 30, 1994.

Nos. S-93-1086, S-93-1087: **LeGrand v. State**, 3 Neb. App. 300 (1995). Petition of appellant for further review sustained on April 19, 1995.

No. S-93-1096: **State v. Lee**. Petition of appellant for further review sustained on September 21, 1994.

No. A-93-1097: **State v. Eberly**, 94 NCA No. 38. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-1099: **In re Interest of Tiffany M.**, 94 NCA No. 29. Petition of appellee for further review overruled on September 28, 1994.

No. S-93-1101: **State v. Dake**, 94 NCA No. 35. Petition of appellant for further review sustained on October 26, 1994.

No. A-93-1109: **Spiegel v. St. Paul Fire & Marine Ins. Co.**, 94 NCA No. 35. Petition of appellee Second Injury Fund for further review overruled on October 26, 1994.

No. A-93-1121: **State v. Kavan**, 95 NCA No. 7. Petition of appellant for further review overruled on March 29, 1995.

No. A-93-1128: **State v. Goering**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1129: **State v. Bowen**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1130: **State v. Strimple-Padios**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1133: **State v. Volquartsen**, 94 NCA No. 42. Petition of appellant for further review overruled on December 29, 1994.

No. A-93-1136: **State v. Larsen**, 94 NCA No. 41. Petition of appellant for further review overruled on December 14, 1994.

No. A-94-009: **State v. Davenport**, 94 NCA No. 45. Petitions of appellant for further review overruled on January 25, 1995.

No. A-94-012: **State v. Adams**, 94 NCA No. 29. Petition of appellant for further review overruled on September 21, 1994.

No. A-94-034: **State v. Krusemark**, 94 NCA No. 40. Petition of appellant for further review overruled on June 28, 1995.

No. A-94-036: **Haney v. Aaron Ferer & Sons**, 3 Neb. App. 14 (1994). Petition of appellant for further review overruled on October 26, 1994.

No. A-94-062: **Huck v. State**, 94 NCA No. 44. Petition of appellant for further review overruled on January 5, 1995.

No. A-94-089: **State v. Winter**, 95 NCA No. 8. Petition of appellee for further review overruled on April 12, 1995.

No. A-94-096: **State v. Webb**, 94 NCA No. 41. Petition of appellant for further review overruled on March 15, 1995.

No. S-94-101: **In re Adoption of Kassandra B. & Nicholas B.**, 3 Neb. App. 180 (1994). Petition of appellant for further review sustained on January 25, 1995.

No. S-94-101: **In re Adoption of Kassandra B. & Nicholas B.**, 3 Neb. App. 180 (1994). Petition of appellee Anita B. for further review sustained on January 25, 1995.

No. S-94-109: **State v. Cody**, 95 NCA No. 16. Petition of appellee for further review sustained on May 11, 1995.

No. A-94-111: **Winker v. Community Memorial Hosp.**, 94 NCA No. 49. Petition of appellant for further review overruled on January 5, 1995.

No. S-94-117: **Koterzina v. Copple Chevrolet**, 3 Neb. App. 695 (1995). Petition of appellee Koterzina for further review sustained on June 14, 1995.

No. A-94-119: **State v. Reineke**. Petition of appellant for further review overruled on November 9, 1994.

Nos. A-94-121, A-94-129, A-94-130: **State v. Meis**. Petition of appellant for further review overruled on August 31, 1994.

No. A-94-165: **Beaman v. Cook Family Foods**. Petition of appellant for further review overruled on June 21, 1995.

No. S-94-173: **Hemmerling v. Happy Cab Co.**, 94 NCA No. 44. Petition of appellant for further review sustained on December 21, 1994.

No. A-94-174: **Lousignont v. Driver Management, Inc.**, 94 NCA No. 45. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-180: **State v. Frieze**, 3 Neb. App. 263 (1994). Petition of appellant for further review overruled on March 1, 1995.

No. S-94-183: **Larson v. Hometown Communications, Inc.**, 3 Neb. App. 367 (1995). Petition of appellee for further review sustained on May 24, 1995.

No. A-94-184: **State v. Jones**. Petition of appellant for further review overruled on March 1, 1995.

No. A-94-196: **Russell v. Department of Corr. Servs.** Petition of appellee for further review overruled on April 12, 1995.

No. A-94-203: **State v. Cash**, 3 Neb. App. 319 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-204: **State v. Davis**. Petition of appellant for further review overruled on November 30, 1994.

No. S-94-206: **State v. Yelli**, 3 Neb. App. 148 (1994). Petition of appellee for further review sustained on December 21, 1994.

No. A-94-208: **State v. Chronister**, 3 Neb. App. 281 (1995). Petition of appellant for further review overruled on March 1, 1995.

No. A-94-210: **State v. Reiter**, 3 Neb. App. 153 (1994). Petition of appellant for further review overruled on December 29, 1994.

No. S-94-228: **State v. Groff**, 94 NCA No. 35. Petition of appellee for further review sustained on November 23, 1994.

No. A-94-237: **Garrett v. Garrett**, 3 Neb. App. 384 (1995). Petition of appellant for further review overruled on May 24, 1995.

No. A-94-238: **In re Interest of Elvis J.**, 94 NCA No. 51. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-245: **In re Interest of Potter**. Petition of appellant for further review overruled on December 29, 1994.

No. S-94-255: **State v. Cisneros**, 95 NCA No. 6. Petition of appellant for further review sustained on March 22, 1995.

No. A-94-259: **State v. Henderson**, 94 NCA No. 38. Petition of appellant for further review overruled on October 26, 1994.

No. A-94-269: **Workman v. Nebraska Dept. of Banking & Finance**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. S-94-290: **State v. Linn**, 3 Neb. App. 332 (1995). Petition of appellant for further review sustained on March 22, 1995.

No. A-94-291: **State v. Burnett**, 95 NCA No. 7. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-294: **State v. Eisenberg**. Petition of appellant for further review overruled on October 13, 1994.

No. A-94-305: **State v. Rodgers**, 94 NCA No. 49. Petition of appellant for further review overruled on January 20, 1995.

No. A-94-317: **Nwachukwu v. Nwachukwu**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. S-94-336: **State v. Matthies**. Petition of appellant for further review sustained on September 14, 1994.

No. A-94-340: **Doolittle v. Doolittle**, 3 Neb. App. 230 (1994). Petition of appellant for further review overruled on March 15, 1995.

No. S-94-344: **State v. Jiminez**, 3 Neb. App. 421 (1995). Petition of appellant for further review sustained on March 22, 1995.

No. S-94-344: **State v. Jiminez**, 3 Neb. App. 421 (1995). Petition of appellee for further review sustained on March 22, 1995.

No. A-94-350: **In re Interest of Travis I. et al.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. A-94-351: **In re Interest of Travis I. et al.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 22, 1995.

No. S-94-364: **State v. Nelson**. Petition of appellant for further review overruled on October 11, 1994.

No. A-94-366: **State v. Crabtree**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-367: **State v. Harwick**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-368: **State v. Hinkley**, 3 Neb. App. 363 (1995). Petition of appellant for further review overruled on March 15, 1995.

No. A-94-375: **Kilmer v. Kilmer**, 95 NCA No. 13. Petition of appellant for further review overruled on June 21, 1995.

No. S-94-398: **State v. Pierce**, 3 Neb. App. 440 (1995). Petition of appellee for further review sustained on March 15, 1995.

No. A-94-406: **Marus v. Universal Terrazzo & Tile Co.**, 95 NCA No. 4. Petition of appellant for further review overruled on March 15, 1995.

No. A-94-424: **State v. Jacob**, 95 NCA No. 15. Petition of appellant for further review overruled on June 14, 1995.

Nos. A-94-444, A-94-445, A-94-498: **Waite v. Carpenter**, 3 Neb. App. 879 (1995). Petition of appellant for further review overruled on August 22, 1995.

No. A-94-448: **State v. Sharp**, 95 NCA No. 12. Petition of appellant for further review overruled on June 14, 1995.

No. A-94-455: **State v. Poitra**, 95 NCA No. 12. Petition of appellant for further review overruled on May 17, 1995.

No. A-94-457: **State v. Perry**. Petition of appellant for further review overruled on December 14, 1994.

No. A-94-464: **Sullivan v. Process Systems Inc.**, 94 NCA No. 49. Petition of appellant for further review overruled on February 1, 1995.

No. A-94-470: **State v. Carrera**. Petition of appellant for further review overruled on October 25, 1994.

No. A-94-471: **Norine v. Norine**. Petition of appellant for further review overruled on August 22, 1995.

No. S-94-495: **State v. Young**, 3 Neb. App. 539 (1995). Petition of appellant for further review sustained on May 11, 1995.

No. A-94-504: **State v. Martin**, 3 Neb. App. 555 (1995). Petition of appellant for further review overruled on May 11, 1995.

No. A-94-519: **State v. Hanus**, 95 NCA No. 11. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-520: **State v. Gould**. Petition of appellant for further review overruled on December 29, 1994.

No. A-94-541: **State v. Bennett**. Petition of appellant for further review overruled on April 10, 1995.

No. S-94-551: **State v. Veiman**, 95 NCA No. 7. Petition of appellant for further review sustained on April 26, 1995.

No. A-94-562: **State v. Dillon**. Petition of appellant for further review overruled on November 16, 1994.

No. A-94-567: **State v. Smith**, 3 Neb. App. 564 (1995). Petition of appellant for further review overruled on May 17, 1995.

No. A-94-567: **State v. Smith**, 3 Neb. App. 564 (1995). Petition of appellee for further review overruled on May 17, 1995.

No. A-94-569: **United Nebraska Bank v. Burnett**. Petition of appellant for further review overruled on August 24, 1994.

No. A-94-571: **In re Interest of April P.**, 95 NCA No. 10. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-577: **State v. Harrison**, 95 NCA No. 10. Petition of appellee for further review overruled on April 26, 1995.

No. A-94-602: **Kraus v. Jones Automotive, Inc.**, 3 Neb. App. 577 (1995). Petition of appellant for further review overruled on May 11, 1995.

No. A-94-612: **State v. Mann**, 95 NCA No. 12. Petition of appellant for further review overruled on May 11, 1995.

No. A-94-614: **State v. Davis**, 95 NCA No. 25. Petition of appellant for further review overruled on July 19, 1995.

No. A-94-622: **Brown v. Butler Holdings**. Petition of appellant for further review overruled on November 9, 1994.

No. A-94-631: **State v. Mosley**, 95 NCA No. 13. Petition of appellant for further review overruled on May 17, 1995.

No. S-94-642: **In re Interest of Daniel W.**, 3 Neb. App. 630 (1995). Petition of appellant for further review sustained on June 1, 1995.

No. A-94-648: **State v. Mueller**. Petition of appellant for further review overruled on January 25, 1995.

No. S-94-663: **State v. Neujahr**, 95 NCA No. 20. Petition of appellee for further review sustained on June 21, 1995.

No. S-94-666: **Becker v. Nebraska Accountability & Disclosure Comm.** Petition of appellant for further review sustained on August 22, 1995, as to the demurrer of the Regents and Wood, but not as to the Commission.

No. A-94-670: **Schrad v. Schrad**. Petition of appellant for further review overruled on June 28, 1995.

No. A-94-674: **State v. Markus**, 95 NCA No. 14. Petition of appellant for further review overruled on June 14, 1995.

No. S-94-693: **Adrian v. Adrian**, 95 NCA No. 6. Petition of appellant for further review sustained on June 14, 1995.

No. A-94-700: **In re Interest of McCauley H.**, 3 Neb. App. 474 (1995). Petition of appellant for further review overruled on April 12, 1995.

No. A-94-708: **Dyer v. Hastings Indus.**, 3 Neb. App. 531 (1995). Petition of appellees for further review overruled on April 26, 1995.

No. A-94-710: **Jones v. Child Saving Institute**, 95 NCA No. 14. Petition of appellant for further review overruled on July 19, 1995.

No. A-94-711: **State v. Martinez**, 95 NCA No. 15. Petition of appellant for further review overruled on May 22, 1995, as being filed out of time.

No. A-94-715: **Quinn v. Archbishop Bergan Mercy Hosp.**, 95 NCA No. 9. Petition of appellant for further review overruled on April 26, 1995.

No. A-94-724: **State v. Green**, 95 NCA No. 23. Petition of appellee for further review overruled on August 22, 1995.

Nos. A-94-726 through A-94-729: **In re Interest of Jessica S. et al.**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-735: **State v. Krogman**, 95 NCA No. 13. Petition of appellant for further review overruled on May 17, 1995.

No. A-94-750: **Krusemark v. Milton Waldbaum Co.**, 95 NCA No. 9. Petition of appellant for further review overruled on April 19, 1995.

No. A-94-765: **Waite v. Regional West Medical Ctr.** Petition of appellant for further review overruled on November 30, 1994.

No. A-94-766: **Waite v. Carpenter.** Petition of appellant for further review overruled on November 30, 1994.

No. A-94-769: **Kohl v. Hawkins Constr. Co.**, 95 NCA No. 5. Stipulation to dismiss appellee's petition for further review allowed on March 24, 1995.

No. A-94-783: **Eichorn v. Eichorn Trucking**, 3 Neb. App. 795 (1995). Petition of appellant for further review overruled on July 19, 1995.

No. A-94-788: **State v. DeLeon.** Petition of appellant for further review overruled on May 11, 1995.

No. S-94-794: **State v. Nelson**, 95 NCA No. 17. Petition of appellant for further review sustained on June 21, 1995.

No. A-94-801: **State v. Miller**, 95 NCA No. 18. Petition of appellant for further review overruled on June 21, 1995.

No. S-94-813: **Stansbury v. HEP, Inc.**, 3 Neb. App. 712 (1995). Petition of appellee for further review sustained on June 1, 1995.

No. A-94-814: **EMC Mortgage Corp. v. Southern California Inst., Inc.** Petition of appellants for further review overruled on May 11, 1995.

No. A-94-828: **State v. Morris**, 3 Neb. App. 835 (1995). Petition of appellant for further review overruled on August 22, 1995.

No. A-94-847: **State v. Kao**, 3 Neb. App. 727 (1995). Petition of appellee for further review overruled on June 21, 1995.

No. S-94-848: **State v. Reeder**, 95 NCA No. 22. Petition of appellant for further review sustained on August 22, 1995.

No. A-94-881: **Edwards v. Aero Mayflower Agency**, 95 NCA No. 19. Petition of appellant for further review overruled on July 19, 1995.

No. A-94-896: **State v. Starks**, 3 Neb. App. 854 (1995). Petition of appellant for further review overruled on August 22, 1995.

No. A-94-900: **State v. Lara.** Petition of appellant for further review overruled on March 17, 1995.

Nos. A-94-907, A-94-1033: **In re Interest of Brosius.** Petition of appellant for further review overruled on May 17, 1995.

No. A-94-921: **State v. Tweedy**, 95 NCA No. 13. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-923: **State v. Barraza-Dominquez**, 95 NCA No. 26. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-951: **State v. Tippit**. Petition of appellant for further review overruled on July 19, 1995.

No. S-94-964: **State v. Kunath**, 95 NCA No. 19. Petition of appellee for further review sustained on June 21, 1995.

No. A-94-976: **Peck v. Northwest Airlines**, 95 NCA No. 25. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1006: **State v. Boehme**, 95 NCA No. 17. Petition of appellant for further review overruled on June 14, 1995.

No. A-94-1007: **State v. Young**. Petition of appellant for further review overruled on August 22, 1995.

No. S-94-1034: **Johnson v. Holdrege Med. Clinic**, 3 Neb. App. 894 (1995). Petition of appellant for further review sustained on August 22, 1995.

No. A-94-1072: **State v. Bennett**. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1099: **State v. Snodgrass**. Petition of appellant for further review overruled on May 24, 1995.

No. S-94-1100: **State v. Sundling**, 3 Neb. App. 722 (1995). Petition of appellant for further review sustained on June 14, 1995.

No. A-94-1124: **State v. Hicks**. Petition of appellant for further review overruled on August 22, 1995.

No. A-94-1144: **State v. Billups**. Petition of appellant for further review overruled on June 21, 1995.

No. A-94-1185: **State v. Davis**. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-1186: **State v. Davis**. Petition of appellant for further review overruled on June 1, 1995.

No. A-94-1205: **State v. Jones**, 95 NCA No. 27. Petition of appellee for further review overruled on August 22, 1995.

No. A-95-043: **McMurray v. Department of Soc. Servs.** Petition of appellant for further review overruled on March 3, 1995.

No. A-95-050: **Wagner v. Wagner**. Petition of appellant for further review overruled on June 1, 1995.

Nos. S-95-077, S-95-082, S-95-083: **In re Interest of Troxel**. Petition of appellant for further review sustained on August 22, 1995.

No. S-95-208: **State v. Schlund**. Petition of appellant for further review sustained on June 28, 1995.

No. A-95-370: **Bassinger v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled on June 1, 1995.

No. A-95-671: **State v. Carter**. Petition of appellant for further review overruled on August 22, 1995.

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-92-687: **Shuck v. Jacob.** 95 NCA No. 33. Affirmed. Sievers, Chief Judge.

No. A-92-743: **Bonney v. Bonney.** 95 NCA No. 24. Affirmed. Miller-Lerman, Judge.

No. A-92-925: **Mercy Midlands Employee Benefits Plan v. Junge.** 94 NCA No. 46. Affirmed as modified. Hannon, Judge.

No. A-92-965: **S.I.D. No. 210 v. City of Omaha.** 94 NCA No. 50. Affirmed. Irwin, Judge.

No. A-92-978: **Kearney State Bank & Trust v. Wiseman.** 94 NCA No. 39. Reversed and remanded. Miller-Lerman, Judge.

No. A-92-990: **In re Conservatorship of Kerrey.** 94 NCA No. 35. Affirmed. Irwin, Judge.

Nos. A-92-1020, A-92-1021: **Reader v. Hoffman.** 94 NCA No. 36. Affirmed. Sievers, Chief Judge.

No. A-92-1074: **LeVasseur v. LeVasseur.** 95 NCA No. 5. Affirmed. Irwin, Judge.

No. A-92-1092: **Sostad v. Batie.** 94 NCA No. 34. Affirmed. Hannon, Judge.

No. A-92-1117: **Reedy v. City of Omaha.** 94 NCA No. 49. Affirmed. Miller-Lerman, Judge.

No. A-92-1124: **Senkbeil v. Anderson.** 94 NCA No. 32. Affirmed. Mues, Judge.

No. A-92-1155: **Hetrick v. AT&T.** 94 NCA No. 34. Affirmed. Miller-Lerman, Judge.

No. A-92-1173: **Slosson v. Collins.** 94 NCA No. 39. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge.

No. A-92-1182: **Glebe v. City of Omaha.** 94 NCA No. 32. Affirmed. Mues, Judge.

No. A-93-001: **Skaff v. Farm Bureau Ins. Co.** 94 NCA No. 41. Affirmed. Mues, Judge.

Nos. A-93-015, A-93-016: **State v. Rodriguez.** 95 NCA No. 7. Affirmed. Hannon, Judge.

No. A-93-047: **Young v. Nebraska Dept. of Corr. Servs.** 94 NCA No. 39. Affirmed. Connolly, Judge.

No. A-93-051: **In re Estate of Sweet.** 95 NCA No. 3. Affirmed in part, and in part reversed. Miller-Lerman, Judge.

No. A-93-059: **General Siding & Roofing v. Katskee & Henatsch.** 94 NCA No. 42. Reversed and remanded with directions. Sievers, Chief Judge.

No. A-93-068: **Ramaekers, McPherron & Skiles v. Ramaekers.** 94 NCA No. 35. Affirmed as modified. Hannon, Judge.

No. A-93-072: **Eberspacher v. Hulme.** 94 NCA No. 51. Reversed and remanded with directions. Mues, Judge.

No. A-93-073: **Rahrs v. Nebraska Pub. Power Dist.** 95 NCA No. 10. Affirmed. Mues, Judges.

No. A-93-079: **Lara v. Employers Mut. Cas. Co.** 94 NCA No. 40. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-93-083: **Ptacek v. Ptacek.** 95 NCA No. 7. Affirmed. Howard, District Judge, Retired.

No. A-93-097: **Carpenter v. Cullan.** 95 NCA No. 6. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Judge.

No. A-93-101: **City of LaVista v. Long.** 94 NCA No. 38. Affirmed. Sievers, Chief Judge.

No. A-93-102: **State v. Jones.** 94 NCA No. 36. Affirmed. Irwin, Judge.

No. A-93-115: **Overton v. Meisinger.** 95 NCA No. 3. Affirmed. Howard, District Judge, Retired.

No. A-93-139: **GWD, Ltd. v. Bakken.** 94 NCA No. 40. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-93-140: **Carlson v. Two Rivers Auto, Inc.** 94 NCA No. 49. Reversed and remanded with directions. Miller-Lerman, Judge.

No. A-93-146: **Griffith v. Griffith.** 94 NCA No. 42. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-93-148: **Collection Bureau v. Burkhardt.** 94 NCA No. 41. Affirmed. Miller-Lerman, Judge.

No. A-93-151: **Benak v. Benak.** 94 NCA No. 48. Affirmed. Connolly, Judge.

No. A-93-197: **In re Estate of Wittmuss.** 95 NCA No. 7. Affirmed. Howard, District Judge, Retired.

No. A-93-198: **In re Estate of Owen.** 94 NCA No. 33. Affirmed. Connolly, Judge.

No. A-93-200: **Mejstrik v. Mejstrik.** 95 NCA No. 4. Reversed and remanded with directions. Howard, District Judge, Retired.

No. A-93-201: **Young v. Young.** 95 NCA No. 4. Affirmed as modified. Irwin, Judge.

No. A-93-207: **Hurlbert v. North Loup River Pub. Power & Irr. Dist.** 94 NCA No. 39. Reversed and remanded for further proceedings. Mues, Judge.

No. A-93-217: **Halstead v. Halstead.** 94 NCA No. 34. Affirmed. Hannon, Judge.

No. A-93-230: **Kraski v. Phillips.** 94 NCA No. 34. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-93-246: **In re Estate of Roth.** 95 NCA No. 6. Affirmed. Sievers, Chief Judge.

No. A-93-247: **Foote v. Gamet.** 95 NCA No. 5. Affirmed. Miller-Lerman, Judge.

No. A-93-253: **Tomlin v. Tomlin.** 94 NCA No. 49. Affirmed in part, reversed and dismissed in part, and remanded with directions. Miller-Lerman, Judge.

No. A-93-302: **In re Application of Qualified Developments, Inc.** 95 NCA No. 11. Affirmed. Irwin, Judge.

No. A-93-303: **Stonestreet v. Stonestreet.** 95 NCA No. 3. Reversed and remanded with direction. Hannon, Judge.

No. A-93-321: **Baker v. Dahlheim.** 95 NCA No. 6. Affirmed. Norton, District Judge, Retired.

No. A-93-328: **Denby v. Clarke.** 95 NCA No. 6. Appeal dismissed. Miller-Lerman, Judge.

No. A-93-336: **Smidt v. Smidt.** 95 NCA No. 12. Affirmed. Moran, District Judge, Retired.

No. A-93-379: **Herald v. Blue Cross Blue Shield of Neb.** 94 NCA No. 33. Reversed and remanded for a new trial. Connolly, Judge.

No. A-93-391: **Summers v. Billups.** 95 NCA No. 12. Affirmed. Sievers, Chief Judge.

No. A-93-403: **Mitchell v. Mizerski.** 95 NCA No. 12. Affirmed. Mues, Judge.

No. A-93-426: **Prochaska v. Department of Motor Vehicles.** 95 NCA No. 9. Reversed and remanded with directions. Mues, Judge.

No. A-93-452: **Chappell v. Littrell.** 95 NCA No. 17. Affirmed. Howard, District Judge, Retired.

No. A-93-475: **Chittick v. Chittick.** 95 NCA No. 7. Affirmed as modified. Miller-Lerman, Judge.

No. A-93-483: **Siedhoff v. Siedhoff.** 95 NCA No. 18. Reversed and remanded with directions. Irwin, Judge.

No. A-93-498: **Fass v. Fass.** 94 NCA No. 42. Affirmed in part, and in part reversed and remanded. Miller-Lerman, Judge.

No. A-93-513: **Hanus v. Sears Roebuck & Co.** 95 NCA No. 26. Affirmed. Sievers, Chief Judge.

No. A-93-541: **Kaspar v. Kaspar.** 95 NCA No. 14. Reversed and remanded for further proceedings. Miller-Lerman, Judge.

No. A-93-570: **Williams v. Grossman.** 95 NCA No. 16. Affirmed in part, and in part reversed and remanded with directions. Sievers, Chief Judge.

Nos. A-93-600, A-93-601: **Scheibe v. Brogan.** 95 NCA No. 26. Affirmed. Hannon, Judge.

No. A-93-618: **Durman v. Holland.** 95 NCA No. 8. Affirmed as modified. Hannon, Judge.

No. A-93-633: **Howard v. Curry.** 95 NCA No. 16. Reversed. Miller-Lerman, Judge.

No. A-93-653: **Hoschler v. YWCA.** 95 NCA No. 15. Affirmed. Mues, Judge.

No. A-93-658: **KCK Parks Estate v. Rroadlands, Inc.** 95 NCA No. 15. Affirmed. Miller-Lerman, Judge.

No. A-93-692: **State v. Johnson.** 95 NCA No. 20. Affirmed. Sievers, Chief Judge.

No. A-93-696: **Allen v. Nebraska Dept. of Corr. Servs.** 95 NCA No. 12. Affirmed. Miller-Lerman, Judge.

No. A-93-699: **Perez v. Perez.** 95 NCA No. 21. Affirmed in part as modified, and in part reversed and remanded with directions. Mues, Judge.

No. A-93-719: **Abboud v. Papio-Missouri Riv. Nat. Res. Dist.** 95 NCA No. 34. Affirmed. Irwin, Judge.

No. A-93-743: **Nelson v. Nelson.** 95 NCA No. 18. Appeal dismissed. Hannon, Judge.

No. A-93-749: **Oberg v. Nebraska Dept. of Motor Vehicles.** 95 NCA No. 26. Affirmed. Miller-Lerman, Judge.

No. A-93-750: **In re Estate of Springer.** 95 NCA No. 20. Affirmed. Miller-Lerman, Judge.

No. A-93-751: **Red Willow Cty. Sch. Dist. No. 109 v. Quigley.** 95 NCA No. 19. Reversed and remanded with directions to dismiss. Irwin, Judge.

Nos. A-93-768, A-93-769: **Urban v. Kircher.** 95 NCA No. 34. Reversed and remanded with directions. Irwin, Judge.

No. A-93-789: **Tunender v. Niobrara Valley Elec. Membership Corp.** 95 NCA No. 24. Affirmed. Miller-Lerman, Judge.

No. A-93-800: **Van Wey v. City of Grand Island.** 95 NCA No. 24. Affirmed. Irwin, Judge.

No. A-93-802: **Kralicek v. Department of Motor Vehicles.** 95 NCA No. 21. Affirmed. Sievers, Chief Judge.

No. A-93-803: **Robertson v. American Nat. Bank.** 95 NCA No. 15. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-93-804: **Kelly v. Kelly.** 95 NCA No. 28. Affirmed. Inbody, Judge.

No. A-93-818: **Ballentyne v. Blair.** 95 NCA No. 20. Affirmed. Warren, District Judge, Retired.

No. A-93-835: **Matheny v. Matheny.** 95 NCA No. 23. Affirmed as modified. Miller-Lerman, Judge.

No. A-93-847: **In re Interest of Anna P. and Samuel P.** 94 NCA No. 32. Affirmed. Mues, Judge.

No. A-93-857: **General Fin. Servs. v. Santee Sioux Dev. Corp.** 95 NCA No. 25. Affirmed. Sievers, Chief Judge.

No. A-93-869: **In re Interest of Michaelia N. et al.** 94 NCA No. 43. Affirmed. Miller-Lerman, Judge.

No. A-93-877: **Wildcat Enter. v. Fifer.** 95 NCA No. 21. Affirmed as modified. Mues, Judge.

No. A-93-879: **Thomas v. Kearney Little League Baseball Assn.** 95 NCA No. 25. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Judge.

No. A-93-883: **State v. Hartman.** 94 NCA No. 34. Affirmed. Mues, Judge.

No. A-93-887: **Hull v. Aetna Ins. Co.** 94 NCA No. 32. Appeal dismissed. Miller-Lerman, Judge.

No. A-93-909: **Hoyt v. Hoyt.** 95 NCA No. 25. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-93-910: **Grindstaff v. Grindstaff.** 95 NCA No. 24. Affirmed as modified. Irwin, Judge.

No. A-93-911: **State v. Bundy.** 94 NCA No. 43. Affirmed. Mues, Judge.

No. A-93-919: **Peterson v. Peterson.** 95 NCA No. 30. Appeal dismissed. Inbody, Judge.

No. A-93-945: **State ex rel. Albers v. Stute.** 95 NCA No. 25. Affirmed. Hannon, Judge.

No. A-93-946: **Woitalewicz v. Post.** 95 NCA No. 26. Affirmed. Hannon, Judge.

No. A-93-951: **Masek v. Masek.** 95 NCA No. 31. Affirmed. Mues, Judge.

No. A-93-952: **State v. Jameson.** 94 NCA No. 45. Affirmed. Miller-Lerman, Judge.

No. A-93-972: **McDaniel v. McDaniel.** 94 NCA No. 42. Affirmed in part, affirmed in part as modified, and in part reversed and remanded with directions. Connolly, Judge.

No. A-93-974: **In re Interest of Crystal W.H.** 94 NCA No. 38. Reversed and remanded for further proceedings. Connolly, Judge.

No. A-93-976: **Rivera v. Rivera.** 94 NCA No. 32. Affirmed. Per Curiam.

No. A-93-982: **State v. Statler.** 94 NCA No. 43. Affirmed. Irwin, Judge.

No. A-93-990: **Davison v. Colburn.** 94 NCA No. 46. Affirmed in part, and in part reversed and remanded with directions. Sievers, Chief Judge.

No. A-93-991: **S & B Corp. v. Sostad, Batie & Assocs.** 95 NCA No. 24. Affirmed. Mues, Judge.

No. A-93-993: **Farmers Co-op Exch. of Elgin v. Demerath Land Co.** 95 NCA No. 26. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-93-1001: **State v. Joseph.** 94 NCA No. 40. Affirmed. Connolly, Judge.

No. A-93-1006: **Robinson v. Douglas Cty. Sch. Dist. No. 059.** 95 NCA No. 31. Affirmed. Miller-Lerman, Judge.

No. A-93-1007: **Gibilisco v. Arkoosh.** 94 NCA No. 48. Affirmed. Mues, Judge.

No. A-93-1008: **Harnett v. State.** 95 NCA No. 22. Affirmed. Hannon, Judge.

No. A-93-1025: **Currie v. Dicus.** 95 NCA No. 31. Affirmed. Irwin, Judge.

No. A-93-1031: **Jerred v. Jerred.** 95 NCA No. 8. Affirmed. Miller-Lerman, Judge.

No. A-93-1033: **State v. Hendrix.** 94 NCA No. 39. Affirmed. Connolly, Judge.

No. A-93-1037: **Ebke v. Ebke.** 95 NCA No. 33. Affirmed as modified. Hannon, Judge.

Nos. A-93-1040, A-94-1041: **State v. Clason.** 94 NCA No. 46. Exception sustained. Hannon, Judge.

No. A-93-1046: **Kouma v. Bee Co-op Elevator Co.** 95 NCA No. 24. Affirmed. Miller-Lerman, Judge.

No. A-93-1049: **State v. Mason.** 94 NCA No. 42. Affirmed. Mues, Judge.

No. A-93-1052: **Olsen v. Western Valley Packing Co.** 95 NCA No. 23. Affirmed. Inbody, Judge.

No. A-93-1053: **State v. Aldana.** 94 NCA No. 33. Affirmed. Irwin, Judge.

No. A-93-1057: **State v. Lobendo.** 94 NCA No. 40. Affirmed. Irwin, Judge.

No. A-93-1068: **King v. King.** 95 NCA No. 25. Affirmed as modified. Mues, Judge.

No. A-93-1075: **Fass v. Fass.** 94 NCA No. 42. Appeal dismissed. Miller-Lerman, Judge.

No. A-93-1077: **Dougherty v. Dougherty.** 95 NCA No. 29. Affirmed. Miller-Lerman, Judge.

No. A-93-1078: **State v. Cates.** 94 NCA No. 39. Affirmed. Sievers, Chief Judge.

No. A-93-1080: **In re Interest of Trenton B. & Thomas H.** 94 NCA No. 40. Affirmed. Miller-Lerman, Judge.

No. A-93-1083: **Martinez v. Martinez.** 94 NCA No. 33. Affirmed as modified. Hannon, Judge.

No. A-93-1097: **State v. Eberly.** 94 NCA No. 38. Affirmed. Hannon, Judge.

No. A-93-1101: **State v. Dake.** 94 NCA No. 35. Affirmed. Mues, Judge.

No. A-93-1109: **Spiegel v. St. Paul Fire & Marine Ins. Co.** 94 NCA No. 35. Affirmed in part, and in part reversed. Connolly, Judge.

No. A-93-1121: **State v. Kavan.** 95 NCA No. 7. Affirmed. Irwin, Judge.

No. A-93-1122: **Valdez v. Packerland Packing Co.** 94 NCA No. 32. Affirmed. Hannon, Judge.

Nos. A-93-1128, A-93-1129, A-93-1130, A-93-1133: **State v. Goering.** 94 NCA No. 42. Affirmed. Miller-Lerman, Judge.

No. A-93-1131: **Jensen v. Innersalon Supply & Design.** 94 NCA No. 33. Affirmed. Irwin, Judge.

No. A-93-1136: **State v. Larsen.** 94 NCA No. 41. Affirmed. Hannon, Judge.

No. A-94-003: **Saathoff v. MRR's, Inc.** 95 NCA No. 34. Affirmed in part, and in part reversed and remanded with directions. Mues, Judge.

No. A-94-009: **State v. Davenport.** 94 NCA No. 45. Affirmed. Sievers, Chief Judge.

No. A-94-013: **State v. Grant.** 94 NCA No. 33. Affirmed in part, and in part vacated and remanded with direction. Miller-Lerman, Judge.

No. A-94-017: **Dorshorst v. Dorshorst.** 94 NCA No. 42. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-94-028: **Lukert v. Midwest Covenant Home.** 94 NCA No. 41. Affirmed. Irwin, Judge.

No. A-94-033: **Price v. Price.** 94 NCA No. 50. Affirmed. Irwin, Judge.

No. A-94-034: **State v. Krusemark.** 94 NCA No. 40. Affirmed. Miller-Lerman, Judge.

No. A-94-038: **Downs v. Downs.** 95 NCA No. 31. Dismissed. Miller-Lerman, Judge.

No. A-94-042: **Schafer v. Schafer.** 94 NCA No. 43. Affirmed. Miller-Lerman, Judge.

No. A-94-045: **Taylor v. Taylor.** 95 NCA No. 28. Reversed and remanded for further proceedings. Howard, District Judge, Retired.

No. A-94-060: **Schick v. Schick.** 94 NCA No. 38. Reversed and remanded with directions. Connolly, Judge.

No. A-94-062: **Huck v. State.** 94 NCA No. 44. Affirmed. Irwin, Judge.

No. A-94-065: **State v. Brazeal.** 94 NCA No. 50. Affirmed. Miller-Lerman, Judge.

No. A-94-088: **State v. Winter.** 95 NCA No. 8. Affirmed. Hannon, Judge.

No. A-94-089: **State v. Winter.** 95 NCA No. 8. Reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-94-096: **State v. Webb.** 94 NCA No. 41. Affirmed. Irwin, Judge.

No. A-94-102: **Dostal v. Behlen Mfg.** 94 NCA No. 44. Affirmed. Connolly, Judge.

No. A-94-107: **Menard v. Koley's Medical Supply.** 94 NCA No. 39. Affirmed. Mues, Judge.

No. A-94-109: **State v. Cody.** 95 NCA No. 16. Reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-94-111: **Winker v. Community Memorial Hosp.** 94 NCA No. 49. Affirmed. Miller-Lerman, Judge.

No. A-94-114: **Boucher v. Melody Motors, Inc.** 94 NCA No. 47. Reversed and remanded. Miller-Lerman, Judge.

No. A-94-127: **State v. Henderson.** 94 NCA No. 44. Affirmed. Mues, Judge.

No. A-94-151: **State v. Andersen.** 94 NCA No. 49. Affirmed. Irwin, Judge.

No. A-94-163: **In re Interest of Elicia R. & Lincoln R.** 95 NCA No. 3. Affirmed. Mues, Judge.

No. A-94-173: **Hemmerling v. Happy Cab Co.** 94 NCA No. 44. Affirmed. Sievers, Chief Judge.

No. A-94-174: **Lousignont v. Driver Management, Inc.** 94 NCA No. 45. Affirmed. Hannon, Judge.

No. A-94-179: **Khachab v. Khachab.** 94 NCA No. 51. Affirmed as modified. Miller-Lerman, Judge.

No. A-94-223: **State v. Weddle.** 95 NCA No. 7. Affirmed and remanded for resentencing. Sievers, Chief Judge.

No. A-94-224: **State v. Russell.** 94 NCA No. 37. Affirmed. Mues, Judge.

No. A-94-227: **WFM, Inc. v. Tetherow.** 95 NCA No. 28. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-94-228: **State v. Groff.** 94 NCA No. 35. Affirmed as modified. Irwin, Judge.

No. A-94-229: **Borchers v. Priority Data Systems.** 95 NCA No. 6. Affirmed. Howard, District Judge, Retired.

No. A-94-231: **Crosley v. Goodyear Tire & Rubber Co.** 94 NCA No. 46. Affirmed. Mues, Judge.

No. A-94-239: **In re Interest of Steven H.** 95 NCA No. 6. Appeal dismissed. Irwin, Judge.

No. A-94-240: **Franzen v. Jensen Irrigation, Inc.** 95 NCA No. 30. Affirmed. Irwin, Judge.

No. A-94-250: **State v. Dunn.** 95 NCA No. 4. Affirmed. Howard, District Judge, Retired.

No. A-94-255: **State v. Cisneros.** 95 NCA No. 6. Affirmed. Irwin, Judge.

No. A-94-259: **State v. Henderson.** 94 NCA No. 38. Affirmed. Sievers, Chief Judge.

No. A-94-260: **State v. Cahill.** 95 NCA No. 2. Affirmed. Howard, District Judge, Retired.

No. A-94-267: **FirsTier Bank v. Cashier.** 95 NCA No. 29. Affirmed. Miller-Lerman, Judge.

No. A-94-285: **In re Interest of Deven B. & Anthony C.** 94 NCA No. 42. Reversed and remanded with directions to dismiss. Connolly, Judge.

No. A-94-291: **State v. Burnett.** 95 NCA No. 7. Affirmed. Miller-Lerman, Judge.

No. A-94-292: **Henke v. IBP, inc.** 94 NCA No. 49. Affirmed. Connolly, Judge.

No. A-94-297: **State v. Sainz.** 95 NCA No. 10. Affirmed. Mues, Judge.

No. A-94-305: **State v. Rodgers.** 94 NCA No. 49. Affirmed. Irwin, Judge.

No. A-94-328: **In re Interest of Elvis J.** 94 NCA No. 51. Affirmed. Hannon, Judge.

No. A-94-343: **State v. Abair.** 95 NCA No. 2. Affirmed. Mues, Judge.

No. A-94-345: **Cokes v. Bullard Bros. Constr. Co.** 95 NCA No. 6. Affirmed. Miller-Lerman, Judge.

No. A-94-346: **State v. Jones.** 95 NCA No. 4. Affirmed. Miller-Lerman, Judge.

No. A-94-348: **In re Interest of Jason H.** 95 NCA No. 4. Affirmed. Hannon, Judge.

Nos. A-94-350, A-94-351: **In re Interest of Travis I. et al.** 95 NCA No. 4. Affirmed. Miller-Lerman, Judge.

No. A-94-371: **State v. Melcher.** 95 NCA No. 8. Affirmed. Mues, Judge.

No. A-94-374: **State v. Burress.** 95 NCA No. 16. Affirmed in part, and in part reversed and remanded for resentencing. Hannon, Judge.

No. A-94-375: **Kilmer v. Kilmer.** 95 NCA No. 13. Affirmed with directions. Mues, Judge.

No. A-94-378: **State v. Brock.** 94 NCA No. 48. Affirmed. Connolly, Judge.

No. A-94-386: **State ex rel. Schrock v. Schmitt.** 95 NCA No. 3. Affirmed. Hannon, Judge.

No. A-94-392: **State v. Billingsley.** 95 NCA No. 5. Affirmed. Sievers, Chief Judge.

No. A-94-400: **Wahrman v. Wahrman.** 95 NCA No. 28. Affirmed. Mues, Judge.

No. A-94-403: **State v. Smith.** 95 NCA No. 15. Affirmed. Howard, District Judge, Retired.

No. A-94-406: **Marus v. Universal Terrazzo & Tile Co.** 95 NCA No. 4. Affirmed. Irwin, Judge.

No. A-94-414: **State v. Mitchell.** 95 NCA No. 7. Affirmed. Norton, District Judge, Retired.

No. A-94-421: **Neddenriep v. Yellow Freight Sys.** 94 NCA No. 42. Affirmed. Connolly, Judge.

No. A-94-424: **State v. Jacob.** 95 NCA No. 15. Affirmed. Sievers, Chief Judge.

No. A-94-426: **County of Cherry v. Tetherow.** 95 NCA No. 31. Judgment vacated, and cause remanded for further proceedings. Mues, Judge.

No. A-94-431: **State v. Kelly.** 95 NCA No. 2. Affirmed. Mues, Judge.

No. A-94-432: **State v. Malec.** 95 NCA No. 16. Affirmed. Mues, Judge.

No. A-94-447: **Harpham v. Harpham.** 94 NCA No. 49. Affirmed. Sievers, Chief Judge.

No. A-94-448: **State v. Sharp.** 95 NCA No. 12. Affirmed. Irwin, Judge.

No. A-94-452: **State v. Hansen.** 94 NCA No. 49. Affirmed. Miller-Lerman, Judge.

No. A-94-455: **State v. Poitra.** 95 NCA No. 12. Affirmed. Sievers, Chief Judge.

No. A-94-464: **Sullivan v. Process Systems Inc.** 94 NCA No. 49. Affirmed. Miller-Lerman, Judge.

No. A-94-473: **State v. Rhome.** 95 NCA No. 1. Affirmed. Miller-Lerman, Judge.

No. A-94-490: **In re Interest of Steven A.** 94 NCA No. 49. Affirmed. Mues, Judge.

No. A-94-497: **Masters v. Masters.** 95 NCA No. 4. Reversed and remanded with direction. Sievers, Chief Judge.

No. A-94-503: **Starks v. Cornhusker Packing Co.** 95 NCA No. 6. Affirmed. Irwin, Judge.

No. A-94-519: **State v. Hanus.** 95 NCA No. 11. Affirmed. Miller-Lerman, Judge.

No. A-94-525: **State v. Relford.** 95 NCA No. 2. Affirmed. Irwin, Judge.

No. A-94-530: **In re Interest of Heather C.** 95 NCA No. 11. Affirmed. Hannon, Judge.

No. A-94-551: **State v. Veiman.** 95 NCA No. 7. Affirmed. Norton, District Judge, Retired.

No. A-94-571: **In re Interest of April P.** 95 NCA No. 10. Affirmed. Moran, District Judge, Retired.

No. A-94-577: **State v. Harrison.** 95 NCA No. 10. Reversed and remanded for further proceedings. Moran, District Judge, Retired.

No. A-94-578: **State v. Burries.** 95 NCA No. 12. Affirmed. Sievers, Chief Judge.

No. A-94-597: **State v. Bindel.** 95 NCA No. 20. Affirmed. Warren, District Judge, Retired.

Nos. A-94-600, A-94-601: **State v. Vokoun.** 95 NCA No. 16. Affirmed. Miller-Lerman, Judge.

No. A-94-607: **State v. Singleton.** 95 NCA No. 28. Motion for rehearing denied. Sievers, Chief Judge.

No. A-94-607: **State v. Singleton.** 95 NCA No. 21. Affirmed. Warren, District Judge, Retired.

No. A-94-612: **State v. Mann.** 95 NCA No. 12. Affirmed. Miller-Lerman, Judge.

No. A-94-614: **State v. Davis.** 95 NCA No. 25. Affirmed. Mues, Judge.

No. A-94-615: **State v. Kafka.** 95 NCA No. 29. Affirmed. Miller-Lerman, Judge.

No. A-94-631: **State v. Mosley.** 95 NCA No. 13. Affirmed. Moran, District Judge, Retired.

Nos. A-94-649, A-94-650: **State v. Olsen and McKinnon.** 94 NCA No. 41. Reversed. Miller-Lerman, Judge.

No. A-94-662: **State v. Sass.** 95 NCA No. 17. Affirmed as modified. Hannon, Judge.

No. A-94-663: **State v. Neujahr.** 95 NCA No. 20. Reversed and remanded for a new trial. Hannon, Judge.

No. A-94-674: **State v. Markus.** 95 NCA No. 14. Affirmed. Irwin, Judge.

No. A-94-683: **State v. Penner.** 95 NCA No. 15. Affirmed. Howard, District Judge, Retired.

No. A-94-693: **Adrian v. Adrian.** 95 NCA No. 6. Affirmed. Sievers, Chief Judge.

No. A-94-699: **State v. Phillips.** 95 NCA No. 26. Affirmed. Hannon, Judge.

No. A-94-703: **In re Interest of Kevin R. et al.** 95 NCA No. 12. Affirmed. Miller-Lerman, Judge.

No. A-94-710: **Jones v. Child Saving Institute.** 95 NCA No. 14. Affirmed. Sievers, Chief Judge.

No. A-94-711: **State v. Martinez.** 95 NCA No. 15. Affirmed. Howard, District Judge, Retired.

No. A-94-715: **Quinn v. Archbishop Bergan Mercy Hosp.** 95 NCA No. 9. Affirmed. Hannon, Judge.

No. A-94-724: **State v. Green.** 95 NCA No. 23. Reversed and remanded for a new trial. Sievers, Chief Judge.

Nos. A-94-726 through A-94-729: **In re Interest of Jessica S. et al.** 95 NCA No. 26. Affirmed. Mues, Judge.

No. A-94-735: **State v. Krogman.** 95 NCA No. 13. Affirmed. Sievers, Chief Judge.

No. A-94-750: **Krusemark v. Milton Waldbaum Co.** 95 NCA No. 9. Affirmed. Norton, District Judge, Retired.

No. A-94-763: **Brown v. Brown.** 95 NCA No. 18. Affirmed. Sievers, Chief Judge.

No. A-94-769: **Kohl v. Hawkins Constr. Co.** 95 NCA No. 5. Affirmed in part, and in part reversed and remanded for further proceedings. Mues, Judge.

No. A-94-779: **State v. Ortega.** 94 NCA No. 46. Affirmed. Mues, Judge.

Nos. A-94-780, A-94-781: **State v. Tinoco and Rodriguez.** 94 NCA No. 46. Affirmed. Sievers, Chief Judge.

No. A-94-785: **Gonzales v. Gonzales.** 95 NCA No. 14. Affirmed in part, and in part reversed and remanded for further proceedings. Howard, District Judge, Retired.

No. A-94-789: **State v. Peterson.** 95 NCA No. 31. Affirmed. Irwin, Judge.

No. A-94-794: **State v. Nelson.** 95 NCA No. 17. Affirmed. Miller-Lerman, Judge.

No. A-94-795: **In re Interest of Anthony S. & Andrew S.** 95 NCA No. 11. Affirmed. Miller-Lerman, Judge.

No. A-94-797: **Pettit v. State.** 95 NCA No. 28. Reversed and remanded. Sievers, Chief Judge.

No. A-94-798: **Sheridan Cty. v. State Bd. of Equal.** 95 NCA No. 12. Affirmed. Hannon, Judge.

No. A-94-801: **State v. Miller.** 95 NCA No. 18. Affirmed. Irwin, Judge.

No. A-94-810: **Vorderstrasse v. Vorderstrasse.** 95 NCA No. 29. Reversed. Miller-Lerman, Judge.

No. A-94-816: **Youngquist v. Kahle.** 95 NCA No. 19. Affirmed. Miller-Lerman, Judge.

No. A-94-821: **State v. Webber.** 94 NCA No. 46. Affirmed. Connolly, Judge.

No. A-94-846: **State v. Petrmichl.** 95 NCA No. 19. Affirmed. Hannon, Judge.

No. A-94-848: **State v. Reeder.** 95 NCA No. 22. Affirmed. Miller-Lerman, Judge.

No. A-94-870: **Brown-Soo v. Soo.** 95 NCA No. 32. Affirmed. Inbody, Judge.

No. A-94-875: **Railcar Specialties v. State.** 95 NCA No. 29. Affirmed. Inbody, Judge.

No. A-94-876: **State v. Clark.** 95 NCA No. 32. Affirmed. Inbody, Judge.

No. A-94-881: **Edwards v. Aero Mayflower Agency.** 95 NCA No. 19. Affirmed. Irwin, Judge.

No. A-94-884: **State v. Boggess.** 95 NCA No. 20. Affirmed. Warren, District Judge, Retired.

No. A-94-917: **State v. Conn.** 95 NCA No. 28. Affirmed. Howard, District Judge, Retired.

No. A-94-918: **State v. Rodriguez.** 95 NCA No. 27. Affirmed. Miller-Lerman, Judge.

No. A-94-921: **State v. Tweedy.** 95 NCA No. 13. Affirmed as modified. Hannon, Judge.

No. A-94-923: **State v. Barraza-Dominquez.** 95 NCA No. 26. Affirmed. Inbody, Judge.

Nos. A-94-927, A-94-928: **State v. Valdez and Hernandez.** 94 NCA No. 51. Reversed and remanded. Hannon, Judge.

No. A-94-935: **State v. Hansen.** 95 NCA No. 28. Affirmed. Irwin, Judge.

No. A-94-942: **In re Interest of Teandra M. et al.** 95 NCA No. 19. Affirmed. Warren, District Judge, Retired.

No. A-94-955: **State v. Moore.** 95 NCA No. 30. Reversed. Inbody, Judge.

No. A-94-962: **State v. Bray.** 95 NCA No. 24. Affirmed. Inbody, Judge.

No. A-94-964: **State v. Kunath.** 95 NCA No. 19. Reversed. Miller-Lerman, Judge.

No. A-94-970: **State v. Svoboda.** 95 NCA No. 34. Affirmed. Sievers, Chief Judge.

No. A-94-971: **State v. DeJonge.** 95 NCA No. 6. Affirmed. Irwin, Judge.

No. A-94-976: **Peck v. Northwest Airlines.** 95 NCA No. 25. Affirmed. Irwin, Judge.

No. A-94-977: **State on behalf of Stutheit & Stice v. Stice.** 95 NCA No. 30. Affirmed as modified. Miller-Lerman, Judge.

No. A-94-992: **State v. Green.** 95 NCA No. 23. Affirmed. Mues, Judge.

No. A-94-999: **State v. Limley.** 95 NCA No. 23. Affirmed. Inbody, Judge.

No. A-94-1000: **State v. Hawley.** 95 NCA No. 28. Affirmed. Miller-Lerman, Judge.

No. A-94-1006: **State v. Boehme.** 95 NCA No. 17. Affirmed. Miller-Lerman, Judge.

No. A-94-1013: **State v. Hathcock.** 95 NCA No. 5. Affirmed. Miller-Lerman, Judge.

No. A-94-1024: **Kreger v. Kreger.** 95 NCA No. 30. Affirmed. Per Curiam.

No. A-94-1026: **State v. Judd.** 95 NCA No. 9. Reversed. Mues, Judge.

No. A-94-1046: **In re Interest of Rosalie C. & Zachary C.** 95 NCA No. 29. Affirmed. Inbody, Judge.

No. A-94-1054: **In re Interest of Jared P.** 95 NCA No. 30. Affirmed. Miller-Lerman, Judge.

No. A-94-1056: **State v. Davis.** 95 NCA No. 31. Affirmed. Howard, District Judge, Retired.

No. A-94-1058: **State v. Moore.** 95 NCA No. 28. Affirmed. Inbody, Judge.

No. A-94-1067: **In re Interest of Jesus G.** 95 NCA No. 28. Reversed. Howard, District Judge, Retired.

No. A-94-1070: **Kapperman v. Kapperman.** 95 NCA No. 28. Affirmed in part, and in part reversed and remanded with directions. Howard, District Judge, Retired.

No. A-94-1081: **Simpson v. Yellow Freight Sys.** 95 NCA No. 32. Reversed and remanded with directions. Inbody, Judge.

No. A-94-1098: **State v. Kunert.** 95 NCA No. 25. Affirmed. Miller-Lerman, Judge.

No. A-94-1113: **In re Interest of Christopher S.** 95 NCA No. 31. Affirmed. Per Curiam.

No. A-94-1158: **State v. Farias.** 95 NCA No. 27. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Irwin, Judge.

No. A-94-1170: **Dewey v. Dewey.** 95 NCA No. 31. Affirmed. Irwin, Judge.

No. A-94-1204: **Geist v. Geist.** 95 NCA No. 30. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-94-1205: **State v. Jones.** 95 NCA No. 27. Sentence modified. Sievers, Chief Judge.

No. A-94-1210: **State v. Johnson.** 95 NCA No. 30. Affirmed. Miller-Lerman, Judge.

No. A-94-1224: **Grobe v. Food 4 Less.** 95 NCA No. 30. Reversed and remanded. Miller-Lerman, Judge.

No. A-94-1230: **Carney v. Carney.** 95 NCA No. 29. Affirmed. Per Curiam.

No. A-94-1249: **State v. Dodson.** 95 NCA No. 30. Affirmed. Inbody, Judge.

No. A-95-029: **Crabb v. Bishop Clarkson Memorial Hosp.** 95 NCA No. 33. Affirmed. Sievers, Chief Judge.

No. A-95-030: **State v. Davis.** 95 NCA No. 13. Affirmed. Hannon, Judge.

No. A-95-052: **In re Interest of Jared P.** 95 NCA No. 30. Affirmed. Miller-Lerman, Judge.

No. A-95-071: **Swenson v. Furnas Cty. Farms.** 95 NCA No. 32. Affirmed. Hannon, Judge.

No. A-95-078: **State v. Johnson.** 95 NCA No. 27. Affirmed. Miller-Lerman, Judge.

No. A-95-087: **State v. Zimmerman.** 95 NCA No. 29. Affirmed. Irwin, Judge.

No. A-95-105: **Crisman v. Beef America, Inc.** 95 NCA No. 31. Affirmed. Irwin, Judge.

No. A-95-116: **State v. Zimmerman.** 95 NCA No. 29. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge.

Nos. A-95-232, A-95-233: **State v. Rodriguez.** 95 NCA No. 26. Reversed. Sievers, Chief Judge.

No. A-95-535: **State v. Nichols.** 95 NCA No. 34. Reversed and remanded for further proceedings. Irwin, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

IN RE INTEREST OF CONSTANCE G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BETH S., APPELLEE, AND LARRY G., APPELLANT.

520 N.W.2d 784

Filed August 16, 1994. No. A-93-1034.

1. **Juvenile Courts: Appeal and Error.** An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by the appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof.
2. **Juvenile Courts: Jurisdiction: Time: Appeal and Error.** An adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed.
3. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** If the pleadings and evidence at an adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.
4. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court.
5. _____. Parties cannot confer subject matter jurisdiction on a court by acquiescence or consent; neither may subject matter jurisdiction be created by waiver, estoppel, or conduct of the parties.

Appeal from the District Court for Howard County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Howard County, DAVID A. BUSH and PHILIP M. MARTIN, JR., Judges. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Michael J. Shaughnessy, of Shaughnessy & Shaughnessy, for appellant.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom, Stehlik & Thayer, for appellee Beth S.

Patrick L. Neid, guardian ad litem.

IRWIN, MILLER-LERMAN, and MUES, Judges.

MUES, Judge.

Larry G. appeals the district court's decision which upheld the Howard County Court's final disposition order regarding Constance G., a minor child. The State filed a petition claiming that the minor child was homeless or without proper support through no fault of her parents. Upon a hearing in Howard County Court, sitting as a juvenile court, the court placed the child in the custody of the Department of Social Services (DSS). Larry appealed to the district court, which affirmed the county court's order. Larry alleges that the child should have been placed in his custody or in foster care in Lincoln, where he resides. Because we find the juvenile court did not have jurisdiction over this matter, we do not address Larry's assignments of error.

STATEMENT OF FACTS

Larry is the natural father of Constance and resides in Lincoln. Larry began dating Constance's mother, Beth S., also a resident of Lincoln, in approximately February 1991. Beth became pregnant, and she moved in with Larry in approximately December 1991. Constance was born in Lincoln on January 1, 1992. On January 12, Beth was involved in an alleged physical altercation with Larry and left with Constance for Dannebrog, where Beth's parents reside. On March 3, Beth's mother talked to a DSS Child Protective Services worker. Beth's mother reported that Beth had been diagnosed, when she was a teenager, as a paranoid schizophrenic and that Beth was currently hearing voices telling her to harm Constance. Constance was placed in a foster care home in Howard County.

On March 11, the Howard County Attorney filed a petition which stated, in pertinent part:

> [Constance] is within Howard County, Nebraska, of the age of two months, and is a minor child as defined under

> Section 43-247(3)(a), in that on the 10th day of March, 1992, said juvenile:
>
> COUNT I:
>
> is a minor child who is homeless or destitute, or without proper support through no fault of her parent, guardian, or custodian.

The petition named Larry as Constance's father and Beth as Constance's mother. An adjudication was held on March 31 regarding whether Constance was a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). Beth admitted the allegations in the petition, and Larry entered a plea of no contest. The court requested that a factual basis be established for the petition, and the State offered an affidavit of Carrie Sheldon, a Child Protective Services worker employed by DSS. The court found that "there is sufficient basis for the Petition, and that the admission is knowingly, intelligently, and voluntarily entered into, and accepts said admission. The Court further finds that it has jurisdiction over the minor child by virtue of Section 43-247(3)(a)." The court then set a disposition hearing for June 2. DSS compiled a case plan regarding Constance's reunification with her parents. The case plan required Larry to arrange for a mental health and alcohol evaluation and to make the results of the evaluation available to DSS. In addition, the case plan required Larry to complete a parenting class. Finally, the plan required that Larry provide a DSS caseworker once a month with copies of his paycheck stubs and monthly budget. DSS drafted a visitation plan agreement, in which DSS proposed that Larry be allowed to visit Constance every Monday at 6:30 p.m. in the Grand Island DSS office. At the visitations, Larry's parenting skills would be observed by DSS.

A hearing regarding Constance's disposition was held on June 2, 1992. At that time, Beth had moved back to Lincoln to live with Larry. In addition to the case plan, DSS submitted a court report, which stated that during visitation, Beth exhibited inappropriate behavior toward Constance, including alleged sexual abuse. Larry presented an alternative plan to that of DSS, in which he set forth a daily care plan to ensure that Constance was not left alone with Beth. At the end of the hearing, Larry requested that Constance be placed in his

custody or that the child be placed in foster care in Lincoln, nearer to Larry and Beth.

The Howard County Court held that the DSS case plan was reasonable, was in the best interests of Constance, and "has as its objective eliminating the situation which led to adjudication in this matter." The court adopted the case plan and ordered Beth and Larry to comply with the plan's terms. The court found that reasonable efforts to attain reunification of the family had not been successful and that to order reunification at the time of the disposition hearing would have posed a possible endangerment to the minor child. The court placed legal custody of Constance with DSS, subject to a review in 3 months. Beth did not appeal the Howard County Court's ruling. Larry appealed to the Howard County District Court, which upheld the Howard County Court's order. Larry appeals from the district court's affirmance.

ASSIGNMENTS OF ERROR

Larry alleges that the district court erred when it upheld the county court's decision to award legal custody of Constance to DSS and when it did not place Constance in a foster care home within a reasonable distance from Lincoln.

STANDARD OF REVIEW

[1] An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. In that review, findings of fact made by the juvenile court may be accorded weight by the appellate court because the juvenile court observed the parties and the witnesses and made findings as a result thereof. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

ANALYSIS

[2,3] The petition filed by the Howard County Attorney charged that Constance was a minor child as defined under § 43-247(3)(a). Section 43-247 provides: "The juvenile court in each county as herein provided shall have jurisdiction of: . . . (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent . . . ." The rights of the parents and the provisions regarding the proceedings for an

adjudication to decide whether a court has jurisdiction over a juvenile are governed by Neb. Rev. Stat. § 43-279.01 (Cum. Supp. 1992). Section 43-279.01(2) states:

> After giving the parties the information prescribed in subsection (1) [right to counsel, etc.], the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

The Nebraska Supreme Court has held that an adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order's entry, will be dismissed. *In re Interest of C.W. et al.*, 238 Neb. 215, 469 N.W.2d 535 (1991). However,

> this rule does not apply when the facts pleaded and the facts developed at the adjudication hearing are not sufficient for a juvenile court to acquire jurisdiction of a juvenile. If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.

In re Interest of D.M.B., 240 Neb. 349, 352, 481 N.W.2d 905, 909 (1992).

[4,5] In the present case, Larry did not appeal the adjudication order. However, lack of subject matter jurisdiction may be raised sua sponte by a court. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *In re Interest of D.M.B., supra*. Parties cannot confer subject matter jurisdiction on a court by acquiescence or consent; neither may subject matter jurisdiction be created by waiver, estoppel, or conduct of the parties. *Scherbak, supra*. The evidence presented at the adjudication hearing to support the court's jurisdiction over Constance consisted solely of the affidavit of Sheldon. This was the only evidence that the juvenile court had before it to fulfill its duty to "ascertain a factual basis" for

Beth's "admission" and Larry's "answer of no contest." § 43-279.01(2). Sheldon's affidavit states that Beth was being evaluated at Richard Young Hospital in Kearney for possible admission, that Beth had been diagnosed as a paranoid schizophrenic as a teenager, and that she was currently hearing voices which were telling her to harm Constance.

Although there was mention made of Larry in this affidavit, there was an absence of any evidence from which a factual basis could be ascertained regarding Larry's ability or inability to properly support Constance or his capability to provide a home for the child. On the face of the petition, it was clear that Larry was the child's father, and without the development of sufficient evidence pertinent to Larry, a determination that Constance was homeless, destitute, or without proper support was without any factual support. While the pleadings and evidence were sufficient to support the admission of the mother, Beth, the evidence was insufficient to confer jurisdiction of the court over Constance in the absence of a sufficient factual basis for Larry's no contest plea. Failure to ascertain and recite the factual basis on which the court found jurisdiction over Constance in regard to Larry is plain error. *In re Interest of D.M.B., supra.*

It was imperative that the juvenile court, under the circumstances of this case, make a finding regarding the alleged inadequacies of each parent. Both parents were named in the petition, and an adjudication that the juvenile court has jurisdiction over a minor child is the first step in a process which potentially has grave and permanent consequences to *both* parents. Once jurisdiction over the minor child is found, the disposition of such juvenile found to be without proper support or homeless is governed by Neb. Rev. Stat. § 43-284 (Cum. Supp. 1992), which provides that

> the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive the juvenile . . . (4) care of a suitable family, or (5) care and custody of the Department of Social Services.

The court may then order a parent to comply with a rehabilitation or reunification plan established by the court to rectify the problems which gave rise to the court's jurisdiction over the child. Once a rehabilitation plan is adopted by the court, serious penalties redound to those parents who do not comply with the plan. Under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), "when a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 266, 417 N.W.2d 147, 158 (1987).

CONCLUSION

We find that the Howard County Court, sitting as a juvenile court, did not have jurisdiction over Constance, as there was insufficient evidence presented at the adjudication to support the charge in the petition that Constance was homeless, destitute, or without proper support in regard to Larry, her father, and without such evidence, the court could not, and did not, ascertain a factual basis for Larry's no contest plea at the adjudication proceeding. The court was without jurisdiction to determine Larry's parental rights and the disposition of Constance. We must, therefore, reverse the orders of the district and juvenile courts and remand the cause with directions to dismiss this case for lack of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. GALE E. METTENBRINK, APPELLANT.

520 N.W.2d 780

Filed August 16, 1994. No. A-93-1114.

1. **Criminal Law: Restitution: Sentences.** A restitution order is part of a criminal sentence.
2. **Restitution: Sentences.** A restitution order does not create a debt between the defendant and the victim and is not a dischargeable civil debt.

3. **Convictions: Restitution.** Nebraska case law restricts the amount of restitution to the loss sustained by the victim resulting from the offense for which the defendant is convicted.
4. **Sentences.** In imposing a sentence, the court must state the precise terms of the sentence.
5. **Appeal and Error.** A trial judge is granted discretion in ruling on a motion to proceed in forma pauperis, and the decision will not be disturbed on appeal unless it amounts to an abuse of discretion.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, Kimberly A. Klein, and, on brief, Donald A. Kohtz for appellee.

IRWIN, MILLER-LERMAN, and MUES, Judges.

MILLER-LERMAN, Judge.

Gale E. Mettenbrink was convicted of three counts of attempted false application for vehicle title. He appeals the portion of the sentence of the Hall County District Court ordering restitution and the court's order denying his request to proceed in forma pauperis after sentencing. For the reasons recited below, we affirm in part, in part reverse, and remand the cause for resentencing.

FACTS

Mettenbrink and a dentist, Les Bowden, had financial dealings at least since 1990. Mettenbrink's rental car franchise was not profitable, and Mettenbrink approached Bowden seeking funds to purchase additional vehicles to rent or sell. Bowden advanced money to Mettenbrink.

In January 1992, Bowden advanced funds to Mettenbrink to purchase certain vehicles at auction. Mettenbrink purchased four vehicles with Bowden's funds: a 1988 Dodge Aries, for which Bowden paid $2,915; a 1986 Jeep Comanche pickup, for which Bowden paid $2,990; a 1988 Mazda B2200 pickup, for which Bowden paid $2,385; and a 1988 Chevrolet Celebrity, for which Bowden paid $2,365. Checks written by Bowden

evidencing the foregoing transactions were received into evidence at the restitution hearing. Bowden received the titles to these four vehicles.

On February 11, 1992, Mettenbrink obtained duplicate titles to the four vehicles at the Hall County treasurer's office. Mettenbrink claimed he needed new titles because he had mistakenly thrown away the originals.

Periodically, Bowden drove by the auto sales lot where the four vehicles were placed for sale. Bowden noticed the vehicles were missing and inquired of Mettenbrink as to their whereabouts. Mettenbrink explained variously that the vehicles had been moved to other sales lots or rented. After Bowden complained to Mettenbrink that he had not received payments occasioned by rentals, Mettenbrink paid Bowden $800. After another lapse in payments, Bowden learned from Mettenbrink's father that the Jeep and Dodge had been sold. Bowden received $5,600 in payments for the sold vehicles. At some point, Bowden learned from the Hall County treasurer's office that Mettenbrink had obtained duplicate titles to the four vehicles.

In September 1992, Mettenbrink and his wife filed a chapter 7 bankruptcy proceeding under 11 U.S.C. §§ 701 through 766 (1988). Bowden was listed as a schedule F creditor holding an unsecured nonpriority claim in the unliquidated amount of $53,500. On January 11, 1993, the U.S. Bankruptcy Court filed an order discharging the debtor of dischargeable debts. Notice was sent to Bowden.

Mettenbrink was thereafter charged in district court with four counts of false application for vehicle title, to which he pled not guilty. Following plea negotiations, he pled no contest on September 3, 1993, to an amended information charging him with three counts of attempted false application for vehicle title, violations of Neb. Rev. Stat. §§ 28-201(1)(b) (Reissue 1989) and 60-116 (Reissue 1988).

Following the preparation of a presentence investigation report and a restitution hearing, Mettenbrink was sentenced to 30 days in jail on each count, sentences to be served concurrently, and ordered to pay $5,055 in restitution. No payment schedule or time limit was placed on the restitution

order. After sentencing, Mettenbrink filed a motion to proceed in forma pauperis and an affidavit of poverty. The district court denied the motion to proceed in forma pauperis. This appeal followed.

ANALYSIS

RESTITUTION FOLLOWING BANKRUPTCY

Mettenbrink argues on appeal that for a variety of reasons, restitution was improperly ordered following the discharge of his debts in bankruptcy. Mettenbrink attacks the fact of restitution and does not quarrel with the amount. The State contends generally that pursuant to *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), a restitution order is not dischargeable in bankruptcy. The parties agree that the issue of the dischargeability of a restitution order is one of first impression in Nebraska.

In *Kelly v. Robinson*, the defendant had been ordered in 1980 to pay restitution to the State of Connecticut as a result of her conviction of welfare fraud. In 1981, she filed a chapter 7 bankruptcy proceeding and listed the restitution order as a debt. The bankruptcy court cited 11 U.S.C. § 523(a)(7) (1982), which provided that a debt is not dischargeable if the debt "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss," and concluded that the restitution order was not dischargeable in bankruptcy. *In re Robinson*, 45 B.R. 423 (Bankr. D. Conn. 1984).

The U.S. Court of Appeals for the Second Circuit reversed the bankruptcy court's decision. See *In re Robinson*, 776 F.2d 30 (1985). In its reversal, the Second Circuit relied in part on the language of the Connecticut statute, which provided that restitution could be assessed "for the loss or damage caused [by the crime]," Conn. Gen. Stat. Ann. § 53a-30(a)(4) (West 1985), and concluded that the debt was, in effect, compensation to the victim, as distinguished from a governmental unit, for "actual pecuniary loss" and, therefore, was not excluded from discharge under § 523(a)(7).

The U.S. Supreme Court reversed the Second Circuit's decision. See *Kelly v. Robinson, supra*. The Court stated that

criminal proceedings involve the penal and rehabilitative interests of the State, and restitution orders imposed in criminal proceedings operate for the benefit of the State and are not assessed for compensation to the victim.

In holding that a restitution order was not dischargeable in bankruptcy, the Court noted as follows:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino:* "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133.

479 U.S. at 52-53.

[1,2] Mettenbrink argues that the instant case is distinguishable from *Kelly v. Robinson* because the restitution order against him was entered after the conclusion of his bankruptcy proceedings. Mettenbrink claims, in effect, that the restitution order is an improper reinstatement of a civil debt which was previously discharged in bankruptcy. Mettenbrink misperceives the nature of a restitution order. A restitution order is part of a criminal sentence. *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). It does not create a "debt" between the defendant and the victim and is not a dischargeable civil debt. *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483 (1974), cited with approval in *Kelly v. Robinson, supra*. The fact that the restitution order in this case followed

Mettenbrink's discharge order does not alter its character or render it discharged or dischargeable. See *State v. West*, 173 Ariz. 602, 845 P.2d 1097 (Ariz. App. 1992) (holding that a restitution order following bankruptcy discharge was proper). Indeed, to be dischargeable in bankruptcy under 11 U.S.C. § 727(b), a debt must be in existence at the time of the bankruptcy. In the instant case, the restitution order was not in existence during Mettenbrink's bankruptcy proceedings.

Based on our reading of *Kelly v. Robinson*, state jurisprudence, and the relevant bankruptcy code provisions, we conclude that ordering restitution was proper. Given Mettenbrink's earning capacity, his current weakened financial condition does not preclude a restitution order. See *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990). See, also, *U.S. v. Rogat*, 924 F.2d 983 (10th Cir. 1991). However, we note that two plain errors were committed by the court in the restitution order. See *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992) (holding that plain error could be found on appeal regarding sentencing when the error is plainly evident in the record and prejudicially affects a substantial right of the litigant, causes a miscarriage of justice, or damages the integrity of the judicial process).

[3] Regarding the first error, Nebraska case law restricts the amount of restitution to the loss sustained by the victim resulting from the offense for which the defendant is convicted. *State v. Kelly*, 235 Neb. 997, 458 N.W.2d 255 (1990). In the case at bar, Mettenbrink was convicted of three counts of attempted false application for vehicle title. It is apparent from the amount of restitution ordered that the court used all four counts with which Mettenbrink was originally charged in determining the amount of restitution. Mettenbrink can be ordered to pay restitution for only the losses sustained by the victim from the three offenses for which he was convicted. This is plain error.

[4] Regarding the second error, in imposing a sentence, the court must state the precise terms of the sentence. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). The requirement of certainty and precision applies to criminal sentences containing restitution orders. *State v. McGinnis*, 2

Neb. App. 77, 507 N.W.2d 46 (1993). In the case at bar, the court failed to inform Mettenbrink as to whether the restitution must be made (1) immediately, (2) in specified installments, or (3) within a specified period of time, not to exceed 5 years. See Neb. Rev. Stat. § 29-2281 (Cum. Supp. 1992). This lack of definiteness is plain error.

DENIAL OF MOTION TO PROCEED IN FORMA PAUPERIS

Mettenbrink claims that the trial judge erred in denying his application to proceed in forma pauperis after sentencing and in concluding that the appeal was not taken in good faith. The State argues that the trial judge's denial of the motion was not an abuse of discretion. We agree with the State.

[5] The Nebraska Supreme Court has stated that a trial judge is granted discretion in ruling on a motion to proceed in forma pauperis, and the decision "will not be disturbed on appeal unless it amounts to an abuse of discretion." *State v. Eberhardt*, 179 Neb. 843, 848, 140 N.W.2d 802, 805 (1966). The record shows that although Mettenbrink has come through a financially extreme period, he is now left with few debts. His obligation to the Internal Revenue Service is payable at the rate of $121 per month. In addition, he has assets consisting of a car valued at $3,000, furniture valued at $1,500, a television valued at $200, a stereo valued at $25, appliances valued at $200, and miscellaneous personal property valued at $500. He has $1,000 in a checking account. At the sentencing hearing, Mettenbrink's attorney admitted that Mettenbrink is employed. Mettenbrink's wife earns approximately $20,000 per year. We note that on appeal, Mettenbrink is represented by the Hall County public defender and observe that his appeal has apparently thus proceeded without his incurring attorney fees. In view of the record, we conclude that the trial court did not abuse its discretion in denying Mettenbrink's motion to proceed in forma pauperis after sentencing.

CONCLUSION

For the reasons recited above, we remand the cause for resentencing regarding the restitution portion of the sentence, and otherwise affirm the convictions and sentences.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

BRUCE D. HANEY, APPELLEE, V. AARON FERER & SONS, CO., APPELLANT.

521 N.W.2d 77

Filed August 23, 1994. No. A-94-036.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. _____: _____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. _____: _____. A decision by the compensation court after review has the same force and effect as a jury verdict, and the court's findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, a higher appellate court determines that those findings are clearly erroneous.
4. **Trial: Witnesses.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of witnesses and the weight to be given their testimony.
5. **Workers' Compensation: Expert Witnesses.** While an expert witness' testimony may be necessary to establish the cause of a claimed injury, the compensation court does not need to depend on expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant in determining the extent of the disability.
6. **Workers' Compensation: Words and Phrases.** Loss of earning capacity under Neb. Rev. Stat. § 48-121(2) (Reissue 1988) is not synonymous with loss of bodily function. Neither is the loss of wages synonymous with loss of earning power.
7. **Workers' Compensation.** Awards for partial disability are measured by the reduction in earning power or employability.
8. _____. There is no numerical formula for determining a worker's earning power following an injury to the body as a whole.
9. _____. Loss of earning power is a question of fact, not measured solely by loss of bodily function, or by reduction in wages alone, but by a myriad of factors set forth in the case law.
10. **Workers' Compensation: Appeal and Error.** A determination as to whether an injured employee is able to perform the work for which that employee was previously trained is a question of fact to be determined by the compensation court, and that determination will not be disturbed by an appellate court unless the finding is clearly erroneous.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas D. Wulff, of Rickerson, Welch, Wulff & Childers, for appellant.

Phillip G. Wright, of Quinn & Wright, for appellee.

IRWIN, MILLER-LERMAN, and MUES, Judges.

MUES, Judge.

Aaron Ferer & Sons, Co., appeals from a review by the Workers' Compensation Court which upheld the trial judge's award of temporary total disability, permanent partial disability, and vocational rehabilitation benefits to Bruce D. Haney. Ferer argues that there was no competent evidence to show that Haney suffered a 25-percent loss in earning capacity and that Haney's testimony regarding his employment and disability was not credible and therefore was not sufficient to support the court's award. We affirm the review panel's decision.

FACTS

Bruce D. Haney was employed by Aaron Ferer & Sons, Co., on June 5, 1991, as a laborer torchman, earning $7.40 per hour cutting up metal or performing odd jobs, such as moving railroad ties. On June 5, during the course of his employment, Haney lifted a railroad tie and heard a loud pop in his back, which was followed by shooting pain in his lower back. Haney testified at the hearing that a typical railroad tie weighs approximately 110 pounds. Haney informed his foreman of the accident that day. On June 6, Haney went to see his family doctor, Dr. Scott Blair, who in turn referred him to Dr. Jay Parsow. Haney received treatment approximately twice a month for about a year from Dr. Blair and twice a month from Dr. Parsow. Both doctors prescribed medication and physical therapy. Dr. Parsow diagnosed Haney's condition as mild acute bilateral L5 and S1 radiculopathy. An MRI scan of Haney's lumbar spine revealed disk bulging at the L4-5 area, posteriorly to the left without changes of disk desiccation.

In a letter to Haney's attorney, Dr. Parsow stated that it was his opinion that Haney had reached maximum medical improvement on March 25, 1992. Dr. Parsow stated that Haney would be allowed to go back to work, so long as it was light

work. Dr. Parsow stated that Haney could occasionally lift and carry 20 pounds and could frequently carry 10 pounds and that he could occasionally bend, stoop, crawl, kneel, and squat, but should do no twisting. Dr. Parsow rated Haney's disability as a 12-percent whole body impairment. Ferer's doctor, Dr. Anil Agarwal, examined Haney once. Haney testified that the exam lasted approximately 3 to 5 minutes. As a result of the exam, Dr. Agarwal opined that Haney had reached maximum medical improvement and had suffered a 2-percent whole body impairment. In a letter to Ferer's insurer, Dr. Agarwal stated that Haney could return to work with a lifting limitation of up to 60 pounds.

Dr. Willard Kuehn of Occupational Health Services, employed by Ferer, examined Haney on June 16, 1991, and released him to go back to work with no restrictions, but when Haney returned to work and was required to shovel as part of his job, Haney's back began to hurt again. Dr. Kuehn then reexamined Haney and found that he was in need of physical therapy. Dr. Kuehn released Haney to work with a 20-pound weight-lifting restriction. Haney testified that his own doctor disagreed with Dr. Kuehn's diagnosis and told him he could not return to work yet because he could not perform the tasks required. Haney testified he received a letter sometime in the summer of 1991 from Ferer informing him he had been fired.

The record shows that Haney's work experience is in the area of manual labor. Haney has a high school education and no special training. On September 28, 1991, Haney began working for L & J Auto, washing and vacuuming cars and driving them to auctions, which he described as light-duty work. Haney testified that the heaviest item he was required to lift at his job with L & J Auto was a wash bucket. Haney worked full time for $5 per hour for L & J Auto until approximately August 1992. Haney then began working for Rodney Farm Center in December 1992, driving grain trucks to grain elevators. Haney earned $6.40 per hour while working for Rodney Farm Center. Because the job required him to shovel grain, he could not carry out the tasks of the job and was laid off in March 1993.

Upon a hearing before the Workers' Compensation Court, the trial judge found that Haney had sustained an injury to his

back as a result of an accident arising out of and in the course of his employment and that as a result of such accident, Haney had been temporarily totally disabled from June 6 to September 7, 1991, and temporarily partially disabled from and including September 28, 1991, to and including March 24, 1992. The court found that after March 24, Haney had sustained a 25-percent loss in earning capacity. Ferer received credit for amounts it paid Haney for temporary total disability and temporary partial disability benefits. Ferer appealed the award, which was sustained by the review panel of the Workers' Compensation Court.

ASSIGNMENTS OF ERROR

Ferer alleges that the trial court erred (1) when it awarded temporary partial disability benefits to Haney during the time Haney was employed by L & J Auto and had been receiving temporary total disability benefits; (2) when it found that Haney sustained a 25-percent loss in earning capacity; and (3) when it found that Haney was incapable of finding suitable, gainful employment and was therefore entitled to vocational rehabilitation benefits.

STANDARD OF REVIEW

[1,2] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Cum. Supp. 1992). In determining whether to affirm, modify, reverse, or set aside the judgment of the review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

[3] A decision by the compensation court after review has the same force and effect as a jury verdict, and the court's findings of fact will not be set aside unless, after reviewing the record in the light most favorable to the successful party, a higher

appellate court determines that those findings are clearly erroneous. See, also, *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992).

ANALYSIS

Temporary Partial Disability Benefits.

[4] Ferer's first assignment of error seems to be based not on an argument that Haney was not temporarily partially disabled during the time for which he was awarded benefits, but instead appears to be based on the contention that Haney's testimony on collateral matters during the hearing lacked credibility. We find that Ferer's first assignment is without merit. In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

The trial court awarded temporary partial disability benefits from September 28, 1991, Haney's first day of employment with L & J Auto until March 25, 1992, when Dr. Parsow determined Haney had reached maximum medical improvement. The trial court awarded Ferer credit for its payment to Haney of temporary total disability benefits from June 13 to 16, 1991, and July 6, 1991, through April 4, 1992; temporary partial disability benefits paid to Haney from June 17 to July 5, 1991; and 1 week of permanent partial disability benefits from April 25 through May 1, 1992. Ferer alleges in its brief that it paid temporary total disability benefits to Haney in reliance on Haney's answers to interrogatories filed in November 1991, in which Haney stated that he had earned no other income after his employment with Ferer. We note that Ferer was credited with all payments to Haney, and therefore, Ferer received credit against the judgment for any temporary total disability benefits it may have erroneously paid. The trial court's findings of fact regarding the time period during which Haney suffered temporary partial disability are supported by sufficient competent evidence in the record, and therefore, the court's findings of fact were not clearly erroneous. See *Wiese, supra.* We therefore affirm the trial court's award to Haney of temporary partial disability benefits.

Loss of Earning Capacity.

Ferer's second assignment of error alleges that the trial court erred when it made a finding of loss of earning power without the testimony of a vocational rehabilitation expert. Ferer claims that it was necessary to present expert testimony to show the causal connection between Haney's injury and his loss of earning capacity and the extent of Haney's loss of earning capacity. Ferer argues that the only expert testimony regarding Haney's permanent disability was Dr. Parsow's rating of 12 percent permanent disability and Dr. Agarwal's rating of 2 percent permanent disability. In support of its argument, Ferer cites Judge Buchholz' dissent from the review panel's opinion, in which the court affirmed the trial court's order. In his dissent, Judge Buchholz stated:

> The question of whether a judge of this Court has, ipso facto, the expertise and power to make a specific loss of earning power assessment based solely on bodily impairment ratings of less than total, rendered by physicians, physical restrictions, and on his or her own presumed "expertise as a trier of fact," is both novel and intriguing. . . .
>
> It is my opinion that the making of a loss of earning power assessment involves technical and specialized knowledge and skills, and, as such, is typically an activity for qualified experts.

[5] There is no dispute among the parties upon appeal that Haney sustained a back injury which arose out of and in the course of his employment, i.e., that Haney's injury was *caused* by the employment accident at the Ferer job. While an expert witness' testimony may be necessary to establish the *cause* of a claimed injury, the compensation court does not need to depend on expert testimony to determine the degree of disability, but instead may rely on the testimony of the claimant in determining the extent of the disability. *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

[6,7] Loss of earning capacity under Neb. Rev. Stat. § 48-121(2) (Reissue 1988) is not synonymous with loss of bodily function. *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980). Neither is the loss of wages synonymous

with loss of earning power. *Id.* Instead, awards for partial disability are measured by the reduction in earning power or employability. *Id.*

> " 'Earning power' . . . 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 work[er] to earn wages in the employment in which he [or she] is engaged or for which he [or she] is fitted. . . . If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his [or her] earning power has not been impaired."

Id. at 546, 288 N.W.2d at 485.

[8] It is well-established law that there is no numerical formula for determining a worker's earning power following an injury to the body as a whole. *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). In applying the principle that compensation is awarded not on physical disability but on earning capacity, the Nebraska Supreme Court has consistently allowed the Workers' Compensation Court to consider the four elements it has determined comprise earning power: (1) the worker's eligibility to procure employment, (2) the worker's ability to hold the job obtained, (3) the worker's capacity to perform the tasks of such job, and (4) the worker's ability to earn wages in employment for which the worker is engaged or fitted. In *Sidel*, the evidence presented to the court established that the claimant's doctor determined the claimant had incurred a back injury resulting in a 10-percent disability. In addition, the doctor noted that because of a preexisting condition, which was not work related, the claimant's overall impairment was between 20 and 25 percent. The compensation court awarded a 20-percent permanent partial disability, and the employer appealed, claiming that the compensation court wrongly considered the noncompensable impairment in its determination of the claimant's percentage of partial disability. The *Sidel* court disagreed.

> [T]he surgeon recommended that plaintiff "be employed in a job which does not require heavy lifting, stooping or twisting of his back which could be in the present

company, if such a job is available."

The evidence shows that plaintiff is a high school graduate. Most of his employment history has been doing manual labor similar to that while employed with Spencer Foods. However, he has also done some work as a mechanic in garages, although not specifically trained in that area. He testified that after the lumbar laminectomy his ability to lift was reduced and he was given lighter work. . . .

. . . .

In this case, the Workmen's Compensation Court was entitled to take into consideration not only the 10 percent loss of bodily function because of the lumbar laminectomy, but also the facts that the plaintiff was engaged in common labor and that that was his primary skill. His ability to lift was impaired and his employability was thus reduced.

205 Neb. at 544-47, 288 N.W.2d at 484-86.

In *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985), the evidence before the compensation court showed that the plaintiff injured his back while employed as a laborer for ASARCO. The plaintiff had been employed by ASARCO as a laborer for approximately 14 years, had not completed the eighth grade, and could not read or write well. The plaintiff had been examined by ASARCO's physician, who rated the plaintiff's disability as a 15-percent permanent partial disability to the whole body. The plaintiff's own physician had restricted the plaintiff's lifting to not more than 20 pounds. The *Aldrich* court upheld the compensation court's determination that the plaintiff had sustained a 30-percent loss in earning power "based upon 'the extent of plaintiff's physical impairment as set forth by Dr. O'Neil, the wages earned by the plaintiff at the time of injury, the work restrictions imposed on him by Dr. O'Neil, and plaintiff's limited educational background . . . .' " *Id.* at 129, 375 N.W.2d at 152.

Finally, in *Thinnes v. Kearney Packing Co.*, 173 Neb. 123, 112 N.W.2d 732 (1962), the evidence before the compensation court was an opinion by the claimant's doctor that the claimant had incurred a physical impairment of between 10 and 15

percent. The court noted:

> The plaintiff is 59 years of age. He has a third grade education. He commenced farming when he was 22 years old and continued until 1937. He has worked on railroad section gangs and extra gangs and has done roofing and painting. He has worked for the defendant at the packing plant for about 14 years. At the time he was injured he was slaughtering and butchering cattle. This work, as done at defendant's plant, is hard manual labor which requires heavy lifting at times. There is other work at the plant such as boning, grinding, packaging, etc., which requires less physical effort and strength, but the defendant's business operation is such that the employees are assigned to whatever work there is to be done at the time and some of it requires heavy lifting and strength.

Id. at 126-27, 112 N.W.2d at 735.

The court held that there was evidence in the record to show that the claimant could no longer perform such heavy lifting. The compensation court awarded the claimant with compensation based upon a 15-percent disability. The Nebraska Supreme Court overruled the compensation court's finding and awarded the claimant benefits based upon a 35-percent loss in earning capacity. In doing so, the court stated:

> It is difficult to determine the extent of the permanent partial disability resulting from the accident in this case upon the evidence which is available to us. The record in this case does not contain any satisfactory direct evidence as to the permanent loss in earning power which the plaintiff has sustained. There is opinion evidence as to what his permanent losses in bodily functions are.

Id. at 129, 112 N.W.2d at 736. The court found that the claimant had sustained a 35-percent loss in earning power, "based upon all of the factors which enter into earning power and [such a finding] is not limited to the evidence relating to loss of bodily functions." *Id.* at 130, 112 N.W.2d at 736-37.

[9] In neither *Thinnes*, *Aldrich*, nor *Sidel* is there any indication that an expert testified as to a percentage loss of earning capacity. Instead, as the Nebraska Supreme Court has

reiterated over and over again, loss of earning power is a question of fact, not measured solely by loss of bodily function, or by reduction in wages alone, but by a myriad of factors set forth in the case law. See, *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980); *Thinnes, supra.* Our research has uncovered no case law which directly supports Ferer's argument that the compensation court must depend upon an expert's assessment as to the extent of the claimant's loss of earning capacity in order to empower an award of partial disability under § 48-121(2).

In the case at hand, the evidence shows that before he was injured, Haney had earned $7.40 per hour and that after his injury, he obtained a job for 33 percent less in salary, or $5 per hour. While employed at Rodney Farm Center, Haney earned $6.40 per hour, or 14 percent less than he earned at Ferer. In addition, Haney was laid off from Rodney Farm Center because he could not perform the tasks required due to his back injury. Haney has a high school education and has been given work restrictions by both Ferer's doctors and Haney's own physicians. The trial court stated that it had "carefully considered the various impairment ratings by the physicians, the work restrictions and the other factors used to determine loss of earning capacity" as set forth in the case law. We find that the court did not need the expert testimony of a vocational rehabilitation counselor to determine earning capacity loss, as the evidence in the record was clear that Haney was placed on work restrictions, had been diagnosed with various impairment ratings, and had a high school education and that his previous work experience was limited to manual labor positions. The trial court's finding of a 25-percent loss of earning capacity is supported by sufficient competent evidence in the record, and after reviewing the record in the light most favorable to Haney, we cannot say that the trial court's finding was clearly erroneous.

Vocational Rehabilitation Benefits.

The trial court stated that "[i]n light of [Haney's] inability to find continuous employment since the date of the accident at a similar or like wage with [Haney's] restrictions, the Court finds

that [Haney] is a candidate for vocational rehabilitation." Ferer alleges that the trial court erred when it found that Haney was unable to find suitable gainful employment and was therefore entitled to vocational rehabilitation benefits. Ferer argues that although Haney earned less while employed by L & J Auto, his salary combined with his workers' compensation benefits resulted in substantially greater income than that he earned at Ferer. The goal of the vocational rehabilitation statute, however, is not to award only those employees whose total income sources, including disability benefits, equal the amount of salary earned before such employees were injured, but, rather, the purpose is the "restoration of the injured employee to gainful employment." Neb. Rev. Stat. § 48-162.01 (Reissue 1988).

Section 48-162.01 provides:

> When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services . . . as may be reasonably necessary to restore him or her to suitable employment.

[10] A determination as to whether an injured employee is able to perform the work for which that employee was previously trained is a question of fact to be determined by the compensation court, and that determination will not be disturbed by an appellate court unless the finding is clearly erroneous. *Willuhn v. Omaha Box Co.*, 240 Neb. 571, 483 N.W.2d 130 (1992). In *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991), the Nebraska Supreme Court found that the phrase "restore him or her to suitable employment" has been defined in other jurisdictions to mean employment similar in remuneration to that earned prior to the injury and which is compatible with the employee's preinjury occupation, age, education, and aptitude. The employer in *Yager* argued that because the employee had obtained a minimum-wage job elsewhere, he had suitable employment and was, therefore, not entitled to vocational rehabilitation benefits. The court stated:

> We hold as a matter of law that accepting a job paying minimum wage does not automatically "restore" a claimant to "suitable" or "gainful" employment pursuant

> to § 48-162.01, where the claimant's previous employment was at a significantly higher wage. At the time of his injury, plaintiff was earning $220 per week and was an able, strong construction worker, with possibilities of progressing in that type of manual labor. . . .
>
> It is inappropriate to hold, from the mere fact that the injured worker has accepted a job resulting in a $104 weekly wage, that, by that act alone, he has foreclosed himself from some training that would enable him to return to the approximate level of the salary he was earning when he was injured. The difference between the wages earned before and after the injury is only $116 per week, but proportionately it is a large difference. To ignore such a difference is to ignore the statutory goal of returning the worker to suitable, that is, comparable, employment. A finding that claimant currently maintains a minimum-wage job is not, in and of itself, sufficient to support a denial of vocational rehabilitation benefits.

236 Neb. at 896-97, 464 N.W.2d at 340-41.

In the case at hand, Haney had earned approximately $298 per week prior to his injury at Ferer. When Haney worked for L & J Auto, he earned approximately $200 per week. As a result, Haney's wages were reduced by one-third. Proportionately, there is a large difference between the wages Haney earned before and after his injury. The evidence is clear that Haney cannot return to a manual labor position that requires heavy lifting. There is sufficient competent evidence to support the trial court's finding that Haney was eligible for vocational rehabilitation. Viewing the record in the light most favorable to Haney, we cannot say the trial court was clearly erroneous when it found that vocational rehabilitation was reasonably necessary to restore Haney to suitable employment.

CONCLUSION

We note that the trial court is the sole judge of the credibility of the witnesses, and therefore, Ferer's first assignment of error, based on Haney's credibility, is without merit. Second, we find that the trial court was not clearly erroneous when it found that Haney sustained a 25-percent loss in earning capacity. Finally,

we find that the trial court was not clearly erroneous when it found that Haney was unable to perform work for which he had previous training or experience, and therefore vocational rehabilitation benefits could be awarded to restore Haney to suitable employment. We therefore affirm.

Pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 1992), an award of attorney fees to Haney is appropriate, and the same will be made upon the filing of a motion in compliance with Neb. Ct. R. of Prac. 9F (rev. 1992).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUDY ARTHUR ROSALES, APPELLANT.

521 N.W.2d 385

Filed August 30, 1994. No. A-93-774.

1. **Right to Counsel.** A defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel.
2. _____. A patently frivolous complaint brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel or standby counsel.
3. _____. Once standby counsel has been appointed for a pro se defendant, the trial court has discretion over the scope of standby counsel's role.
4. **Trial: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Right to Counsel.** When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.
6. **Criminal Law: Motions for Continuance: Appeal and Error.** The decision of whether to grant a continuance in a criminal case is addressed to the discretion of the trial court, and that court's ruling will not be disturbed on appeal absent an abuse of discretion.
7. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under such rules when judicial discretion is a factor involved in the admissibility of evidence.
8. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the trial court's

discretion to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion.

9. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2) is an inclusionary rule which permits the use of relevant prior bad acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
10. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of evidence of other acts by considering (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for unfair prejudice; and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
11. **Convictions: Verdicts: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed in a light most favorable to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where the evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by the evidence beyond a reasonable doubt.
12. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
13. **Motions for New Trial: Evidence.** Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that if offered and admitted at the former trial, it probably would have produced a substantial difference in the result.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Sandra Hernandez Frantz for appellant.

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

IRWIN, MILLER-LERMAN, and MUES, Judges.

IRWIN, Judge.

Rudy Arthur Rosales was convicted in the district court for Lancaster County of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1989). The property taken

had a value of $9,678. At an enhancement hearing, Rosales was found to be a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989) and was sentenced to 15 to 20 years' imprisonment. Rosales has appealed to this court, claiming, among other things, that his court-appointed standby counsel was ineffective and that Rosales was denied adequate access to a law library and other tools required for his pro se trial defense. After reviewing the record and the applicable law in this case, we find that Rosales' claims lack merit, and accordingly, we affirm the decision of the court below in all respects.

FACTUAL BACKGROUND

On April 8, 1992, Lincoln real estate agent Rhonda Novak received a phone call from defendant, who identified himself as Rudy Lopez. Defendant told Novak that he was looking to buy a home for around $200,000 and that he wished to purchase it quickly. That evening, Novak and a coworker, Larry Geiger, met with defendant and Julie Engebretson, whom defendant introduced as his wife, at the Hilton Hotel in Lincoln. During the meeting, defendant told Geiger that he was looking for an "upper-scale" home in Lincoln because he had a "capital gain situation." Defendant also told Geiger that he would look only at existing homes and that he was not interested in newly constructed homes. Before the meeting ended, a time was agreed upon when Geiger would show the defendant five or six homes the next day.

In the morning, Geiger picked up defendant and Engebretson at the Hilton and proceeded to show them four or five homes. When Geiger attempted to show them new homes, they refused to exit the car or look at the homes.

Between 2 and 3 o'clock that afternoon, Geiger showed the couple a home belonging to Cynthia and Rick Rohrs. Cynthia Rohrs left the home shortly after they arrived. While Geiger was showing the upstairs level of the home, defendant left for approximately 5 minutes, stating that he wanted to look at a room that would be suitable for an office. When defendant met up with Geiger and Engebretson, defendant stated that he was feeling ill and requested Geiger to take them back to the Hilton.

Geiger complied with the request. When Geiger later phoned the Hilton to see if defendant was feeling better, he was informed that defendant and Engebretson had checked out.

The day after the defendant was shown the Rohrses' house, Cynthia Rohrs discovered several items of jewelry missing from a dresser drawer in her bedroom, including a black onyx ring with six diamonds, a pair of 14-karat gold earring hoops, a pair of cubic zirconia earring studs, a gold cross pendant and chain, a Geneve quartz watch, a gold and diamond tennis bracelet, and a gold herringbone chain.

On April 14, 1992, defendant and Engebretson were arrested at a hotel in Las Cruces, New Mexico, pursuant to a warrant. In a search of defendant's hotel room, police discovered a white box containing jewelry, and also found credit cards bearing the names of Patricia L. McDonald and Regan Dean. Police also confiscated several items of jewelry from defendant's and Engebretson's persons. Among the items of jewelry seized by police were a black onyx ring, gold earring hoops, and a pair of cubic zirconia earring studs, all of which matched descriptions of the jewelry missing from the Rohrses' residence.

In an amended information, defendant was charged in Lancaster County with theft by unlawful taking of property valued at more than $1,500, and was also charged as a habitual criminal.

At defendant's request, the district court appointed Robert G. Hays of the Lancaster County public defender's office to represent defendant. Hays served as defendant's attorney until March 9, 1993, when the court sustained Hays' motion for leave to withdraw. Defendant then moved to proceed pro se. The court granted this motion and appointed Hays as defendant's standby counsel, over defendant's objection.

At trial, Novak and Geiger each identified defendant as the man who represented himself as Rudy Lopez and to whom Geiger had shown homes on April 9, 1992. Cynthia Rohrs identified the black onyx ring, the gold earring hoops, and the cubic zirconia earring studs as matching those that were missing from her home. The State called a gemologist to testify that the replacement value of all of the jewelry missing from the Rohrses' home exceeded $9,000.

Defendant called only one witness to testify. That witness was Paula Blackman Thrasher, a gemologist from Lincoln. Thrasher testified that the onyx ring, the earring hoops, and the cubic zirconia studs had a combined street value of between $100 and $130, and a combined retail value of between $400 and $425.

The jury found defendant guilty of theft by unlawful taking, with the property taken having a value of $9,678. At a later hearing, the court found defendant to be a habitual criminal. Defendant thereafter filed a motion for new trial. At the hearing on the motion, defendant attempted to show that he had inadequate access to the law library while he was incarcerated, that the law library did not contain materials necessary for defendant to present his defense, and that his standby counsel did not "assist" him. Defendant also called Engebretson, who testified that she alone committed the theft. The trial judge denied defendant's motion for new trial, and thereafter sentenced him to 15 to 20 years' imprisonment.

ASSIGNMENTS OF ERROR

Defendant claims that the district court erred in (1) refusing to appoint new counsel for him when it became apparent that his counsel had a "conflict of interest," (2) limiting the role of his standby counsel, (3) denying his request for additional time in the law library, (4) denying his requests for various "tools . . . to prepare for his own defense," (5) denying his request for continuance, (6) admitting evidence of credit cards found in his hotel room, (7) finding sufficient evidence to convict him, and (8) denying his motion for new trial.

ANALYSIS

Conflict of Interest.

In his first assigned error, defendant claims that the trial court erred in refusing to appoint new counsel for him when his court-appointed counsel developed an alleged conflict of interest.

The record establishes that Hays was appointed as counsel for defendant on May 12, 1992. On March 2, 1993, Hays filed a motion to withdraw as defendant's counsel after defendant informed him that he wished to proceed pro se. On March 9,

defendant filed a motion to proceed pro se. At a hearing on the motions, defendant did not request substitute counsel, and objected to the court's appointing Hays as standby counsel, stating, "I don't particularly need anybody to be on standby at this point. I'd like to exercise the right of representing myself pro se in full by myself as adequate counsel."

The record clearly establishes that defendant invoked his right to represent himself and did not desire substitute counsel. Thus, the court did not "refuse" to appoint substitute counsel for defendant. Rather, the court granted defendant's request to represent himself. In fact, had the court not allowed defendant to represent himself, it would have violated defendant's constitutional right to self-representation. See *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Defendant also claims that the trial court should have appointed different standby counsel for him once the court became aware of Hays' alleged conflict of interest. At his arraignment, defendant objected to Hays' serving as standby counsel, stating that he had filed a complaint against Hays with the Nebraska State Bar Association and that such complaint gave rise to a conflict of interest for Hays. A copy of the letter defendant sent to the bar association is in the record. In the letter, defendant complains that Hays had "verbally taken sides with the county attorney's office," had cursed defendant, and had told defendant that he could not win. Defendant also states in the letter that he could not trust Hays to "carry out my wishes confidently" and that Hays "never comes see's [sic] me when needed." After a brief investigation, the bar association's Counsel for Discipline dismissed defendant's complaint.

[1,2] It is well settled that "a defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel." *State v. McCoy*, 228 Neb. 178, 182, 421 N.W.2d 780, 783 (1988). Accord *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). In the present case, defendant's complaint to the bar association is merely an expression of his mistrust of, or dissatisfaction with, his standby counsel, and as such, did not require appointment of new standby counsel. Further, defendant's complaint to the

bar association was frivolous. A patently frivolous complaint brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel or standby counsel. See *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991). We find defendant's first assigned error without merit.

Role of Standby Counsel.

When the trial court appointed standby counsel for defendant, it informed him what the role of his standby counsel would be, stating:

> Mr. Rosales, you have a constitutional right to represent yourself, if you choose to do that. If you do that and I give Mr. Hays leave to withdraw, I will appoint him as standby counsel, which means that he will be present at the times of the hearings for you. It does not mean that he will file motions for you; it does not mean that he will do research for you; it does not mean that he will investigate the case for you; he will simply be available at the time of hearings or trial to advise you.

Defendant claims that it was error for the court to restrict the role of standby counsel. Although the Nebraska Supreme Court has held that the decision of whether to appoint standby counsel for a pro se defendant is left to the discretion of the trial court, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991), we have been unable to find any precedent in this state outlining the role standby counsel is to perform once he or she is appointed.

In *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), the Court briefly discussed the role of standby counsel, stating:

> A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible . . . .

In a footnote, the court in *Wiggins* indicated that the level of participation by standby counsel should be left to the discretion of the trial court:

> The trial judge may be required to make numerous rulings reconciling the participation of standby counsel with a *pro se* defendant's objection to that participation; nothing in the nature of the *Faretta* right suggests that the usual deference to "judgment calls" on these issues by the trial judge should not obtain here as elsewhere.

465 U.S. at 178 n.8. Other jurisdictions have also recognized that a trial court has discretion over the extent of standby counsel's involvement in a case. See, *People v. Smith*, 249 Ill. App. 3d 460, 619 N.E.2d 799 (1993) (holding that trial judge has discretion to decide nature and extent of standby counsel's involvement); *Commonwealth v. Molino*, 411 Mass. 149, 580 N.E.2d 383 (1991) (holding that trial judge had discretion to appoint standby counsel with any reasonable limitations); *People v. Garcia*, 69 N.Y.2d 903, 508 N.E.2d 929, 516 N.Y.S.2d 194 (1987) (determining that trial court had discretion to allow standby counsel to question defendant at trial); *Contempt in State v. Lehman*, 137 Wis. 2d 65, 403 N.W.2d 438 (1987) (holding that the scope of the duties of standby counsel lies within the discretion of the trial judge); *Cano v. Municipality of Anchorage*, 627 P.2d 660 (Alaska App. 1981) (finding that trial court had discretion to allow advisory counsel to participate actively at trial); *State v. Randall*, 530 S.W.2d 407 (Mo. App. 1975) (holding that trial court has discretionary power over role of standby counsel).

[3] Different rationales have been offered for giving the trial court discretion to limit the role of standby counsel. In *Lehman, supra*, the court found that the purpose of appointing standby counsel is to serve the trial court's interest in having the trial proceed in an orderly fashion. The court thus reasoned that the trial court is in the best position to tailor the scope of standby counsel's duties to serve the court's needs. The court in *Molino, supra*, reasoned that because the trial court has the discretion to determine whether to appoint or deny standby counsel for a pro se defendant, it follows that the trial court also has the discretion to limit standby counsel's role once he or she

is appointed. We find this reasoning persuasive, and we agree that once standby counsel has been appointed for a pro se defendant, the trial court has discretion over the scope of standby counsel's role.

[4] We now turn to whether the trial court abused its discretion in limiting standby counsel's role in this case. " 'A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.' " *State v. Trackwell*, 244 Neb. 925, 931-32, 509 N.W.2d 638, 643 (1994).

Several factors lead us to conclude that the trial court did not abuse its discretion in limiting the role of defendant's standby counsel in this case. First, defendant clearly indicated that he wished to invoke his right to represent himself. In fact, defendant objected to the appointment of *any* standby counsel. For the court to assign standby counsel a more active role under such circumstances could be perceived as an impediment to defendant's right to self-representation.

Second, defendant's record reveals that he is a veteran criminal who has had many experiences in courtrooms, and thus required comparatively little assistance from standby counsel. According to his presentence report, defendant has been arrested over 30 times in his adult life, for offenses including, but not limited to, theft, assault, possession of marijuana, kidnapping, embezzlement, forgery, burglary, and fraud. Defendant has at least 10 prior felony convictions. The trial record from this case shows that defendant was well aware of trial procedures and strategies and that he used them to his advantage.

Third, it is evident that standby counsel provided assistance to defendant when requested to do so. The record shows that defendant consulted with standby counsel on numerous occasions at hearings and at trial. In fact, in his closing argument to the jury, defendant stated that his standby counsel had been "extremely helpful" to him. In light of this and the above-mentioned factors, we conclude that the trial court did not abuse its discretion in limiting the role of standby counsel in this case.

Access to Law Library.

In his third assigned error, defendant claims that he was denied adequate access to the law library while he was incarcerated prior to trial. We find that this assigned error is unsupported by the record. At the motion for new trial, an employee of the Lancaster County Corrections Department testified that inmates, including defendant, were allowed 15 minutes per day, 5 days per week, to select books from the law library. Once an inmate had selected the books, he or she could check those books out of the library for 2 additional hours each day. The trial court found that defendant had had 124 hours of research time, in addition to the 15 minutes per day that he was allowed to select books from the law library, and concluded that defendant had adequate access to the law library. We agree with the trial court's findings, and accordingly we reject this assigned error.

Preparation Tools.

Defendant next claims that the trial court erred in denying his request for trial preparation tools. In his motion to proceed pro se, defendant requested the court to provide defendant with typing paper, access to a typewriter or word processor, pencils, carbon paper or access to a copier, legal pads and file folders, envelopes and postage, access to long distance telephone operators, free local phone calls, a legal researcher, a private investigator, and expert witnesses. The court granted defendant's motion with regard to the typing paper, pencils, carbon paper, and legal pads, and denied defendant's other requests. However, the record reveals that the court later granted defendant's motion to obtain an expert witness at the county's expense and that it accommodated defendant by allowing him to take depositions of witnesses before and during trial.

[5] "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). In *State v. Walle*, 182 Neb. 642, 156 N.W.2d 810 (1968), the court addressed a situation nearly identical to the one

presented in the present case. In *Walle*, the court appointed the public defender as a " 'technical adviser' " for the defendant after the defendant had elected to proceed pro se. *Id.* at 644, 156 N.W.2d at 811. The defendant, who was incarcerated awaiting trial, presented a pretrial motion for a private cell for purposes of research and study, access to a typewriter, carbon paper, legal pads, and a daily transcript of all trial testimony. The trial court denied the defendant's motion, and the Supreme Court affirmed. The court held that a defendant has no absolute right to be placed in a private cell; to be given access to a typewriter, carbon paper, legal pads, and access to a law library; or to be furnished with a daily transcript of the testimony. In light of this language and the particular facts of the present case, we cannot find that the trial court erred in denying defendant's motion for the materials requested.

Failure to Grant Continuance.

[6] Defendant claims that the trial court erred in failing to grant his oral motion for continuance made on May 17, 1993, the date trial was scheduled to begin. The decision of whether to grant a continuance in a criminal case is addressed to the discretion of the trial court, and that court's ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

The record establishes that the trial was originally scheduled to take place during the March 29, 1993, jury term, but the defendant successfully moved the court to continue the case until the May 10 jury term. Defendant's second motion for continuance was based on his alleged lack of adequate trial preparation materials. As we noted above, defendant's rights to such materials were met. In addition, the record indicates that defendant was originally released on bond while he was awaiting trial and that he left the state of his own volition for over 6 months while released on bond. We find that the trial court did not abuse its discretion in denying defendant's second motion for continuance.

Evidence of Credit Cards.

During the trial, the court granted defendant's motion in limine wherein defendant requested the court to advise the

prosecution not to bring in evidence of stolen property found in defendant's hotel room other than the property involved in the crime for which defendant was being tried. Thereafter, the State called Officer Gilbert Apodaca of the Las Cruces, New Mexico, Police Department to testify. The State proceeded to ask Officer Apodaca about the credit cards seized from defendant's hotel room. Defendant objected to the question, at which point the State argued that the credit cards were going to be used to show that defendant used a false name when he committed the crime in the instant case. The court overruled defendant's objection, and Officer Apodaca proceeded to testify that the names on the credit cards were Patricia L. McDonald and Regan Dean. Defendant claims that the trial court erred in admitting Officer Apodaca's testimony regarding the credit cards, apparently relying on Neb. Evid. R. 404(2).

[7,8] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under such rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). It is within the trial court's discretion to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. *Wood, supra*; *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

[9] Rule 404(2) "is an inclusionary rule which permits the use of relevant prior bad acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character." *Wood*, 245 Neb. at 69, 511 N.W.2d at 95. Accord *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). Under rule 404(2), evidence of other acts is admissible in circumstances such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident.

[10] An appellate court reviews the admission of evidence of other acts by considering (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for

unfair prejudice; and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *Wood, supra*; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992).

With regard to the relevancy of the evidence, Neb. Evid. R. 401 states that relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. "To be relevant, evidence must be rationally related to the issue by a likelihood, not a mere possibility, of proving or disproving the issue to be decided." *Wood*, 245 Neb. at 70, 511 N.W.2d at 96.

Officer Apodaca's testimony was relevant and proper to establish that defendant had a common plan or scheme of using a false identity. The real estate agents testified that defendant had given them a false name when they showed him the Rohrses' home. This evidence was also admitted for a proper purpose, that is, to prove a common plan or scheme.

We also find that the probative value of Officer Apodaca's testimony was not outweighed by the potential for unfair prejudice. With regard to the fourth part of the admissibility test, the record does not contain a request from defendant to instruct the jury to consider the evidence only for the limited purpose for which it was admitted.

We find that the trial court did not abuse its discretion in admitting Officer Apodaca's testimony regarding the credit cards found in defendant's hotel room. Accordingly, we find no merit to this assigned error.

Sufficiency of Evidence.

[11] In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed in a light most favorable to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal

case where such verdict is supported by relevant evidence. Only where the evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by the evidence beyond a reasonable doubt. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

The evidence, when viewed in a light most favorable to the State, establishes that on April 9, 1992, defendant committed the crime of theft by unlawful taking, with the property taken being valued at $9,678. The evidence also establishes that defendant is a habitual criminal as defined in § 29-2221. Accordingly, we find this assigned error to be without merit.

Motion for New Trial.

[12] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

Defendant claims that he should have been granted a new trial due to irregularities he experienced in the trial proceedings and due to newly discovered evidence. See Neb. Rev. Stat. § 29-2101 (Reissue 1989). With regard to his claim of irregularities in the proceedings, defendant merely reasserts that he had difficulties with regard to library usage, access to law books, and access to a telephone. Those issues were addressed above, and we determined that the claims lacked merit. We therefore will not reanalyze them here, as we conclude that these claims are equally meritless for purposes of this assigned error.

Defendant's claim of newly discovered evidence consists of Engebretson's testimony at the motion for new trial, wherein she stated that she alone took the jewelry from the Rohrses' residence and that defendant had no knowledge of the theft. The trial judge found that Engebretson's testimony lacked credibility.

[13] Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that if offered and

admitted at the former trial, it probably would have produced a substantial difference in the result. *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984). Because Engebretson's testimony was found to lack credibility, it cannot be said that it would have produced a substantial difference in the result had it been offered and admitted at trial. We find no merit to defendant's claim that the trial court erred in failing to grant his motion for new trial.

CONCLUSION

Having found all of defendant's assigned errors lacking in merit, we affirm the disposition of the court below in all respects.

AFFIRMED.

BALDWIN CARPET LINOLEUM & CARPET, INC., APPELLEE, V. BUILDERS, INC., AND ST. PAUL FIRE & MARINE INSURANCE CO., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS, AND BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, THIRD-PARTY DEFENDANT, APPELLEE.

523 N.W.2d 33

Filed October 4, 1994. No. A-93-085.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.
4. _____: _____. After the moving party has shown facts entitling it to a

judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

5. **Actions: States: Statutes: Contracts.** The State Contract Claims Act authorizes suits against the State, in derogation of the State's sovereignty, and courts must strictly construe its provisions in favor of the sovereign.
6. **Limitations of Actions.** A claim accrues when an injury occurs and the injured party has the right to seek redress by instituting and maintaining a lawsuit.
7. **Limitations of Actions: Breach of Contract.** A cause of action for breach of contract accrues as soon as the breach occurs.
8. **Limitations of Actions: Appeal and Error.** An appellate court must determine from the facts of each case the point at which a statute of limitations begins to run.
9. **Limitations of Actions.** The existence of continuing negotiations without deceit or other unfulfilled promises does not ordinarily toll a statute of limitations.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Larry V. Albers, of Erickson & Sederstrom, P.C., for appellants.

Andrew D. Strotman, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Board of Regents.

IRWIN, MILLER-LERMAN, and MUES, Judges.

MILLER-LERMAN, Judge.

Builders, Inc., and St. Paul Fire & Marine Insurance Co. (collectively referred to as Builders) appeal the decision of the district court for Lancaster County which found that Builders' third-party petition against the Board of Regents of the University of Nebraska (University) was time barred, and granted summary judgment in favor of the University. For the reasons recited below, we affirm.

SCOPE OF REVIEW

[1,2] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994); *Dowis v. Continental Elev. Co.*, 241 Neb.

207, 486 N.W.2d 916 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Anderson v. Nashua Corp., supra*; *Hillie v. Mutual of Omaha Ins. Co., supra*; *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993); *Hanson v. General Motors Corp.*, 241 Neb. 81, 486 N.W.2d 223 (1992); *Antelope Cty. Farmers Coop. v. Citizens State Bank*, 240 Neb. 760, 484 N.W.2d 822 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

[3,4] A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Spittler v. Nicola, supra*; *Flamme v. Wolf Ins. Agency, supra*.

FACTS

This litigation arises from the construction project to build the Lied Center for Performing Arts (Lied Center) on the campus of the University of Nebraska at Lincoln. Builders, defendant and third-party plaintiff in this action, entered into a contract with the University to act as the general contractor for the construction of the Lied Center. Builders subcontracted with plaintiff, Baldwin Carpet Linoleum & Carpet, Inc. (Baldwin), to purchase and install the carpet in the Lied Center.

In March 1987, Builders informed the University that Baldwin anticipated the price of the carpet would, in the near future, rise above the price specified in the contract and that the University needed to select the colors for the carpet by April 3 to

avoid incurring such a price increase. The University responded that any delay in selecting the carpet colors was due to the fact that the brick suppliers had not yet provided color samples to the University for comparison. The University also indicated that it expected Builders and Baldwin to supply the carpet at no additional cost. The University notified Builders of its initial carpet color selections in a letter dated April 21, 1987, after Builders extended the color selection deadline to April 22.

The University made its final selections in regard to carpet color, style, and pattern in June 1988, whereupon Baldwin learned that the initial supplier had gone out of business and that the selected carpet would cost $19,680 over and above the original bid price. Consequently, in mid-July 1988, Builders submitted two claims to the University for additional costs. By letter dated August 3, 1988, the University denied Builders' claims for additional moneys, asserting that Builders and Baldwin remained responsible for any increase in the price of the carpet. Notwithstanding the denial of the claims, the University indicated it was willing to negotiate regarding alternative solutions through August 8.

On September 30, 1988, pursuant to a series of negotiations, the University agreed to pay the additional installation costs that would be incurred because the carpet from the new supplier required a double-glue carpet pad. However, the University refused to pay for any increase in the price of the carpet. The record shows that the University paid $112,500, the full original contract price for the cost of the carpet, when it arrived at a bonded warehouse in Lincoln.

On November 15, 1989, the project architect issued a certificate of substantial completion for the Lied Center. The parties agree that Baldwin completed the installation of the carpet prior to the issuance of the certificate of substantial completion on November 15.

After substantial completion, Builders requested that the University pay Baldwin an additional $27,543 due to the increase in the cost of the carpet. The University offered Baldwin $10,824 in settlement of this claim. Baldwin rejected this settlement offer and countered with an offer of $19,000. On or about September 26, 1990, in connection with Baldwin's

counteroffer, the University requested additional information and documentation to substantiate the additional charges. On October 5, the University denied Baldwin's modified claim for $19,000, in a letter styled "Final Response."

Baldwin filed the present action in Lancaster County District Court against Builders on November 21, 1991. On November 25, Builders submitted its claim in connection with the carpet dispute to the Office of Risk Management, pursuant to the State Contract Claims Act, Neb. Rev. Stat. § 81-8,302 et seq. (Cum. Supp. 1992). On December 11, 1991, Builders objected to the submission of the claim to the State Claims Board and expressed its desire to pursue action in district court. Builders filed a third-party petition against the University in the district court for Lancaster County on June 12, 1992.

On November 4, 1992, the University moved for summary judgment against Builders. The district court for Lancaster County sustained the University's motion for summary judgment on December 21. The trial court found that Builders had failed to file its claim with the Office of Risk Management within the 2-year statute of limitations set forth in the State Contract Claims Act at § 81-8,306. Builders appeals.

ANALYSIS

Prior to full briefing of this case, the University moved to dismiss this appeal for lack of a final, appealable order as required by Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1992). The University argued that the pendency of the main action between Baldwin and Builders precluded appellate review. This court denied the motion. Under Nebraska practice, the granting of a motion for summary judgment in favor of a third-party defendant has been treated as an appealable order. See, *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993); *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993).

On appeal, Builders asserts that the district court erred in sustaining the University's motion for summary judgment. Builders argues generally that its case against the University was timely because its claim was filed within 2 years of the University's final reply, dated October 5, 1990. The University

responds generally that the third-party petition against it was time barred because Builders' cause of action accrued when the carpet was installed on or before the issuance of the certificate of substantial completion, dated November 15, 1989. The parties agree that the carpet was installed prior to November 15.

[5] The district court granted the University's motion for summary judgment because it found that Builders did not file its claim within the 2-year statute of limitations under § 81-8,306 of the State Contract Claims Act. The State Contract Claims Act governs all contract disputes between the claimant and the State of Nebraska or a Nebraska state agency. § 81-8,303. For these purposes, the term "state agency" includes all departments, agencies, boards, bureaus, and commissions of the State. *Id.* Because the State Contract Claims Act authorizes suits against the State, it is in derogation of the State's sovereignty, and we must strictly construe its provisions in favor of the sovereign. See *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988).

[6-8] Section 81-8,306 of the State Contract Claims Act provides that "every contract claim permitted under the State Contract Claims Act shall be forever barred unless the claim is filed with the Risk Manager within two years of the time at which the claim accrued." Nebraska law is well settled that a claim accrues when an injury occurs and the injured party has the right to seek redress by instituting and maintaining a lawsuit. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). The Nebraska Supreme Court has held that "a cause of action for breach of contract accrues as soon as the breach occurs." *Id.* at 714, 502 N.W.2d at 449. We must determine from the facts of each case the point at which a statute of limitations begins to run. *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988).

This litigation is founded on an alleged breach of contract. The record clearly indicates that a dispute regarding the payment for the increased price of the carpet arose during the summer of 1988. The University rejected claims for the increased cost of purchasing the carpet, a position to which it adhered throughout the dispute and subsequent litigation. On September 30, the University indicated it would pay for the

additional installation costs, but not the increased price of the carpet. After these negotiations, Baldwin completed the carpet installation. The carpet installation was completed before the architect issued a certificate of substantial completion on November 15, 1989.

We have reviewed the record, and even taking the inferences in favor of Builders, we conclude that by the time the carpet was installed and the architect issued the certificate of substantial completion, the parties were aware of enough facts to know whether a case or controversy existed, and whether they were satisfied with the other parties' positions and concessions in regard to their existing disputes. At the time the certificate of substantial completion was issued on November 15, 1989, the carpet was installed and the University had indicated that it would not pay for the increased price of the carpet. Based on the undisputed facts of this case in which the parties agree the carpet installation was completed before the issuance of the certificate of substantial completion, we conclude that the statute of limitations began to run on or before the date the architect issued the certificate of substantial completion on November 15. Accordingly, the submission of Builders' claim to the Office of Risk Management on November 25, 1991, was not timely.

The conclusion that the action between Builders and the University accrued on or before November 15, 1989, is consistent with the facts of this case and with Nebraska jurisprudence on accrual of actions. Although we acknowledge the distinction in the roles among the architect, general contractor, and subcontractor in a construction project, we note that the Nebraska Supreme Court has interpreted the statutory period of repose applicable to architects who have a contractual duty to inspect throughout the duration of the construction project to begin to run when construction is completed. See, *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988); *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987). Research shows that in actions between general contractors and owners in other jurisdictions, measuring the statute of limitations from the point of issuance of a certificate of substantial completion

or earlier has also been endorsed. See, *Grand Island Cent. School v. Transcom Equip.*, 128 Misc. 2d 858, 859-60, 491 N.Y.S.2d 262, 264 (1985) (explaining in an action between a general contractor and owner that "the courts of this state have held that a cause of action for failure to pay the contractor accrues upon substantial completion, or, if earlier, upon representation by the contractor to the architect of substantial completion"); *District School Bd. of Desoto County v. Safeco Ins. Co.*, 434 So. 2d 38, 39 (Fla. App. 1983) (construing Fla. Stat. ch. 255.05(2) (1973) and holding that "a certificate of substantial completion and the acceptance of a constructed building by the owner [start the running of the statute of limitations] for actions against the surety on the bond"). See, also, *Housing Now-Village West v. Cox & Crawley*, 646 S.W.2d 350 (Ky. App. 1982); *U. S. F. & G. v. Hamilton*, 241 Md. 133, 215 A.2d 735 (1966).

[9] We note that Builders argues on appeal that the statute of limitations should begin to run on October 5, 1990, the date the University issued its "Final Response." Builders' contention is based on the fact that Builders submitted claims to the University for additional moneys after the date of substantial completion, and Builders and the University engaged in additional discussions regarding the carpet dispute between the date of substantial completion and October 5, 1990. The existence of continuing negotiations without deceit or other unfulfilled promises does not ordinarily toll a statute of limitations. See *Luther v. Sohl*, 186 Neb. 119, 122, 181 N.W.2d 268, 270 (1970) (holding that although inducement to delay institution of action may initially act to toll the statute of limitations, "after the inducement for delay has ceased to operate [a plaintiff] cannot excuse [its] failure to act within the statutory time on the ground of estoppel"). See, also, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985) (holding in a construction case based on a contract but presented in tort that the act which provided the basis for the claim occurred when the construction of the building was completed, irrespective of any continuing professional relationship between the parties). Our review of the record does not show any equitable or legal excuse which would justify

tolling the statute of limitations in this case.

We are aware of authority in other jurisdictions in which the statute of limitations was deemed to begin running when an owner refused to pay for extras, which is somewhat consistent with Builders' argument on appeal, but we find the facts too dissimilar to be persuasive. See, e.g., *Hanover Ins Co v Drainage Dist*, 52 Mich. App. 658, 218 N.W.2d 109 (1974) (holding that, in a situation where subsurface conditions were found to differ from those anticipated at the time of the original bid, the statute of limitations began to run on the contractor's claim from the date when the owner denied liability for claimed extras, rather than from the date the contractor notified the owner of the differing conditions or from the date of substantial completion). Furthermore, we note that in *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989), the Nebraska Supreme Court held in a construction case that the statute of limitations began to run when the department ousted the contractor from the construction project, not when the department made final payment to the contractor. Thus, payment or lack of payment is relevant to the issue of damages, rather than to accrual of the cause of action. *Id.*

Because Builders did not submit its claim to the Office of Risk Management until November 25, 1991, more than 2 years after the accrual of its cause of action on or before November 15, 1989, the date upon which the architect issued the certificate of substantial completion following installation of the carpet, we find that Builders' third-party action against the University was time barred. We conclude that the University was entitled to judgment as a matter of law and affirm the order of the district court.

AFFIRMED.

GEORGETOWNE SQUARE, A NEBRASKA PARTNERSHIP, APPELLANT, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLEE.

523 N.W.2d 380

Filed October 4, 1994. No. A-93-132.

1. **Appeal and Error.** Regarding questions of law, an appellate court is obliged to reach a conclusion independent of the decision reached by the trial court.
2. **Contracts.** The construction of a contract is a question of law.
3. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made; when the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
5. **Insurance: Contracts.** If an ambiguity as to the terms of a contract exists, the contract will be construed against the party who prepared it.
6. _____: _____. When a clause of an insurance policy can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law.
7. **Insurance: Contracts: Proof.** When an insurer's defense is based upon an exclusionary clause in the policy, the burden is on the insurer to prove facts which bring it within the exclusion.
8. **Waters: Words and Phrases.** Surface water, sometimes referred to as "diffused surface water," has been defined in Nebraska law as water which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.
9. _____: _____. Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation.
10. _____: _____. The term "runoff" is defined as water resulting from precipitation and running off the surface of the land without human intervention.
11. _____: _____. Runoff is merely another term for surface water.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

Michael F. Kinney and Helarie H. Hollenbeck, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Lisa M. Meyer and David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellee.

SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges.

HANNON, Judge.

Georgetowne Square (Georgetowne), the appellant, insured its property by a "Builders Risk" insurance policy issued by United States Fidelity and Guaranty Company (Fidelity), the appellee. A retaining wall on the insured property was damaged by water and water pressure emanating from an underground pipe that drained water from the roof of a neighbor's building. Georgetowne made claim for damages. Fidelity denied the claim on the basis that a policy provision excluded coverage for damages resulting from flooding, which term was defined under the policy to include "run-off" and "surface water." Georgetowne commenced this action, and a trial was held based upon stipulated facts. The trial court dismissed the petition because it determined the policy excluded coverage for the loss claimed. Georgetowne appeals. We conclude that the damage was not caused by either surface water or runoff, and we reverse the judgment and remand the cause with directions to enter judgment for Georgetowne for the amount of the stipulated damages.

STIPULATED FACTS

The case was tried on a stipulation of facts. The stipulation included the insurance policy and two small photographs depicting the drainage pipe and the damage to Georgetowne's wall on its property. One photograph shows a significant section of the wall between Georgetowne's lot and the adjoining lot. The ground level of the adjoining lot is 3 to 4 feet higher than Georgetowne's lot and is hard surfaced. The vertical wall separating the properties extends from the ground level of Georgetowne's lot up to the ground level of the adjoining lot. The wall is constructed with 4- by 4-inch timbers stacked horizontally and staggered in the manner bricks are staggered in a wall. In the photograph, the wall bows out at one point, and this is the section of wall for which Georgetowne claims damages caused by the drainage of water. A 2- or 3-foot space

behind the wall is excavated in the area where the wall is bowed. The written stipulation states this photograph fairly and accurately portrays "the damage inflicted on the wall."

The other photograph shows a small dirt embankment with a hard surface both above and below the embankment. An old, bent pipe protrudes for a few inches from the embankment at a point near the bottom of the embankment. A black flexible tube protrudes a few feet out of the old pipe, and it appears to be the end of a liner that was placed in the existing drain. The stipulation states the photograph "fairly and accurately depicts the drainage pipe in question as it appeared after the damage to the retaining wall."

The part of the stipulation concerning the causation of the damage states:

> Said wall was damaged due to the build-up of water underground and water pressure underground which emanated from an underground drainage pipe. Said drainage pipe extended underground from the property to the immediate west of the subject property to the subject property. Said drainage pipe was located approximately 4 feet below surface and extended underground approximately 80-100 feet back to a structure on the property adjacent to the west side of plaintiff's property. The water which entered and departed the underground drainage pipe was water which flowed from the roof of the structure on the adjoining property and which was the result of rain or melted snowfall.

The parties also stipulated that Georgetowne suffered damages to the retaining wall in the amount of $19,034.05 and that this is an insured loss, "unless Exclusion k . . . is found to apply to this loss." The "Exclusions" section provides:

> [Fidelity] will not pay for "loss" caused by or resulting from any of the following:
>
> . . . .
>
> **k.** Flood, unless a Limit of Insurance is specifically shown for this coverage in the Declarations. Flood means waves, surface water, run-off, tides or tidal water, and the rising out of or overflowing of any body of water, whether or not driven by wind.

Georgetowne also maintains that even if exclusion k applies to exclude coverage, the loss is still covered by a specific exception contained in exclusion i. Exclusion i reads as follows: "**i.** Rain, snow, ice, or sleet, whether or not they are driven by wind. But we will pay for "loss" due to collapse of building or structure caused by the weight of rain, snow, ice, or sleet."

TRIAL COURT'S RULING

On January 26, 1993, the trial court entered an order dismissing Georgetowne's petition, stating that exclusion k applied:

> It seems quite clear to the Court that this is "run off water". No definition or explanation was given as to what exactly, or not so exactly, run off water consists of, however, the term itself gives the Court all the help it needs in arriving at the conclusion that this is run off water.

The trial court also rejected Georgetowne's argument that the exception to exclusion i of the policy provided coverage for damage caused to a structure or building from "the weight of rain, snow, ice, or sleet."

ASSIGNMENTS OF ERROR

Georgetowne makes nine separate assignments of error, but these assignments essentially state two errors; that is, the trial court erred in (1) finding that exclusion k of the policy applied and excluded Georgetowne's claim for damages from coverage, based on the stipulated facts, and (2) finding that the exception to exclusion i of the policy was not applicable to the damages claimed by Georgetowne under the stipulated facts.

SCOPE OF REVIEW

[1,2] Regarding questions of law, an appellate court is obliged to reach a conclusion independent of the decision reached by the trial court. *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994); *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993); *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993). The construction of a contract is a question of law. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993).

[3] Fidelity argues that the trial court found the rain and melted snow draining from the roof was runoff, that there is sufficient evidence to support that finding, and therefore that this finding is binding on this court. Fidelity's position is in error. In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991). The questions presented by the case at hand are questions of law, not of fact.

DISCUSSION

We shall consider the last assignment of error first. The policy provides Fidelity would pay for a loss due to the collapse of a building or structure caused by the weight of rain, snow, ice, or sleet. The stipulation provides that the damage was "due to the build-up of water underground and water pressure underground which emanated from an underground drainage pipe." Under the stipulation, the damage was not caused by the weight of rain, snow, ice, or sleet. The trial court clearly did not err in determining the loss was not covered under the exception contained in exclusion i.

The resolution of this case turns upon the meanings of "flood," "run-off," and "surface water" under exclusion k. The policy provides that "[f]lood means waves, surface water, run-off, tides or tidal water, and the rising out of or overflowing of any body of water, whether or not driven by wind." Under the stipulation, the parties herein agreed that the water which drained through the pipe "was the result of rain or melted snowfall." The trial court determined that the water damage sustained by Georgetowne was a result of "run-off." In order for exclusion k to apply, the water damage suffered by Georgetowne must be from either surface water or runoff, as the other types of water set forth under exclusion k clearly do not apply.

PRINCIPLES OF CONSTRUCTION

[4-7] We recognize the rule that an insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of

such a contract are clear, they are to be accorded their plain and ordinary meaning. *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992); *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991). However, if an ambiguity as to the terms of the contract exists, the contract will be construed against the party who prepared it. *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.*, 238 Neb. 531, 471 N.W.2d 438 (1991). When a clause of an insurance policy can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law. *Thorell, supra*. Further, when an insurer's defense is based upon an exclusionary clause in the policy, the burden is on the insurer to prove facts which bring it within the exclusion. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 188 Neb. 470, 197 N.W.2d 396 (1972).

"SURFACE WATER" DEFINED

[8] Nebraska case law has long held that rain or melted snowfall is considered "surface water." In *Thorell*, 242 Neb. at 62, 492 N.W.2d at 883, the Supreme Court held the following:

> "Surface water," sometimes referred to as "diffused surface water," has been defined in Nebraska law as " ' "[water] which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to and does flow with other waters . . . ." . . . ' "

Accord, *Shotkoski v. Prososki*, 219 Neb. 213, 362 N.W.2d 59 (1985); *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985); *LaPuzza v. Sedlacek*, 218 Neb. 285, 353 N.W.2d 17 (1984); *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984); *Kuta v. Flynn*, 182 Neb. 479, 155 N.W.2d 795 (1968); *Rolfsmeyer v. Seward County*, 182 Neb. 348, 154 N.W.2d 752 (1967). See, also, Restatement (Second) of Torts § 846 at 199 (1979) (defining surface water as "water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake").

[9] The cases in Nebraska also emphasize that the definition of surface water involves the "natural" drainage of such water.

In *Schomberg v. Kuther*, 153 Neb. 413, 427, 45 N.W.2d 129, 137 (1950), the court stated, " 'A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow.' " Accord *Rolfsmeyer, supra*. Surface water is water " 'carried off by surface drainage, that is, drainage independent of a watercourse. . . .' " *Bahm v. Raikes*, 160 Neb. 503, 515, 70 N.W.2d 507, 513 (1955). More recently, the court restated the following rule:

> " ' "Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation. . . ." ' "

Sullivan v. Hoffman, 207 Neb. 166, 170, 296 N.W.2d 707, 710 (1980). Accord *Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962).

"RUNOFF" DEFINED

We do not find the term "runoff" to be so easily defined as the trial court determined. An exhaustive but unsuccessful search of case law in Nebraska and other jurisdictions was made for a definition of runoff, as the insurance policy itself does not provide one. Several Nebraska cases use the term "runoff" without specifically defining it. In these cases, runoff is used in discussions involving the runoff of surface or irrigation waters through natural drainage. See, *Eunice Harrington Investments, Ltd. v. Wallace*, 207 Neb. 373, 299 N.W.2d 174 (1980); *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969); *Wiese v. Klassen*, 177 Neb. 496, 129 N.W.2d 527 (1964); *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962); *Schmutte v. State*, 147 Neb. 193, 22 N.W.2d 691 (1946). These cases tend to import that runoff water is water which flows naturally over the surface of the ground rather than under it and that runoff is just another word for "diffused surface water." However, we can find no Nebraska case which

gives a specific definition of runoff.

[10] In the glossary in 6 Waters and Water Rights at 542 (Robert E. Beck 1991), runoff is defined as that "portion of precipitation that would ultimately reach a stream without human intervention." In 14 The Oxford English Dictionary 279 (2d ed. 1989), "run-off" is defined as

> **1. a.** [t]he amount of water that is carried off an area by streams and rivers after having fallen as precipitation; the water itself; also, water that runs straight off the ground without first soaking into it.
>
> . . . .
>
> **b.** The process or fact of water, or what the water contains, running off from an area; an instance of this; (*N. Amer.*) the period when such a process occurs, esp. the spring thaw.

The Oxford English Dictionary cites and quotes various writings as authority for the definitions it gives, and each of these several quotes uses runoff in such a way as to connote water from rain or snow running over land.

There is, of course, no doubt that the rainwater and snowmelt that flowed off the roof of the structure on the adjoining property was runoff to begin with. There is no doubt that at some point such water ceased to be runoff. The definitions of the term "runoff" do not touch upon the question of when water ceases to be runoff.

[11] Based upon our review of the available law and technical definitions, we find that runoff is merely another term for surface water.

Change of Character of Surface Water or Runoff

The question then arises that if surface water and runoff water are diverted or channeled by an artificial force or manmade device, thereby altering it from its natural course of flow, does the water then cease to be surface water or runoff water? No Nebraska case can be found which addresses this specific question, although other jurisdictions have dealt with the issue.

Georgetowne cites *Ferndale Dev. v. Great Am. Ins. Co.*, 34 Colo. App. 258, 527 P.2d 939 (1974), wherein a water main

broke, resulting in water damage to an insured's property. While *Ferndale Dev.* involves the channeling of water through an artificial device, we find this case and other cases to which Georgetowne cites inapplicable because the water in *Ferndale Dev.* and the other cases originated from controlled bodies of water rather than from surface water or runoff water, e.g., from rain or melted snowfall.

Particularly relevant and factually similar to the case at bar is *Heller v. Fire Ins. Exchange*, 800 P.2d 1006 (Colo. 1990), upon which Georgetowne principally relies. In *Heller*, the insureds claimed damages pursuant to their policy after discovering that spring snowmelt had caused extensive water damage to their home. The spring runoff, which in previous years had caused no damage, had been diverted from its natural flow and channeled through manmade trenches on neighboring property. The insurance company denied coverage on the basis of a "water damage" exclusion provision, which defined water damage as " 'flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether driven by wind or not.' " *Id.* at 1007-08. After their claim for damages was denied, the insureds brought suit against the insurance company. A jury entered a verdict for the insureds. The Colorado Court of Appeals reversed, ruling that because the spring runoff was "surface water," it was excluded from coverage, regardless of the fact that the water was diverted to the insureds' property by the negligent or intentional acts of a third party.

The Colorado Supreme Court reversed the court of appeals and reinstated the jury verdict. In so doing, the court held the following:

> Here, the water originated from natural runoff of melted snow, but was diverted into man-made trenches that were fifteen to twenty feet long and six inches deep. The trenches diverted the regular path of the melted snow over a natural ridge. These trenches were "defined channels" that diverted the regular flow of the water, preventing "percolation, evaporation, or natural drainage." In examining the characteristics of the water that damaged the Hellers' property, we conclude that the

> runoff lost its character as surface water when it was diverted by the trenches and therefore was not within the surface water exclusion contained in the Hellers' policy.

Id. at 1009.

The Texas Court of Civil Appeals has also determined when water ceases to be characterized as surface water. In *Transamerica Insurance Company v. Raffkind*, 521 S.W.2d 935 (Tex. Civ. App. 1975), homeowners suffered damage to the interior of their house and to their furnishings when surface water seeped into the ground and entered subsurface air conditioning and heating ducts. As a result, the former surface water circulated as vapor into the home. The appeals court affirmed the trial court's judgment for the homeowners and held that the definition of "surface water" under the flood exclusion in the homeowners policy meant natural precipitation which fell on and passed over the ground's surface until it either evaporated, was absorbed by the ground, or reached channels in which water naturally flows.

We state the obvious when we observe that the water in this case was not "surface" water because it was carried by a drainage pipe 4 feet beneath the ground's surface. We also observe that the likelihood is obvious that the damage sustained by Georgetowne's retaining wall would more readily occur from water diverted through an underground drainage pipe measuring 80 to 100 feet in length, as opposed to the rain or snowmelt flowing in its natural course or diffused state. See *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992). Exclusion k does not apply to Georgetowne's claim for damages, because the water causing the damage ceased to exist as surface water or runoff once it was channeled through the pipe. See *Heller, supra*. Fidelity asserts that there is no distinction under the terms of the policy between artificial and natural causes of flooding and that none should be drawn on this appeal. However, based on the above-cited case law construing the term "surface water" as water diffusing naturally over the ground, as well as our holding that, by definition, runoff is the same as surface water, we find as a matter of law that the terms as used in the policy are restricted to surface waters and runoff waters which flow naturally. We

therefore reverse the order of the trial court dismissing Georgetowne's petition and remand the cause with directions to enter judgment for Georgetowne for the stipulated damages, along with attorney fees incurred in that court. We also award Georgetowne $3,200 for the services of its attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

RONALD SINN, APPELLANT, V. CITY OF SEWARD, A CITY OF THE FIRST CLASS, ET AL., APPELLEES.

523 N.W.2d 39

Filed October 18, 1994. No. A-93-025.

1. **Motions for New Trial: Time: Appeal and Error.** A notice of appeal must be filed within 30 days of the rendition of a judgment. However, a motion for new trial, filed within 10 days of the rendition of judgment, tolls the running of time for filing the notice of appeal.
2. **Judgments: Records: Appeal and Error.** The mere oral pronouncement of a judgment without an entry on the trial docket is not the rendition of judgment and does not set the clock for appeals.
3. **Judgments: Records.** In the absence of a trial docket notation, judgment is rendered when some written notation is made and filed in the records of the court which becomes the equivalent of the notation on the trial docket.
4. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, 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.
5. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.
6. **Demurrer: Pleadings.** In ruling on a demurrer, 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.
7. **Constitutional Law: Due Process: Property.** The 14th Amendment to the U.S. Constitution prohibits the taking of property without due process.
8. **Constitutional Law: Employer and Employee.** With respect to employment, there is a protected property interest in employment when the employee has a legitimate claim of entitlement to continued employment.

9. _____: _____. An employee has no protected property interest in an expected salary raise.
10. **Constitutional Law: Public Officers and Employees.** A grievance filed by a public employee must involve matters of public concern, rather than private concern, so as to be entitled to First Amendment protection.
11. **Employer and Employee: Discrimination.** The major focus of Neb. Rev. Stat. § 20-148 (Reissue 1991) is to provide a civil action for recovery for private acts of discrimination by private employers.
12. **Municipal Corporations: Contracts: Claims: Time.** Under Neb. Rev. Stat. § 16-726 (Reissue 1991), a contract claim against a city of the first class must be filed within 90 days of the accrual of the claim in the office of the city clerk.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Jerry L. Pigsley, of Harding & Ogborn, for appellees.

SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges.

SIEVERS, Chief Judge.

This matter is before us upon Ronald Sinn's appeal after the district court for Seward County sustained the demurrer to his third amended petition and dismissed the case. The issues presented are, first, whether Sinn timely perfected his appeal; second, whether the third amended petition was subject to the demurrer; and third, even if so, whether leave to amend should have been granted.

ALLEGATIONS OF THIRD AMENDED PETITION

We summarize the allegations of the third amended petition as follows: The first paragraph of the third amended petition alleges that the action is brought pursuant to 42 U.S.C. § 1983 (1986), 42 U.S.C. § 1988 (1989), Neb. Rev. Stat. § 20-148 (Reissue 1991), and "[for] breach of contract." Sinn works for the City of Seward in the waste water department and has done so since 1981. The individually named defendants are the city administrator of Seward and four city council members. The estate of Fred J. Welsh is named as a defendant "as a claim based on this action has been filed in the County Court of Seward County in PR 92-01." On November 30, 1989, Sinn "filed a grievance contesting his rate of pay, salary grade, and classification," but alleges that such grievance "was denied by

Mayor Fred Welsh." Sinn requested a hearing before the city council, but alleges that all the defendants and Mayor Welsh refused "to process the plaintiff's grievance." Sinn alleges that he filed another grievance on January 22, 1991, and received a negative response from the city administrator. However, prior thereto, in July 1990, Sinn, along with other unnamed employees, filed a petition with the Commission of Industrial Relations (CIR) alleging a dispute as to "wages, terms, and conditions of employment." The CIR granted the City of Seward's motion to dismiss on November 1, 1990, finding that "there is no allegation or evidence of the existence of an industrial dispute." No appeal was taken from this determination. During the pendency of the CIR action, Sinn was notified that the salary increase approved by the defendants on July 23, 1990, would be frozen for 1 year or until further notice. Sinn alleged that his increase for the 1990-91 fiscal year would have been $1,086.80. The city administrator indicated to Sinn that the city had elected to freeze wages for nonappointed employees in the waste water and water departments as a result of unexpected litigation costs incurred by the city in the CIR proceeding, causing the city to have insufficient funds with which to pay increases to waste water and water employees, including Sinn.

Sinn alleges that the actions of the defendants constituted a taking of $41.80 per pay period from his salary which was accomplished without a hearing or notice to him and in retaliation for his association with other employees who brought suit in the CIR to litigate the issue of their pay and treatment by the city "which is of public concern." Sinn alleges that the actions of the defendants are for the purpose of prohibiting and discouraging Sinn from associating with others about policies, wages, hours, and conditions of employment.

Sinn alleges a Fifth Amendment right to a hearing regarding the wage freeze. He also alleges that his civil rights under § 20-148 have been denied by the taking of his money without notice or hearing, contrary to article I, § 3, of the Nebraska Constitution, and that such taking is in retaliation for his exercise of his right of association as guaranteed by the 1st and 14th Amendments to the U.S. Constitution and by the

Constitution of the State of Nebraska.

The third amended petition further alleges the existence of a personnel manual setting forth a grievance procedure which allows an aggrieved employee to protest salary decreases and that on January 22, 1991, Sinn filed "a grievance contesting the taking of his money." The third amended petition alleges that under Seward city ordinance § 2-101, the Finance, Audit, Budget, and Personnel Committee handles employee grievances as a fact finder and reports to the full city council for final determination, but that the defendants refused to comply with § 2-101 and denied Sinn a factfinding hearing and a hearing before the full city council. The prayer of the third amended petition asks for a finding that the defendants had violated Sinn's civil and due process rights by denying him his property in violation of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. Sinn also alleges the denial of his First Amendment right of freedom of expression and association. Sinn alleges that he has suffered actual damages from lost pay in the past and in the future. Sinn also claims entitlement to punitive damages and to attorney fees under 42 U.S.C. § 1988.

The foregoing represents an attempted distillation of Sinn's 14-page, 51-paragraph third amended petition. This petition also has pleadings attached from the action before the CIR.

PROCEDURAL HISTORY

On August 11, 1992, the defendants demurred to the third amended petition for the reasons that it did not state facts sufficient to constitute a cause of action, the court had no jurisdiction over the subject matter, and the court had no jurisdiction over the estate of defendant Welsh. The demurrer included a notice of hearing for August 31. Thirty minutes after the appointed hour, the court took up the demurrer of the defendants, reciting that Sinn did not appear in person or by counsel. After hearing argument from the defendants, the trial court stated on the record:

> [D]efendants' demurrer to plaintiff's third amended petition should be and is sustained. Third amended petition is dismissed *with prejudice*. I'm going to take the

> application for attorney fees under advisement. . . . I do want to study that a bit further. But to that extent if you want to prepare an order and send it to me, I'll entertain it accordingly.

(Emphasis supplied.)

No trial docket is included within the transcript before this court; however, the "Judge's Notes," which does not bear a file stamp of the clerk of the court, is dated August 31, 1992, and has a date of service upon counsel of September 1, 1992. The document states: "Defendants' demurrer argued and sustained in open court. Plaintiff's third amended petition is dismissed *without prejudice*. Application for attorney's fees reserved and taken under advisement. Clerk will please notice." (Emphasis supplied.)

On September 2, the trial court signed a 7-page document entitled "Findings and Order" which was file stamped by the clerk of the district court that same day. This document sets forth the ruling that "the Defendants' Demurrer should be sustained and the Plaintiff's Third Amended Petition should be dismissed *with prejudice*." (Emphasis supplied.) The trial court made a specific finding denying Sinn another opportunity to amend the petition, since "no reasonable possibility exists that Plaintiff will, by amendment, be able to state a cause of action."

On September 11, Sinn filed a motion for new trial asking the trial court to set aside and vacate its order of September 2. The district court held a hearing on this motion on October 26, at which time the trial court observed on the record that the first order of dismissal was without prejudice, and

> to that extent the order that was prepared and forwarded [September 2] changes that to read with prejudice. I think that's a — that's a modification of my previous order and for purposes of extending the statute of limitations I think extends it then another day. I'm going to find the motion for new trial is timely made.

However, on December 7, the district court signed and filed an order finding that the motion for new trial was filed on the 11th day after the rendition of the court's decision and therefore it was "filed out of time and, therefore, ineffectual and a procedural nullity under Neb. Rev. Stat. § 25-1143 (Reissue

1989). Plaintiff's motion for new trial must be and is hereby overruled." The court also denied the defendants' application for attorney fees in the order of December 7. Sinn perfected an appeal to this court within 30 days of December 7.

IS SINN'S APPEAL TIMELY?

This court previously overruled, without opinion or explanation, a motion by the defendants for summary dismissal made on the basis that we lack jurisdiction because of the alleged failure of Sinn to timely perfect an appeal. The defendants renew the argument that the motion for new trial was filed out of time, making the notice of appeal filed January 5, 1993, untimely, which would mean that this court was without jurisdiction.

[1] Clearly, the discrepancies between pronouncements from the bench, signed but not filed orders, and filed orders which infect this case are unfortunate. Nonetheless, we conclude that "rendition" of judgment is the key to the jurisdictional issue. The clock begins ticking for appeal purposes after there has been "rendition" of a final judgment, and the appeal must be filed within 30 days thereof, unless a motion for new trial, filed within 10 days of the rendition of the judgment, interrupts the running of the 30 days. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992).

[2,3] On August 31, 1992, there was an oral pronouncement from the district court sustaining the demurrer and dismissing the petition with prejudice. However, the mere oral pronouncement of a judgment without an entry on the trial docket is not the rendition of judgment, *Fritsch v. Fritsch*, 191 Neb. 29, 213 N.W.2d 445 (1973), and thus does not set the clock for appeals. There is no trial docket in this record, but it has been held that, in the absence of a trial docket notation, judgment is rendered when some written notation is made and filed in the records of the court which becomes the equivalent of the notation on the trial docket. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). The written but unfiled "Judge's Notes" of August 31 and a pronouncement from the bench on that date were insufficient to constitute

rendition of judgment. However, on September 2, 1992, there was a written and filed order. The written order of September 2 was consistent with the oral pronouncement of August 31 in that the dismissal was with prejudice.

We hold that judgment was not rendered in this case until September 2, and thus Sinn's motion for new trial filed on September 11 was timely. Therefore, the conclusion of the trial court that the motion for new trial was out of time is in error. The appeal was timely filed, and therefore we turn to Sinn's assignments of error.

ASSIGNMENTS OF ERROR

Sinn alleges that the trial court erred in sustaining the demurrer for failure to state a cause of action and that the court erred in failing to allow him to file an amended petition.

ANALYSIS

[4-6] The Nebraska Supreme Court has recently set forth the "roadmap" for consideration of demurrers in *Hoiengs v. County of Adams*, 245 Neb. 877, 882, 516 N.W.2d 223, 230-31 (1994):

> In considering a demurrer, a court must assume that the pleaded facts, 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. *DeVaux v. DeVaux, ante* p. 611, 514 N.W.2d 640 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).
>
> A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Wheeler, supra*; *Schieffer, supra*.
>
> In ruling on a demurrer, 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. See, *Wheeler, supra*; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

Although the third amended petition is inartfully drawn, short on facts, and replete with conclusions, we nonetheless believe that we can discern therein four different matters which we consider on the question of whether Sinn has stated a cause of action. They are (1) that there was a taking without due process in violation of the 14th Amendment to the U.S. Constitution of the raise which Sinn had been granted; (2) that the defendants abridged Sinn's right to freely associate and express himself (in the context of his filing with coemployees the action before the CIR) by withdrawing his previously granted raise as retaliation; (3) that there is a cause of action under § 20-148 because the defendants took Sinn's raise without a hearing in retaliation for the exercise of his rights of association and free expression in the context of his grievance and CIR filings; and (4) that the defendants violated the employee handbook provisions concerning grievance procedures by failing to give Sinn a hearing on his grievance protesting the taking of his raise, which constituted a breach of contract, as did the failure to receive the raise.

Sinn's third amended petition prays for a finding of a violation of the civil rights guaranteed to him, as well as for damages, including punitive damages under 42 U.S.C. § 1983; for attorney fees under 42 U.S.C. § 1988; "and for such other and further relief as the Court deems just and equitable."

Taking Without Due Process.

The property which has been allegedly "taken" in this case is a raise in pay. However, Sinn does not allege that he actually had started receiving this raise. We read his allegations to be that he would have started receiving the raise but for the salary freeze for waste water and water department employees. The third amended petition does not allege a starting date for the raise and a freeze date thereafter. We also observe that the allegations of plaintiff's third amended petition are not specific with respect to the contents of his November 30, 1989, grievance. Sinn alleges that his grievance filed January 22, 1991, contested

the "taking of his money," presumably referencing the salary freeze.

[7,8] The 14th Amendment to the U.S. Constitution prohibits the taking of property without due process. With respect to employment, there is a protected property interest in employment when the employee has a legitimate claim of entitlement to continued employment. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). See, also, *Johnston v. Panhandle Cooperative Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987) (holding that for due process purposes under Neb. Const. art. 1, § 3, an at-will employee has no reasonable expectation of continued employment, or legitimate claim of entitlement to it and thus has no property interest). However, the instant case does not involve the termination of employment, but merely the denial of Sinn's expectation of a pay raise, which is clearly less significant than the loss of a job. The question is whether such an expectation is a property interest protected by the 14th Amendment. We bear in mind that the U.S. Supreme Court has stated that the federal courts are "not an appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

In *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983), a sheriff announced, pursuant to a local ordinance, that his deputies who worked overtime would be able to take off compensatory time. However, the "comp time" accrued faster than the sheriff could allow it to be taken without endangering public safety, as the county board failed to appropriate money to hire additional deputies. The deputies contended that they had a property right in the "comp time" once they had put in overtime. The circuit court stated several times that it "doubted" that there was a property interest involved. The court rejected the deputies' claim that they were entitled to a predeprivation hearing and noted that they could obtain the same relief in a state court breach-of-contract suit. The deputies' constitutional claim was turned away with the reasoning that "it may even be doubted whether any deprivation in the constitutional sense has yet occurred, or will occur unless and until the state courts turn down a meritorious contract claim." *Id.* at 366. The court in

Brienen stated: "But the Constitution must not be trivialized by being dragged into every personnel dispute in state and local government. Disputes over overtime, over work assignments, over lunch and coffee breaks do not implicate the great objects of the Fourteenth Amendment." 722 F.2d at 365.

[9] Sinn's counsel has cited no case to us where there has been a finding of a taking in a constitutional sense when a public employee did not receive a future raise he expected, or was promised, as is allegedly the case here. We have not found any case where the denial of an expected raise was successfully litigated as a constitutional deprivation under 42 U.S.C. § 1983.

In *New York City Managerial Employees Ass'n v. Dinkins*, 807 F. Supp. 958, 973 (S.D.N.Y. 1992), an action contesting, on constitutional grounds, salary cuts and freezes imposed on city employees by a mayoral order, the court summarily rejected the plaintiffs' due process claims, saying:

> Simply put, there is no due process violation because plaintiffs and other managers have no legitimate claim of entitlement to a particular salary increase, and because, in any event, defendants' salary actions constitute a type of legislative classification that the courts consistently have held does not give rise to a due process violation.

A salary differential granted to Virginia State Police officers in one of seven geographic regions in the state was alleged to be a denial of due process and the basis for a claim under 42 U.S.C. § 1983 for those not receiving the differential in *Eldridge v. Bouchard*, 645 F. Supp. 749 (W.D. Va. 1986). The court grounded its rejection of the due process claim on the lack of an "existing entitlement" of the plaintiffs to receive the differential, characterizing it as only a "desire to receive it." *Id.* at 756-57. The *Eldridge* court cited *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), for the principle that due process protection is accorded to already acquired and existing specific benefits. In the case at bar, the third amended petition alleges only that the city budgeted a raise for a coming fiscal year which was frozen when litigation costs, allegedly due to the CIR litigation, left the City of Seward with "insufficient funds this Fiscal year with which to provide

pay increases to Wastewater and Water employees," quoting from the city administrator's memorandum of January 25, 1991, which is appended to Sinn's third amended petition.

By analogy, we have also looked at cases involving physicians where the denial of hospital privileges, alleged to impact earnings, is alleged as an unconstitutional taking. However, it has been held that the expected economic value of staff privileges does not create a property interest in those staff privileges. See, *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991); *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir. 1990).

Of similar import is *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), holding that there is no protected property interest in a security clearance enabling one to work at a government job or a private industry job requiring such clearance. See, also, *Board of Regents v. Roth, supra* (holding that in order to have a constitutionally protected property interest in a government benefit, a person must have a legitimate claim of entitlement to it, not just an abstract need or desire for it, or a unilateral expectation of it). However, we bear in mind that *Roth* is a case involving the termination of employment itself, not merely a dispute over pay or working conditions.

Under the facts alleged here, we find that Sinn has not alleged a property interest in the expected raise so as to generate 14th Amendment due process protections.

Freedom of Association and Speech.

In the third amended petition, Sinn alleges that the actions of the defendants "prohibit," "discourage," "curtail," and "chill" his right to "organize and associate with other employees . . . for the purpose of expressing his views regarding city policy and thus takes away and prohibits plaintiff's constitutional right to associate and to express himself." Other than the denial of the raise, there are no factual allegations raising First Amendment concerns which satisfy the factual specificity requirement of *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). Accordingly, we deal only with Sinn's claim of denial of his rights of association and free speech in the context of his actions allegedly taken to remedy

the denial of his raise.

We begin our analysis with *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Myers was an at-will employee working as an assistant district attorney in New Orleans on the staff of Harry Connick, the district attorney for Orleans Parish. Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court, but she was strongly opposed to the proposed transfer, a view she expressed to her supervisors, including Connick. In the course of discussing her opposition to the transfer with one of her supervisors, a number of other office matters were discussed, but her transfer remained in effect. Myers then prepared a questionnaire soliciting the views of other staff members on office transfer policy, office morale, the need for a grievance committee, the level of competence of the supervisors, and whether employees were pressured to work in political campaigns. After preparing the questionnaire, Myers met with Connick, who urged her to accept the transfer, and she said she would "consider" it. Myers then distributed her questionnaire to 15 assistant district attorneys, and when Connick was informed of her actions, he terminated her employment because of her refusal to accept the transfer. Connick also told Myers that her distribution of the questionnaire was considered an act of insubordination. Myers filed suit under 42 U.S.C. § 1983 contending that her employment was wrongfully terminated in retaliation for the exercise of her constitutionally protected right of free speech.

The trial court agreed and ordered Myers reinstated. The court found that Myers was fired because of the questionnaire and that Connick had not clearly demonstrated that the questionnaire "substantially interfered with the operations of the District Attorney's office." 461 U.S. at 142. The Supreme Court granted certiorari and began its analysis by quoting from *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), stating that the Court's task was to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 461 U.S. at

140. The Supreme Court disagreed with the lower court's conclusion that the issues presented in the questionnaire related to the effective functioning of the district attorney's office and therefore were matters of public importance and concern.

The *Connick* Court stated that the emphasis in *Pickering*, a case dealing with a high school teacher's public criticism of the board of education for its allocation of school funds between athletics and education, was upon a citizen's right of comment upon matters of public concern and that the decision "reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." 461 U.S. at 143. The Court in *Connick* reminded the reader that it has frequently reaffirmed that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." 461 U.S. at 145.

We believe the following holding from *Connick* provides the necessary standard for determination of whether Sinn's claims concerning abridgment of First Amendment rights of freedom of association and speech are demurrable:

> *Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann, supra*; *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

461 U.S. at 146-47.

Thus, the question in the case at bar is whether the raise of Sinn and his coworkers is a matter of "public concern" so that the grievances filing and the filing of an action before the CIR are protected to the extent that the City of Seward could not lawfully rescind the raise without running afoul of the First Amendment. Sinn does allege that a matter of "public concern" was involved, but merely alleging it does not make it so. *Connick* states that whether an employee's speech addresses a matter of public concern must be determined by the context, form, and content of a given statement as revealed by the whole record.

[10] Although Sinn's factual allegations are "thin" at best, we take them to be that he spoke out against the revocation of the raise by filing the grievance of January 22, 1991, as well as the CIR petition; that he associated with others of like mind; and that for these actions, he lost his raise. However, we are of the view that the amount of pay to be received by Sinn, the hours he works, and his job classification are matters of *private concern* between him and the City of Seward and are not subject to judicial intervention, at least in the guise of the First Amendment.

In *Hoffman v. Mayor, Councilmen & Citizens of Liberty*, 905 F.2d 229 (8th Cir. 1990), a former police detective brought a 42 U.S.C. § 1983 action because he had been rehired to a lower position after a successful grievance filing which voided his firing. When hired back as a result of the grievance review board's mandate, he was placed as a property control officer, was no longer eligible for pay increases, could not work overtime, was not permitted to wear the uniform of an officer, and was even advised that he need not attend monthly police department meetings. The plaintiff in *Hoffman* premised his claim on the ground that his diminished status upon rehiring was in retaliation for his grievance filing and that as a result, his First Amendment rights of speech and petition were violated. In *Hoffman*, the Eighth Circuit Court of Appeals set forth a convenient framework for the analysis of First Amendment concerns in discharge cases:

1) did the employee show that he or she did something

> which was speech touching upon public concern thereby making it protected activity; 2) if yes, did the employee then show that the protected activity was a substantial or motivating factor in the employer's action against the employee; and 3) did the employer show that it would have taken the same action absent the protected activity?

905 F.2d at 233.

The Eighth Circuit relied upon *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), for the threshold test as to whether Hoffman's grievance touched upon a matter of public concern and found that it did not, as his dismissal, rehiring, and placement were wholly personal. The court recited that Hoffman did not raise issues of favoritism, corruption, or misfeasance in which there might be said to be a general public interest. The court also rejected Hoffman's claim that the very act of his filing a grievance over his discharge was a matter of public concern. Hoffman argued that the treatment he received after his successful grievance would chill the rights of others to file grievances. The court rejected the superficial appeal of that argument, reasoning that with or without a grievance procedure, Hoffman could have engaged in conduct which touched a matter of public concern for which he could not be rebuked by the city. However, Hoffman did not do so. The court concluded by stating, "The conduct on which he attempts to make a first amendment claim is only a personal grievance filing in which the public had no interest. Hoffman raised only his own concerns; that he did so in a formal grievance filing does not transmute his concerns into public concerns." 905 F.2d at 234.

Here, review of Sinn's CIR petition, which is attached to the third amended petition, reveals only an employee's disgruntlement with the results of a comparability study which the City of Seward used to make classifications of employees and set wages, hours, and conditions. The CIR petition, filed July 31, 1990, also complains of inadequate compensation in the past for Sinn and his similarly situated coworkers. This petition was dismissed because of the lack of an industrial dispute. Jurisdiction of the CIR is over industrial disputes; it has no authority to adjudicate constitutional rights or hear

cases involving breaches of contract. *Nebraska Pub. Emp. v. City of Omaha*, 235 Neb. 768, 457 N.W.2d 429 (1990).

The premise of Sinn's third amended petition is a claim for damages because his constitutional rights under the First Amendment of speech and assembly have been violated. The matter of his wages, job classification, and hours seems to us to be uniquely a private concern between Sinn and his employer. The petition alleges absolutely nothing which would make this of public concern, which is the requirement from *Connick v. Myers, supra*, before the protections of the First Amendment are implicated. This is true whether we consider Sinn's actions to be speech, assembly, petition, or some combination thereof.

We are unable to distinguish the instant case in any meaningful sense from *Crain v. St. Louis Board of Police Commissioners*, 920 F.2d 1402, 1411 (8th Cir. 1990), where the Eighth Circuit found that a police officer's complaints concerning the police board's sick-leave policy "were merely personal grievances attacking internal departmental policy and accordingly did not involve protected speech." In *Crain*, the employee had argued that his criticisms involved matters of significance to his family and all relatives of police officers. The court rejected this argument, saying:

> Although this may be true, it does not serve to convert his personal grievances into a matter of public concern. Any management decision, e.g., a size of a salary increase or the number of company holidays, affects the employees and their families; this is decidedly not the proper test for determining what speech implicates a matter of public concern.

Id. Sinn's third amended petition alleges no cause of action arising under the First Amendment.

§ *20-148 Remedies.*

A portion of Sinn's third amended petition, designated as "Count Three," alleges that the individual defendants have denied his constitutional rights under § 20-148 by taking "his money without notice or hearing contrary to the Constitution of the State of Nebraska Article I Section 3, and the U.S. Constitution." He also alleges within this "count" that the

defendants have violated his right of association under the 1st and 14th Amendments by taking his salary as retaliation for the exercise of his rights. Having dealt with the First Amendment claims, we now deal with the allegations in the third amended petition as premised on § 20-148. That statute provides in relevant part:

> Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

The plain language of the statute excludes political subdivisions from its operation, and thus, the trial court's ruling on "Count Three" as to the city is obviously correct. The demurrer was also sustained as to "Count Three" with respect to the individual defendants and the estate of Welsh. The Nebraska Supreme Court has discussed this statute and narrowed the scope of the statute from what might appear from the statutory language. *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984), involved a certified question from the federal court as to whether the state had waived its sovereign immunity for actions brought in federal court under 42 U.S.C. § 1983 to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the 14th Amendment. The court held that § 20-148 did not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 to protect rights under the contract clause and property interests protected under the 14th Amendment.

In *Wiseman*, the Supreme Court discussed the legislative history of § 20-148, stating:

> The legislative history of § 20-148 indicates that the major focus of the statute was to wipe out private acts of discrimination by private employers, thus excluding the state. Judiciary Committee Hearing, L.B. 66, 85th Leg.,

> 1st Sess. (Jan. 18, 1977).
>
> Further support for this conclusion is found in other statutes passed by the Nebraska Legislature which specifically provide the state is subject to suit only under certain circumstances. See, e.g., Neb. Rev. Stat. §§ 24-319 (Reissue 1979), 25-1012.01 (Cum. Supp. 1984), 81-8,209 (Reissue 1981), 48-1126 (Supp. 1983), and 48-1227.01 (Supp. 1983).

218 Neb. at 721, 358 N.W.2d at 771.

[11] Although we read *Wiseman* to suggest that the sweep of § 20-148 is limited to private acts of discrimination, presumably of a constitutional dimension, by private employers, the Eighth Circuit Court of Appeals has gone further in *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992), a case involving a suit by employees alleging that their termination for failing drug tests violated their employment contracts, as well as state and federal constitutional and statutory provisions. The plaintiffs in *Ritchie* alleged a cause of action against their private employer using § 20-148. The circuit court agreed with the district court's conclusion that § 20-148 did not apply to drug testing by private employers for several reasons:

> [P]erhaps most importantly, the statute's legislative history indicates that its purpose was limited. Summarizing Section 20-148, its sponsor explained that "[t]he bill is designed to allow people who have complaints of discrimination to go into court rather than being compelled to go only through the Equal Opportunity Commission." Floor Debate, L.B. 66, Judiciary Committee, 86th Leg. 1st Sess. 434-35 (Feb. 11, 1977). Thus, the intent of section 20-148 is to allow plaintiffs to bypass the time-consuming administrative procedures of the Equal Employment Opportunity Commission. This legislative history demonstrates that the statute does not sweep as far as it first appears. Indeed, section 20-148 merely usurps the jurisdiction of the EEOC, which by statute already entertains claims charging private discrimination. Conversely, no analogous state or federal statute reaches the private search and seizure involved here.

963 F.2d at 1122-23.

"Count Three" of Sinn's third amended petition does not allege a private act of discrimination by a private employer. Instead, it alleges the revocation of a raise by individuals acting in their capacities as public officials. There are no allegations of facts in "Count Three" stating a cause of action under § 20-148. The district court did not err in sustaining the demurrer as to "Count Three."

Breach of Contract and Grievance Procedure.

[12] "Count Four" of the third amended petition contains an allegation at paragraph 50 as follows: "That the plaintiff further states that the actions of the defendants by taking his salary and denying him a hearing violates his contractual rights and constitute a breach of that agreement." We assume that the contract being referenced is the one to allegedly receive a pay raise of $1,086 per year. Neb. Rev. Stat. § 16-726 (Reissue 1991) sets forth the procedure for presentation of liquidated and unliquidated claims against a city of the first class and contains therein the provision that for other than a tort claim, "the claimant shall file such claim within 90 days of the accrual of the claim in the office of the city clerk." There is no allegation in the third amended petition that Sinn filed his claim or grievance concerning the raise with the city clerk of the City of Seward. It is only claimed in paragraphs 12, 13, 17, and 46 of the third amended petition that he "filed a grievance."

The statutory scheme for filing claims against a city of the first class like Seward is set forth in § 16-726, and a subsequent appeal to the district court is provided for in Neb. Rev. Stat. § 16-727 (Reissue 1991). Although these statutes have not been construed in the context presented by this litigation, virtually identical statutes for cities of the primary class were discussed in a relevant context in *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987). In *Andrews*, the city employee filed suit for loss of employment, loss of wages, humiliation, and embarrassment because the city had failed to perform its contract of employment. The district court's judgment in favor of the employee was reversed by the Supreme Court, which found that the city employee's failure to file his contract claim

with the city clerk deprived the district court of the power to decide whether the claim was meritorious. The Supreme Court held that Neb. Rev. Stat. § 15-840 (Reissue 1991) prescribes a "procedural prerequisite concerning contract claims, liquidated or unliquidated, against a city of the primary class." 224 Neb. at 751, 401 N.W.2d at 469. Since that prerequisite had not been followed, the district court lacked jurisdiction, that is, the power to adjudicate the merits of Andrews' claim. See, also, *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986) (identical holding for a city of the metropolitan class).

In *Jackson v. County of Douglas*, 223 Neb. 65, 388 N.W.2d 64 (1986), county employees sued the county to recover compensation for a 15-minute unpaid period for which they were required to report prior to work for purposes of conferring with workers on the preceding shift. The trial court sustained a demurrer on the ground that the court lacked subject matter jurisdiction. The Supreme Court affirmed, finding that the failure to comply with Neb. Rev. Stat. § 23-135 (Reissue 1987) (the claim statute against counties) rendered the petition subject to demurrer unless there was some other basis for jurisdiction, which was not found in *Jackson*.

The law is firmly established that after a demurrer is sustained, an opportunity to amend the petition should be given unless there is no reasonable possibility that the plaintiff will, by amendment, be able to state a cause of action. *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (1992). However, in the case at hand, the requirement of § 16-726 that the claim be filed within 90 days of accrual operates as a statute of limitations. See *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990) (holding that a statute requiring that claims against a city of the metropolitan class be filed with comptroller within 18 months operated as a statute of limitations). In the present case, the grievance filed by Sinn on November 30, 1989, concerning regular pay, referenced in paragraph 12 of the third amended petition, and the decision to freeze wages as communicated to Sinn by the city administrator on January 25, 1991, as alleged in paragraph 24 of the third amended petition, reveal that Sinn's claim in those respects is now time barred.

Sinn seeks to claim wages for an unspecified time period

prior to his first grievance of November 30, 1989, which is obviously barred. Paragraph 46 of the third amended petition alleges that "on January 22, 1991, the plaintiff filed a grievance contesting the taking of his money." To avoid the demurrer, Sinn was bound to allege filing with the city clerk within 90 days of accrual of the claim. He has alleged neither, and due to the passage of time, there is no possibility that he can now properly file a contract claim against the city under § 16-726 for his wage claims for 1989, 1990, or 1991. Accordingly, the district court properly sustained the demurrer to Sinn's claim for breach of contract.

Handbook and Grievance Procedure.

"Count Four" of the third amended petition alleges that the City violated specific ordinances which allegedly accord Sinn a hearing on his grievances before the Finance, Audit, Budget, and Personnel Committee or a hearing before the full city council. The consequence of such denial is alleged to be that it "violated his constitutional rights" and constitutes "a breach of that agreement." We believe that "Count Four" fails to state a cause of action. It raises no new matters concerning Sinn's constitutional rights which we have not already discussed. We have already found the absence of a property interest in the raises, as well as an adequate postdeprivation state remedy, which was not followed. We find that the trial court properly sustained the demurrer to "Count Four."

CONCLUSION

The trial court properly sustained the demurrer to the third amended petition and dismissed the case, as there was no reasonable possibility that Sinn could amend and cure the defects we have set forth herein.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN F. COX, APPELLANT.

523 N.W.2d 52

Filed October 18, 1994. No. A-93-1044.

1. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court must look at the statutory objective to be accomplished, the problem to be remedied, or 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.
2. **Criminal Law: Directed Verdict: Evidence.** A motion for directed verdict is properly granted only when there is a complete failure of evidence to establish an essential element of the crime charged or evidence is so doubtful in character, lacking in probative value, that a finding of guilt cannot be supported by the evidence.
3. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
4. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
5. **Indictments and Informations: Motions to Suppress: Courts: Double Jeopardy.** Neb. Rev. Stat. § 29-827 (Reissue 1989) permits the State to dismiss a charge filed against a defendant in a county court and to refile the same charge in district court after an order of the county court has sustained the defendant's motion to suppress evidence, provided that the defendant has not been placed in jeopardy at the time of the dismissal.
6. _____: _____: _____: _____. Neb. Rev. Stat. § 29-827 (Reissue 1989) does not define an appeal procedure, but is merely a codification of the right of the State to dismiss a charge and refile it, in the same court, or another, provided jeopardy has not attached.
7. **Motions to Suppress: Courts.** Neb. Rev. Stat. § 29-827 (Reissue 1989) permits the State to obtain an interlocutory review of a ruling on a motion to suppress which has been sustained in an inferior court.
8. **Statutes: Legislature: Intent.** When a court must interpret a statute that is in a series or collection all relating to a certain subject matter, these statutory components are in pari materia and may be considered conjunctively in determining the Legislature's intent.
9. **Statutes.** A clause, paragraph, or provision in a section should be construed in connection with all other clauses, paragraphs, and provisions in the same and other sections of the statute connected therewith or relating thereto.
10. _____. Where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning.
11. **Courts: Jurisdiction.** A district court has original jurisdiction in all matters civil and criminal except where otherwise provided.
12. **Criminal Law: Courts: Jurisdiction.** A county court has concurrent original

jurisdiction with the district court in any criminal matter classified as a misdemeanor.

13. **Courts: Jurisdiction: Motions to Dismiss: Evidence.** The county court order transferring jurisdiction of property to the district court in conjunction with a county court dismissal under Neb. Rev. Stat. § 29-827 (Reissue 1989) addresses jurisdiction over property, and not subject matter jurisdiction.
14. **Criminal Law: Directed Verdict: Waiver: Convictions: Appeal and Error.** If a defendant in a criminal prosecution, upon the overruling of a motion for directed verdict, proceeds with the trial and introduces evidence, he waives the appellate right to challenge the correctness of the trial court's overruling the motion, but may challenge the sufficiency of the evidence for the defendant's conviction.
15. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior, even though there is no probable cause to make an arrest.
16. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.
17. **Police Officers and Sheriffs: Investigative Stops.** The purpose of an investigative stop is to clarify ambiguous situations. Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, the police must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.
18. **Motor Vehicles: Investigative Stops: Probable Cause.** A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping the vehicle for investigation regarding the driver's condition in operating the weaving vehicle.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

David E. Veath for appellant.

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

IRWIN, MILLER-LERMAN, and MUES, Judges.

MUES, Judge.

Calvin F. Cox was originally charged in Box Butte County Court with operating a motor vehicle while under the influence of an alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). Upon the county court's sustaining of Cox's motion to suppress all evidence obtained as

a result of his arrest, the county attorney dismissed the county court charge and refiled the same charge in Box Butte County District Court. Cox's motion to suppress filed in district court was overruled, he waived a jury, and he was convicted of the charge. Cox appeals from the judgment of conviction of the district court. We affirm the conviction.

PROCEDURAL FACTS

The information was filed in the Box Butte County District Court on July 30, 1993, following the sustaining of Cox's motion to suppress by the Box Butte County Court on July 27, 1993. The county judge's order suppressed all evidence obtained as a result of the "stop and seizure" of Cox, most notable being the results of blood alcohol testing. A hearing on Cox's motion to suppress in district court was held, at which time Cox's counsel urged the court to take into consideration the ruling of the county court, arguing that the district court procedure was merely a "review hearing" to determine whether the county court decision was "clearly wrong." The district court rejected that approach and determined to handle the proceeding as an original action filed in that court. Cox's motion to suppress was overruled, and the matter proceeded to trial.

During trial, Cox objected to the admission of the blood test results. He also moved for a directed verdict at the close of the State's case. Both the objection to evidence and the motion for directed verdict were grounded on Cox's contention that certain provisions of Neb. Rev. Stat. § 29-827 (Reissue 1989) had not been complied with. The court received the test results over Cox's objection and overruled the motion for directed verdict. Cox presented evidence. During his closing statement, Cox's counsel "renew[ed]" his "Motion to Dismiss" on "jurisdictional grounds." The district court found Cox guilty of violating § 39-669.07. This appeal followed.

FACTS

On May 7, 1993, at approximately 1:05 a.m., Officer Eric Smithgall, a police officer in Alliance, Nebraska, observed Cox's vehicle back out of a parking space and proceed southbound on Box Butte Avenue. Slightly farther south on

that road, there was a pickup truck stopped in the southbound lane. Cox claimed that as he approached the pickup, the driver motioned for him to drive around the truck. Cox passed the pickup by driving his car left of the centerline and then returned to the proper lane and continued southbound. Smithgall testified that as Cox passed the truck, he did not appear to slow down or stop, and it was Smithgall's opinion that Cox failed to use "due caution." Smithgall similarly passed the truck and continued to follow Cox's vehicle as it completed a U-turn in the road and headed back north. Smithgall observed that Cox's car was weaving in the lane and swerving side to side for approximately two blocks. At that time, Smithgall activated his overhead lights and stopped Cox's vehicle. Smithgall testified that he stopped the vehicle because he believed Cox committed a violation by driving left of the centerline, was not driving with due caution, and was swerving in his lane for two blocks.

When Smithgall approached Cox in his vehicle, he detected an odor of alcohol on Cox's breath and noticed that Cox's eyes were watery and his face was "flush." Smithgall asked Cox if he had been drinking that evening, and Cox responded by admitting that he had had a few beers. At that point, Smithgall had Cox perform several field sobriety tests, including the "Rhomberg Maneuver," the "finger to Nose/Earlobe Maneuver," and the walking "heel to toe maneuver," all of which were performed unsatisfactorily. Smithgall then conducted a preliminary breath test which resulted in a breath alcohol content reading of .174 and thereafter placed Cox under arrest for driving under the influence. Smithgall based his opinion that Cox was driving under the influence of alcohol on his visual observations, the odor of alcohol on Cox's breath, and the unsatisfactory performance of the field sobriety maneuvers. Additional field sobriety tests were administered and videotaped at the police department. Cox consented to having a blood test taken by a registered nurse at Box Butte General Hospital.

ASSIGNMENTS OF ERROR

Cox's brief asserts seven assignments of error. We read them as essentially asserting that the district court erred (1) in

receiving evidence of Cox's body fluid alcohol content when the court was without jurisdiction of said property because there was no order from the county court transferring the property to the jurisdiction of the district court, pursuant to § 29-827; (2) in failing to direct a verdict or dismiss the charge for the failure of the State to prove compliance with § 29-827; (3) in failing to dismiss the case "on jurisdictional grounds"; and (4) in failing to sustain his motion to suppress because the arresting officer observed no violations of law prior to stopping his vehicle and was not able to articulate sufficient facts based on the totality of the circumstances to justify the investigatory stop.

SCOPE OF REVIEW

[1] In construing a statute, an appellate court must look at the statutory objective to be accomplished, the problem to be remedied, or 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. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991).

[2] It is well established that a motion for directed verdict is properly granted only when there is a complete failure of evidence to establish an essential element of the crime charged or evidence is so doubtful in character, lacking in probative value, that a finding of guilt cannot be supported by the evidence. See, e.g., *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993).

[3,4] In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992); *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992).

ANALYSIS

§ 29-827.

Cox's first three assignments of error are based upon § 29-827, which provides:

> Where motions to suppress and for the return of seized property are made in courts inferior to the district court in cases involving violations of state laws, the county attorney may give notice to such court that the property in question will be further required as evidence, may then dismiss the action in such court and refile the complaint in the district court. *In its order of dismissal the court shall order transfer of the property to the jurisdiction of the district court.*

(Emphasis supplied.) It is the last sentence of this statute upon which Cox relies to support these assignments of error. His argument, as we understand it, is that there was no showing in the district court that the county court had entered an order transferring "the property" to the jurisdiction of the district court. In this case, the property includes the blood test results. Cox argues that without proof of the order from county court, the district court was "without jurisdiction" over the blood test results, and therefore, the blood test results, over which the court did not have jurisdiction, could not be received into evidence. Brief for appellant at 11. Cox concludes that in the absence of those test results, the State failed to prove its case against him, and moreover, the district court did not have jurisdiction to hear and determine the State's case.

As a preface to our analysis, we note that the record before us does not contain a county court complaint charging Cox with violation of § 39-669.07, the motion of the State to dismiss that charge, or the order of the county court dismissing it. However, it is clear from comments made during trial by both the county attorney and Cox's counsel that this is what occurred. The record does contain an order of the county court of July 27, 1993, sustaining Cox's motion to suppress made in that court. Cox does not argue on appeal that jeopardy had attached before the dismissal in county court. We proceed, then, on the basis that, as in *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988), the State moved to dismiss the county court charge

before jeopardy attached and refiled the same charge against Cox in district court. The county court's order of dismissal is not before us, and thus, we have no record that, in fact, the county court did not issue an order transferring the "property" in this case to the jurisdiction of the district court. Since support for Cox's assigned errors depends upon the language of such an order, we are inclined to summarily dispose of these errors under the well-known principle that it is incumbent upon the party appealing to present a record which supports the errors assigned and that absent such a record, as a general rule, the decision of the lower court is to be affirmed. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). However, since the assigned errors contend that it was the State's burden to prove that an order transferring the property was entered as a prerequisite to admitting the blood test results into evidence and as an element necessary to the State's case and to the jurisdiction of the district court, we will address the assignments under the assumption that no such order was entered.

[5,6] Before engaging in a specific discussion of each of Cox's assignments of error that rely upon § 29-827, we believe a review of the effect and purpose of that statute is helpful. On its face, this statute allows a county attorney to dismiss actions originally filed "in courts inferior to the district court," i.e., in county courts, and to refile the complaint in district court "[w]here motions to suppress and for the return of seized property are made" in inferior courts. The Nebraska Supreme Court has held that this statute permits the State to dismiss a charge filed against a defendant in a county court and to refile the same charge in district court after an order of the county court has sustained the defendant's motion to suppress evidence, provided that the defendant has not been placed in jeopardy at the time of the dismissal. *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986). In so doing, however, the *Chamley* court emphasized that this statute does not define an appeal procedure, but is merely a codification of the right of the State to dismiss a charge and refile it, in the same court, or another, provided jeopardy has not attached.

[7] In *State v. Dail*, 228 Neb. at 657, 424 N.W.2d at 102, the Supreme Court characterized this statute as permitting the

State to obtain an "interlocutory review of a ruling on a motion to suppress" which has been sustained in an inferior court. In *Dail*, the Supreme Court recognized that there was a specific statutory procedure which allowed for an interlocutory review of decisions of the *district* court sustaining a defendant's motion to suppress, but that this statute did not apply to a county court's sustaining of such a motion, and that § 29-827 was the only statute addressing such interlocutory review of a motion to suppress in county court.

Thus, the interlocutory review envisioned by § 29-827 does not involve an *appeal* to the district court from the county court's ruling on the motion to suppress, but, rather, anticipates the total dismissal of the county court charges, provided jeopardy has not attached, and refiling the case in district court. At that point, if the defendant desires to file another motion to suppress, it will be determined in the district court independent of the county court's findings. As clarified in *State v. Dail, supra*, the State is not restricted to awaiting a final judgment or final order of the county court and then appealing under Neb. Rev. Stat. § 24-541.01 (Cum. Supp. 1986) (currently Neb. Rev. Stat. § 25-2728 (Cum. Supp. 1992)), but may proceed, in such circumstances, under § 29-827, provided jeopardy has not attached. Although this procedure is not technically an *appeal* procedure such as the one provided for in Neb. Rev. Stat. § 29-824 (Cum. Supp. 1992), where a motion to suppress evidence has been granted in *district* court and an appeal is taken to a judge of the Court of Appeals, the practical effect of the procedure, as interpreted in *Chamley* and *Dail*, is to avoid the time and expense of obtaining a final order in the inferior court and then appealing the ruling on the motion to suppress to the district court, thus allowing the district court to directly rule on the issues involved in the motion to suppress, provided the defendant chooses to file another such motion in district court. To that extent, it does operate as an "interlocutory review" of the county court's ruling on the motion to suppress. An important factor to keep in mind, however, is the statement in *Chamley* that, in substance, § 29-827 merely "codifies the State's right" to dismiss any charge without prejudice and refile such charge, either in the same, or another, court, providing

that jeopardy has not attached at the time of the dismissal. 223 Neb. at 616, 391 N.W.2d at 100.

Regarding the provision in § 29-827 that the county court's order of dismissal shall contain an order transferring jurisdiction over the property involved in the criminal prosecution to the district court, the Nebraska Supreme Court has not specifically ruled on the purpose for that requirement. In construing a statute, we are bound to the rule that an appellate court must look at the statutory objective to be accomplished, the problem to be remedied, or 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. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991).

[8-10] The Supreme Court has stated that when a court must interpret a statute that is in a series or collection all relating to a certain subject matter, these statutory components are in pari materia and may be considered conjunctively in determining the Legislature's intent. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *Gatewood v. Powell*, 1 Neb. App.749, 511 N.W.2d 159 (1993). A clause, paragraph, or provision in a section should be construed in connection with all other clauses, paragraphs, and provisions in the same and other sections of the statute connected therewith or relating thereto. *Enyeart v. City of Lincoln*, 136 Neb. 146, 285 N.W. 314 (1939). Finally, it is the recognized rule of statutory construction that where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning. *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986).

Section 29-827 appears in a series of Nebraska statutes on criminal procedure entitled "Part II[:] Disposition of Seized Property." Neb. Rev. Stat. §§ 29-818 to 29-829 (Reissue 1989 & Cum. Supp. 1992). This series or collection of statutes, as the title suggests, addresses various rules pertaining to the possession, control, suppression, disposition, and return of property seized in connection with a criminal proceeding. As part of this collection of statutes, it is provided that the court in which a complaint was filed, and where in connection with which complaint the property was or may be used as evidence,

"shall have exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof." § 29-818. This series of statutes also contains a provision that at such time as seized property is no longer required as evidence in the prosecution of any complaint or information, "the court which has jurisdiction of such property may transfer the same to the jurisdiction of any other court" upon a showing that it is required as evidence in any prosecution in such other court. § 29-819. This statutory series also contains a section which speaks to the disposition of seized property when it is no longer required as evidence. § 29-820.

We believe that the obvious purpose of those provisions in the foregoing statutes which define which court has "jurisdiction" over the seized property is to assure safekeeping and custody of the property, as well as identifying which court has the authority, should the issue arise, to dispose of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof. Such provisions also outline a mechanism enabling the physical transfer of seized property from one court to the other (when such a transfer is necessary) and assure accountability for the property.

Section 29-827, consistent with the above series of statutes of which it is a part, which statutes, inter alia, relate to the disposition of seized property, similarly provides that when the county attorney determines to dismiss a county court action and refile the complaint in the district court, he *may* give notice that the property in question will be further required as evidence, and the county court is to order transfer of the property to the jurisdiction of the district court. This is similar to the above-cited language of § 29-819. We construe the purpose for this requirement in § 29-827 to be the same as that for similar provisions in the other statutes in this series of which it is a part. Thus, § 29-827 is concerned with jurisdiction over the property, as distinguished from jurisdiction over the case. It provides a safeguard for the integrity of the seized property. It provides a mechanism for transfer to the district court of the "jurisdiction" over the property for purposes of disposition of

the property or determination of rights therein, should such question be presented. It enables the physical transfer of the property, should it be necessary.

We believe that such a construction harmonizes this provision of § 29-827 with the concept and purpose of "jurisdiction" over seized property as that term is used throughout this series of statutes and that such interpretation is reasonable to accomplish the objectives sought by this legislation. With this background, we will now attempt to succinctly address Cox's specific assignments of error as they relate to § 29-827.

The Nebraska Supreme Court has not ruled on the issues presented by Cox. He cites *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988), in general support of his arguments, but *Dail* does not directly address these issues. Guided by general principles of law announced by the Supreme Court, we reach the conclusion that Cox's assignments of error, although novel, are without merit.

"Jurisdictional Grounds."

[11,12] As to Cox's assignment of error that the district court should have dismissed this case on jurisdictional grounds, Cox's argument is that the issuing of the order by the county court was a necessary predicate to the district court having authority or jurisdiction to hear the case. Cox cites us to no authority for that proposition other than *State v. Dail, supra*. *Dail* does not hold, or even suggest, that such an order from county court is a necessity to a district court's exercise of jurisdiction over a criminal charge once filed in county court and subsequently dismissed and refiled in district court. Indeed, a district court has original jurisdiction in all matters civil and criminal except where otherwise provided. Neb. Rev. Stat. § 24-302 (Reissue 1989). A county court has concurrent original jurisdiction with the district court in any criminal matter classified as a misdemeanor. Neb. Rev. Stat. § 24-517(5) (Cum. Supp. 1992). The charge of violating § 39-669.07 is a Class W misdemeanor. Therefore, this charge could have been filed in district court to begin with.

[13] We do not construe § 29-827 as either creating

jurisdiction in the district court or imposing an impediment to jurisdiction which it otherwise enjoys. As clarified in *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986), it merely codifies a procedure. The county court order transferring jurisdiction of property to the district court in conjunction with a county court dismissal under § 29-827 addresses jurisdiction over property, and not subject matter jurisdiction. The district court had jurisdiction over Cox's criminal proceeding. This assignment of error is rejected.

Admissibility of Blood Test Results.

Cox also directly presents the issue of whether the district court erred in admitting evidence of Cox's blood test results without proof that the Box Butte County Court had entered an order to transfer "the property" to the jurisdiction of the district court. That evidence came in the form of exhibit 3 and consisted of a lab report from the Nebraska Department of Health laboratories containing the results of a test performed on a sample of Cox's blood, with the results showing body fluid alcohol content at .211 grams per 100 milliliters. Obviously, the State had exhibit 3 at the district court trial, as it was physically offered into evidence.

Cox argues no grounds for the inadmissibility of this exhibit, other than the absence of the county court order. Implicit in this position is that there was insufficient foundation laid for its admission without proof that the district court had "jurisdiction" over the blood test results, i.e., "the property" as that phrase appears in § 29-827. We assume, without deciding, that exhibit 3 is "property" as that term is used in § 29-827.

Cox apparently relies on the plain language of § 29-827 and implies that a court must have jurisdiction over a piece of evidence before it is admissible as evidence. Cox cites us to no authority for this proposition, and we have found none. There is certainly no language in § 29-827 suggesting that an order of the county court transferring property to the jurisdiction of the district court has any relationship to the admissibility of such property into evidence at the district court trial. Nothing in the record before us indicates that the county attorney gave notice in the county court proceeding that "the property in question,"

here the blood test results, would be required in evidence as contemplated by the language of that statute. Presumably, that was because he did not require an order to obtain their physical custody.

Consistent with our construction of § 29-827 and the purpose of such an order within the context of this statute, we find that equating "jurisdiction" over the test results with their admissibility into evidence has no support in either law or logic. To do so would do nothing to achieve the statutory objective, and we will not read into the statute a requirement that imposes an impediment to the receipt of evidence in the absence of any language to support it. Thus, the presumed lack of a county court order transferring the "jurisdiction" over these blood test results to the district court was of no consequence to the issue of whether those blood test results were admissible into evidence in the district court. We find that the district court did not err in admitting such evidence.

Directed Verdict and Sufficiency of Evidence.

Cox contends that the district judge erred in overruling his motion for directed verdict made at the close of the State's case. If we understand Cox's argument, it is that the blood test results were inadmissible and, therefore, that the State had failed on its proof, or that the order of the county court transferring the results was an essential element of the State's case, and failure to prove the order required a directed verdict.

[14] A motion for directed verdict is properly sustained only when there is a complete failure to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking in probative value, that a finding of guilt cannot be supported by the evidence. *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993). If a defendant in a criminal prosecution, upon the overruling of a motion for directed verdict, proceeds with the trial and introduces evidence, he waives the appellate right to challenge the correctness of the trial court's overruling the motion, but may challenge the sufficiency of the evidence for the defendant's conviction. *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992); *State v. Gray*, 239 Neb. 1024, 479 N.W.2d 796 (1992). Cox proceeded with the trial and offered

evidence after the district judge overruled his motion. In any event, the blood test results were admissible, as we have already determined. Moreover, the order of the county court was not an essential element of the crime charged of driving under the influence of alcohol. Cox does not otherwise challenge the sufficiency of the evidence for his conviction. This assignment of error is, therefore, without merit.

Motion to Suppress.

Cox also alleges that the district court erred in overruling his motion to suppress because the arresting officer observed no violations of law prior to stopping his vehicle and was not able to articulate sufficient facts based on the totality of the circumstances to justify the investigatory stop. In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous.

Cox asserts that the only reason Smithgall stopped his vehicle was because he drove left of the centerline while passing another vehicle stopped in the road. This action in and of itself may not be unlawful; however, the record reflects that Smithgall based the actual stopping of Cox's vehicle upon other evidence as well. Smithgall testified that at the time of the stop, he believed the action taken by Cox in driving left of the centerline to get around the truck parked in the road was illegal, but that he also felt the vehicle was not being driven cautiously, since it failed to stop or slow down while passing the truck. As he continued to follow the vehicle, but prior to the stop, Smithgall observed the vehicle weaving in its lane and swerving from side to side. At this point, Smithgall stopped the vehicle.

[15-17] The Supreme Court has previously stated that " ' "[a] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ' " *State v. Dail*, 228 Neb. 653, 658, 424 N.W.2d 99, 103 (1988). Accord *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been,

is, or is about to be engaged in criminal activity. *State v. Bridge*, 234 Neb. 781, 452 N.W.2d 542 (1990); *State v. Dail, supra*; *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Thomte, supra*. The purpose of an investigative stop is to clarify ambiguous situations. Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, the police must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent. *State v. Bridge, supra*.

[18] In this case, the evidence demonstrates that Smithgall had a reasonable suspicion for stopping the vehicle. Smithgall testified that it was his opinion that the car was not being driven cautiously, and he also observed the vehicle weaving and swerving from side to side in its lane. In *State v. Thomte*, 226 Neb. at 663, 413 N.W.2d at 919, the Supreme Court stated that "a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle." See, also, *State v. Dail, supra*. The district judge was the trier of fact in connection with the motion to suppress. His ruling was not clearly erroneous. See, e.g., *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). This assignment of error is without merit.

CONCLUSION

The purpose of the provision of § 29-827 that an order be entered transferring property to the jurisdiction of the district court is to maintain the integrity of seized property and to empower the district court to make dispositions of the property and to determine rights therein. The district court was not asked to do either in these proceedings. Such order was not a requisite to the jurisdiction of the district court under the circumstances of this case. The district court did not err in receiving Cox's blood test results into evidence and in overruling Cox's motion for directed verdict. The district judge's decision to overrule the motion to suppress was not clearly erroneous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL CERVANTES, ALSO KNOWN AS MICHAEL GUTIERREZ, APPELLANT.

523 N.W.2d 532

Filed November 1, 1994. No. A-94-073.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
3. **Rules of Evidence: Hearsay: Proof.** In order to satisfy the hearsay exception of Neb. Rev. Stat. § 27-803(4) (Reissue 1989), one must provide the proper foundation.
4. _____: _____: _____. The proper foundation for admitting evidence as past recollection recorded under Neb. Rev. Stat. § 27-803(4) (Reissue 1989) should consist of a showing that (1) the witness has no present recollection of the facts, (2) the witness' memory is not refreshed upon reference to the document, (3) the document is an original memorandum made or adopted by the witness from personal observation, (4) the document was prepared or adopted by the witness contemporaneously with the event and was an accurate recording of the occurrence, and (5) the substance of the proffered writing is otherwise admissible.
5. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

Michael Cervantes was charged with two counts of first degree sexual assault and one count each of false imprisonment and driving under suspension. Cervantes pled guilty to driving under suspension. The other charges were tried before a jury in the district court for Scotts Bluff County, and the jury returned

a verdict of acquittal on one of the charges of first degree sexual assault and verdicts of guilty on the remaining charge of first degree sexual assault and the charge of false imprisonment. Cervantes appeals his convictions on the grounds that testimony excluded upon objection by the State should have been admitted into evidence as past recollection recorded, and also appeals his sentences on the grounds that they were excessive. We affirm because Cervantes did not provide sufficient foundation for admission of the testimony as past recollection recorded and because the sentences were not excessive.

I. BACKGROUND

The events which led to Cervantes' arrest began on the afternoon of June 24, 1993. The victim and her roommate, Starla, were driving around Scottsbluff in the victim's car early that evening. The victim and Starla spotted Cervantes and a man named "Danny Ramirez" and stopped to talk to Cervantes. Starla asked Cervantes if he would like to go drinking with the victim and Starla later on that evening. Cervantes agreed.

Ultimately, Cervantes ended up at the victim and Starla's apartment, where a party was taking place with a little more than a half dozen people. When the beer ran out at approximately 2 a.m., all of the people at the party decided to go out for breakfast, except for the victim and Cervantes. Cervantes wanted to stay at the apartment to finish his last beer, and the victim remained because her child was in the apartment.

The evidence was conflicting with regard to what happened next. The victim stated that she told Cervantes she was going upstairs to go to bed and that Cervantes attacked her as she started up the stairs, and forcibly penetrated her. Cervantes testified that he and the victim began romantically kissing and were about to engage in sexual intercourse when Starla and her boyfriend knocked on the door. All the evidence then indicates that Cervantes held the door shut while he and the victim put their clothes on. After a few minutes, Cervantes admitted Starla and her boyfriend into the apartment. The first charge of first degree sexual assault arose out of this incident, and the jury

returned a verdict of acquittal.

At Cervantes' request, he and the victim then left the apartment together. Cervantes drove the victim's car into the country, where he forced the victim to engage in sexual intercourse. On the basis of this incident, the jury convicted Cervantes of false imprisonment and first degree sexual assault.

Cervantes was sentenced to 7 to 15 years in the Nebraska Penal and Correctional Complex on the first degree sexual assault conviction, 1 to 5 years on the false imprisonment conviction, and 30 days' jail for driving under suspension, with all sentences to be served concurrently.

II. ASSIGNMENTS OF ERROR

Cervantes assigns two errors: (1) The trial court erred in sustaining the State's objection to defense counsel's request that an adverse defense witness read into evidence an excerpt from materials used as past recollection recorded, and (2) the sentences imposed on the defendant were excessive.

III. STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994); *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *Wood, supra*; *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994).

IV. ANALYSIS

1. EXCLUDED EVIDENCE

Cervantes argues that the trial court erred in sustaining the State's objection to defense counsel's request that a witness read into evidence materials supplied by defense counsel. Cervantes alleges that the materials should have been read to the jury as evidence of the witness' past recollection recorded.

The alleged error involved evidence related to interviews conducted with the victim by Det. Scott Crawford. Detective Crawford was one of the investigating officers in this case. During the course of his investigation, Detective Crawford interviewed the victim on several occasions. The victim admitted during the course of the trial that the first time she was interviewed by Detective Crawford, she told him that she and Starla had not seen Cervantes during the day on June 24 prior to the party. In a subsequent interview, she changed this statement and admitted that she and Starla had seen Cervantes earlier and invited him to go drinking with them.

Detective Crawford was called to the stand by the defense. He was asked if he had brought his report with him. Detective Crawford stated that he had not brought the entire file, whereupon defense counsel approached and asked him to review what were apparently copies of portions of Detective Crawford's report, compiled and prepared by defense counsel. On cross-examination by the State, Detective Crawford stated that what defense counsel had given him was not a copy of his report, but, rather, excerpts or portions from the report. Detective Crawford stated that he had never seen that particular collection of documents before. Then, on redirect examination, defense counsel asked Detective Crawford to "go ahead and quote the things" that Detective Crawford thought were correct in the report. The State objected on the grounds that the statements were hearsay, and the objection was sustained.

Cervantes' sole assignment of error with regard to the trial is that Detective Crawford should have been instructed to read the portions of the report to the jury that he recognized as direct quotes from his own reports. Cervantes notes that the documents were presented to Detective Crawford to "refresh his recollection since he did not bring his copy of his report to court," and argues that the materials he asked Detective Crawford to read should have been admitted as "past recollection recorded," an exception to the hearsay rule under Neb. Rev. Stat. § 27-803(4) (Reissue 1989). Brief for appellant at 15.

Cervantes' reliance on § 27-803(4) is misplaced. That

subsection excludes the following from the hearsay rule:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

[3,4] In order to satisfy the hearsay exception of § 27-803(4), one must provide the proper foundation. While the Nebraska courts have not yet had an opportunity to set forth the exact foundational requirements for the admissibility of past recollection recorded under § 27-803(4), other states that have adopted the same statutory language have elaborated on its foundational requirements. Synthesizing the opinions of those courts, we hold that the proper foundation for admitting evidence under § 27-803(4) should consist of a showing that (1) the witness has no present recollection of the facts, (2) the witness' memory is not refreshed upon reference to the document, (3) the document is an original memorandum made or adopted by the witness from personal observation, (4) the document was prepared or adopted by the witness contemporaneously with the event and was an accurate recording of the occurrence, and (5) the substance of the proffered writing is otherwise admissible. See, *Moncrief v Detroit*, 398 Mich. 181, 247 N.W.2d 783 (1976); *Linch v. Nebraska Buick Automobile Co.*, 120 Neb. 819, 235 N.W. 456 (1931) (the Nebraska Supreme Court stated generally these foundational elements based on the common-law past recollection recorded rule, prior to passage of § 27-803(4)). See, also, *State v. Bloss*, 3 Haw. App. 274, 649 P.2d 1176 (1982); *State v. Ottwell*, 239 Mont. 150, 779 P.2d 500 (1989); *State v. Paquette*, 146 Vt. 1, 497 A.2d 358 (1985).

Cervantes fails to satisfy even one of the foundational elements for past recollection recorded. There was no evidence that Detective Crawford did not have a current recollection of the facts; to the contrary, Detective Crawford had already

testified from memory that the victim's testimony was consistent with the interviews he conducted. Nothing at trial indicated that Detective Crawford ever made or adopted the statements that were handed to him by defendant's counsel. In fact, Detective Crawford clearly stated that what was given to him was *not* the report he had compiled. Therefore, the court properly found that the materials that Detective Crawford was asked to read from were not past recollection recorded under § 27-803(4), and no prejudicial error occurred.

2. Excessive Sentences

As his second assignment of error, Cervantes argues that his sentences are excessive and constitute an abuse of discretion. Cervantes was sentenced to concurrent, indeterminate sentences of 1 to 5 years for the false imprisonment conviction and 7 to 15 years for the first degree sexual assault conviction in the Nebraska Penal and Correctional Complex, and 30 days' jail for driving under suspension. All of these sentences are within the maximum sentences allowed by law, and Cervantes could have received up to 50 years' imprisonment for the sexual assault conviction.

[5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

The sentences imposed by the trial judge in this case were neither excessive nor an abuse of discretion. The record reveals that Cervantes has been convicted of numerous misdemeanors and also has a prior felony conviction. He has been imprisoned on a number of occasions. Cervantes committed the violent and serious crimes of sexual assault and false imprisonment. The only mitigating factors presented by Cervantes are the fact that the victim did not seek counseling for the trauma she experienced as a result of this ordeal and that Cervantes had

maintained his innocence of the sexual assault and false imprisonment charges throughout the entire proceeding. Cervantes offers nothing that would indicate an abuse of discretion by the trial judge. The sentences will be not be disturbed.

V. CONCLUSION

The State's objection to defense counsel's request that a witness read excerpts from documents provided by defense counsel was properly sustained, and the materials were not admissible as past recollection recorded. The sentences imposed by the trial court were neither excessive nor an abuse of discretion.

AFFIRMED.

THOMAS E. NUNN, APPELLEE, V. TEXACO TRADING AND TRANSPORTATION, INC., APPELLANT.

523 N.W.2d 705

Filed November 1, 1994. No. A-94-083.

1. **Workers' Compensation: Appeal and Error.** The review panel of the Workers' Compensation Court sits as an appellate court when reviewing an award of the trial judge. Neb. Rev. Stat. § 48-179 (Reissue 1993). As such, the review panel may reverse or modify the findings, order, award, or judgment of the trial court only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
2. _____: _____. When a judgment of the compensation court's review panel is appealed to a higher appellate court, such judgment has the same force and effect as a jury verdict in a civil case. The higher appellate court may modify, reverse, or set aside the review panel's judgment on the grounds that (1) it acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there was not sufficient evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact do not support the order or award.
3. **Workers' Compensation: Proof.** In order for an employee to recover benefits under the Nebraska Workers' Compensation Act, the employee must first prove that the accident giving rise to the injuries arose out of and in the course of his or her employment. Neb. Rev. Stat. § 48-101 (Reissue 1993).
4. **Workers' Compensation: Words and Phrases.** The term "arising out of"

describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job.

5. **Workers' Compensation: Insurance.** Payment of private insurance benefits, even if made pursuant to an employer-funded plan, does not entitle an employer to reduce an employee's benefits due under the Workers' Compensation Act.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Paul F. Prentiss, of Timmermier, Gross & Burns, for appellant.

Robert W. Mullin, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

Texaco Trading and Transportation, Inc., appeals from a decision of the review panel of the Workers' Compensation Court, which affirmed the trial court's award of benefits to Texaco's former employee, Thomas E. Nunn. Texaco claims that the review panel erred in affirming the trial court's determination that an accident in which Nunn was injured arose out of Nunn's employment with Texaco and in finding that Texaco was not entitled to credit in the award for payments it had made to Nunn through a short-term disability plan. We find no error in the lower court's determination that Nunn's accident arose out of his employment with Texaco and that Texaco was not entitled to credit for disability payments, and we therefore affirm the review panel's decision.

FACTUAL BACKGROUND

Texaco hired Nunn as a crude oil truckdriver in 1988. On July 3, 1991, the date of the accident, Nunn was hauling crude oil from fields and depots in western Nebraska and eastern Wyoming to refineries in that region. Nunn was operating a semi-tractor with an attached crude oil tank and a "pup" tank trailer. That morning, Texaco dispatched Nunn from Kimball, Nebraska, to the "Sioux Depot Oil Lease" near Sidney, Nebraska. He arrived at the Sioux Depot Lease at

approximately 7:30 a.m., filled the truck tank and pup trailer with crude oil, and then drove to the Frontier Refinery in Cheyenne, Wyoming, to unload the oil. After he unloaded at the refinery, Nunn was dispatched to the "Quealy Dome Oil Lease," an oilfield near Laramie, Wyoming, to pick up another load of oil.

The oil that Nunn was to load at the Quealy Dome Lease was "sour crude," which meant that the oil had a high sulfur content and emitted hydrogen sulfide (H_2S) gas. According to testimony at the trial hearing, exposure to high concentrations of H_2S can cause loss of consciousness and even death. For that reason, Texaco equipped its drivers, including Nunn, with personal monitoring devices that were to warn them when concentrations of H_2S approached a level that posed a health risk.

When Nunn arrived at the Quealy Dome Lease, he noticed a sign warning of H_2S gas, and he faced his truck into the wind so that he would not inhale the gas as the oil was being pumped into the tanks on his truck. Although Nunn's H_2S monitor did not go off at any time while he was at the Quealy Dome Lease, he began feeling stomach pains as the oil was being pumped into the tanks. After filling the tanks and starting down the road to Cheyenne, Nunn's stomach pains subsided. When Nunn was approximately 25 miles west of Cheyenne on Interstate 80, he began descending a long, steep hill known as Sherman Hill. As he was descending Sherman Hill, he felt a heavy feeling in his stomach, which he described as like "swallow[ing] a brick or bread dough." As he approached a bridge spanning some railroad tracks, Nunn suddenly felt lightheaded, and before he could do more than remove his foot from the throttle, he blacked out. Nunn's truck then traveled off the roadway preceding the bridge, struck a guardrail, rolled onto the passenger's side, and skidded to a stop on the bridge. The pup trailer became unattached and fell from the bridge onto the railroad tracks. Oil spilled from the tanker truck and the pup trailer, and caught fire.

When Nunn regained consciousness, he was hanging by his seatbelt inside the truck cab. He noticed that the engine was still running, and as he reached to shut it off, flames emerged

around the passenger's-side corner of the windshield. He immediately released his seatbelt, and as he stood up inside the cab, the flames engulfed the entire exterior of the cab. Nunn then climbed up through the driver's side window and jumped from the truck, sustaining burns as he did so. He then ran away from the truck and was picked up by some passers-by, who drove him away from the accident scene.

Nunn was treated by emergency personnel near the scene and then transported by helicopter to the North Colorado Medical Center in Greeley, Colorado. He was diagnosed with first, second, and third degree burns of the face, neck, arms, back, buttocks, and hands, covering 25 to 28 percent of his total body surface area. Nunn was also diagnosed with psychological trauma resulting from the accident. He was treated at the hospital's burn center until July 27, 1991, and thereafter he received outpatient physical therapy at the Regional West Medical Center in Scottsbluff, Nebraska.

At the time of the accident, Nunn was covered by a short-term disability plan that was both administered and funded by Texaco. Pursuant to the plan, Texaco paid Nunn a total of $14,327 during the year following the accident. Texaco also paid a portion of Nunn's medical bills, in the amount of $34,457. However, Texaco did not pay workers' compensation disability benefits to Nunn.

In February 1993, Nunn obtained a vocational assessment and rehabilitation plan from Centennial Rehabilitation Associates, Inc. A report from Centennial contained in the record indicates that as a result of his injuries, Nunn was precluded from working in occupations that he had previously been engaged in. Nunn's vocational rehabilitation goal was to become a registered nurse.

Nunn filed a petition in the Workers' Compensation Court, and in an amended answer, Texaco denied that Nunn's injuries arose out of his employment. Texaco also alleged that it had paid certain "other benefits" to Nunn and claimed reimbursement for the medical expenses that it had paid on Nunn's behalf.

A hearing was held before a single judge of the Workers' Compensation Court on March 23, 1993. Among the exhibits

presented at the hearing was a letter from Dr. Louis W. Burgher to Texaco's counsel. In the letter, Dr. Burgher states that after he reviewed Nunn's medical records, he found nothing to support the theory that Nunn suffered from H_2S overexposure. In its brief, Texaco also claims that a Dr. Weber concluded that Nunn passed out at the wheel due to the flu. We note that Texaco cites exhibit 29 in support of this statement. Exhibit 29 is a document entitled "perusal of records" and dated February 6, 1992. The document states that Nunn "[m]ost likely" suffered from vasovagal dizziness because of the flu. The document bears an illegible signature with a handwritten date below it of March 22, 1993, over 1 year later than the date at the top of the document. There is nothing in the record indicating what this document is supposed to be, whose signature is on the document, and in what capacity he or she signed the document. We recognize that the Workers' Compensation Court is not bound by rules of evidence or technical and formal rules of procedure. However, we remind counsel that we are not clairvoyant and that such exhibits are of limited value on appeal. After the accident, Nunn reported that he had felt flulike symptoms before he had blacked out and that he believed he had contracted the flu because his mother had been sick from the flu on the day before the accident.

On May 3, the single judge found that Nunn's injuries resulted from an accident which arose out of and in the course of his employment with Texaco and that as a result of such injuries, Nunn was temporarily and totally disabled from July 4, 1991, through September 3, 1992. The single judge found that Nunn thereafter sustained a 10-percent permanent loss of earning capacity and that he was entitled to vocational rehabilitation benefits as set forth in the rehabilitation plan developed by Centennial.

The court specifically rejected Texaco's claim that Nunn's accident did not arise out of his employment, stating that under the "positional risk" test, Nunn satisfied the "arising out of" requirement because he was required by his employment to be in a place of danger at the time that the accident occurred. The court also rejected Texaco's claim for credit for short-term disability benefits that it had paid to Nunn because the court

found that Texaco had denied liability for Nunn's injury.

Texaco filed an application for review, claiming that the trial court erred in adopting the positional risk doctrine and in failing to award credit to Texaco for short-term disability payments. The review panel affirmed the trial court's order, and Texaco thereafter timely appealed to this court.

ASSIGNMENTS OF ERROR

Texaco claims that the review panel erred in affirming the trial court's determinations that (1) the accident arose out of Nunn's employment and (2) Texaco was not entitled to credit in the award for benefits paid to Nunn under its short-term disability plan.

STANDARD OF REVIEW

[1] The review panel of the Workers' Compensation Court sits as an appellate court when reviewing an award of the trial judge. Neb. Rev. Stat. § 48-179 (Reissue 1993). As such, the review panel may reverse or modify the findings, order, award, or judgment of the trial court only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. *Id.*

[2] When a judgment of the review panel is appealed to a higher appellate court, such judgment has the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1993). The higher appellate court may modify, reverse, or set aside the review panel's judgment on the grounds that (1) it acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there was not sufficient evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact do not support the order or award. *Id.* See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

DISCUSSION

Arising Out of Employment.

[3]In order for an employee to recover benefits under the Nebraska Workers' Compensation Act, the employee must first prove that the accident giving rise to the injuries arose out of and in the course of his or her employment. Neb. Rev. Stat.

§ 48-101 (Reissue 1993). The term "accident" is defined in the Workers' Compensation Act 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 (Reissue 1993). The parties in this case stipulated that Nunn's accident occurred in the course of his employment, but Texaco denied that the accident *arose out of* his employment.

[4] " 'The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from within the scope or sphere of the employee's job.' " *Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 237-38, 388 N.W.2d 820, 822 (1986). Appellate courts in this state have not squarely addressed the issue of whether one's injuries arise out of his or her employment where, due to an idiopathic condition, he or she blacks out while driving and is involved in an accident. While the Nebraska Supreme Court has addressed factually similar cases, it did not address this particular issue or declined to do so in such cases. See, *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986); *Swartz v. Hess, Inc.*, 188 Neb. 542, 198 N.W.2d 64 (1972).

The trial court in the present case applied the positional risk doctrine in determining whether Nunn's accident arose out of his employment. Under the positional risk doctrine, an employee's injuries arise out of his or her employment if, during the course of employment, he or she is reasonably required to be at a particular place at the time of the accident, and there meets with an accident. *Nippert, supra.* See *McGinn v. Douglas County Social Services Admin.*, 211 Neb. 72, 317 N.W.2d 764 (1982) (White, J., dissenting). Texaco claims that the court erred in applying the positional risk doctrine and that the court should have applied the "increased risk" doctrine instead.

Under the increased risk doctrine, a claimant's accident arises out of his or her employment if the claimant's employment duties expose him or her to a greater risk or hazard than that to which the general public in the area is exposed. *Nippert, supra*; *McGinn, supra*; *Crow v. The Americana Crop Hail Pool, Inc.*, 176 Neb. 260, 125 N.W.2d 691 (1964). The Nebraska Supreme Court has traditionally applied an increased

risk analysis in cases involving injuries resulting from the elements or "acts of God." See, *McGinn, supra*; *Ingram v. Bradley*, 183 Neb. 692, 163 N.W.2d 875 (1969); *Crow, supra*. Recently, however, the court abandoned the increased risk approach and adopted the positional risk approach in one such case, *Nippert, supra*.

In *Nippert*, the claimant sought compensation benefits for injuries he sustained when, while in the course of his employment, a tornado picked him up and hurled him to the ground. The court noted that the claimant's injuries would not be compensable under the increased risk test because the claimant was not exposed to a different hazard than others generally in the area where the injury occurred. However, after careful consideration, the court concluded that the positional risk analysis was the better rule to be applied. Employing the positional risk test, the court found that the claimant's injuries arose out of his employment.

In the present case, Texaco claims that the Supreme Court's application of the positional risk doctrine is limited to act-of-God cases and that the Workers' Compensation Court erred in applying the positional risk doctrine to this case. We note that the Supreme Court has not employed an analysis applying the positional risk test in any case that it has decided since *Nippert*. In addition, when faced with cases factually similar to the one presently before us, the clear majority of other jurisdictions have employed an increased risk rationale in determining whether an employee's injuries arose out of his employment. 1 Arthur Larson, The Law of Workmen's Compensation § 12.12 (1993). See, *Murray v. Associated Insurers Inc.*, 114 N.C. App. 506, 442 S.E.2d 370 (1994); *Nat. Health v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001 (1992); *Marshall v. Bob Kimmel Trucking*, 109 Or. App. 101, 817 P.2d 1346 (1991); *Aetna Finance Co. v. Bourgoin*, 252 Miss. 852, 174 So. 2d 495 (1965); *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E.2d 476 (1960); *Tapp v. Tapp*, 192 Tenn. 1, 236 S.W.2d 977 (1951).

Given the above, we are not led to an inescapable conclusion regarding whether the positional risk or increased risk analysis

should be applied in this case. Nonetheless, we need not make such a determination, as we find that Nunn's injuries are compensable under either doctrine.

Applying the positional risk doctrine, we find that Nunn's employment reasonably required him to be behind the wheel of a truck hauling thousands of gallons of crude oil at the time and place that he blacked out and experienced the accident resulting in his injuries.

Employing the increased risk doctrine, we also conclude that Nunn's injuries arose out of his employment, because his duties exposed him to a greater risk than that to which the public is exposed. Clearly, the consequences of blacking out behind the wheel of a truck carrying 8,000 to 10,000 gallons of oil are much more severe than the consequences of blacking out at home or while walking on the sidewalk.

Having concluded that Nunn's accident arose out of his employment, we reject Texaco's first assigned error.

Credit for Short-Term Disability Payments.

Texaco claims that the review panel erred in affirming the trial court's determination that Texaco was not permitted to credit payments made pursuant to its short-term disability plan against the workers' compensation award. Texaco bases its claim on language in the disability policy that provides that short-term disability benefits may be offset by workers' compensation benefits paid. The trial court found that Texaco was not entitled to credit for its payment of short-term disability benefits because Texaco denied liability for the injury. See *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954). The review panel also found that Texaco was not entitled to such credit, but based its finding on Neb. Rev. Stat. §§ 48-130 and 48-147 (Reissue 1993).

[5] Section 48-130 provides:

> No savings or insurance of the injured employee or any contribution made by him or her to any benefit fund or protective association independent of the Nebraska Workers' Compensation Act shall be taken into consideration in determining the compensation to be paid thereunder; *nor shall benefits derived from any other*

> *source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act.*

(Emphasis supplied.) Section 48-147 provides in part: "[L]iability for compensation under [the Workers' Compensation Act] *shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever,* due to or received by the person entitled to such . . . ." (Emphasis supplied.) These two provisions make it clear that the payment of private insurance benefits, even if made pursuant to an employer-funded plan, does not entitle an employer to reduce an employee's benefits due under the Workers' Compensation Act. Similar provisions are found in a majority of states' workers' compensation laws. See 4 Arthur Larson, The Law of Workmen's Compensation § 97.51(a) (1993). We understand and agree that a private insurance policy may provide that benefits *payable under the private insurance policy* can be offset by workers' compensation benefits paid. See *id.*, § 97.51(c). Such would be a contract issue. However, that is not the situation in this case. Rather, Texaco asks for a *reduction in compensation benefits* payable, which is prohibited by law. We find that the review panel committed no error in finding that Texaco was not entitled to credit for disability payments paid to Nunn.

CONCLUSION

Having found no error in the review panel's determination that Nunn's accident and resulting injuries arose out of his employment with Texaco and that Texaco was not entitled to credit in the award for disability benefits paid to Nunn via an employer-funded disability plan, we affirm the review panel's decision.

Pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993), an award of attorney fees to Nunn is appropriate, and the same will be made upon the filing of a motion in compliance with Neb. Ct. R. of Prac. 9F (rev. 1992).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY R. BLEVINS, APPELLEE.

523 N.W.2d 701

Filed November 1, 1994. No. A-94-162.

1. **Criminal Law: Prosecuting Attorneys: Appeal and Error.** The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made.
2. **Statutes: Legislature: Intent.** To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
3. **Statutes.** Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
4. **Statutes: Legislature: Intent.** Courts should not give an interpretation to a statute which would have the effect of nullifying another statute, when obviously that was not the clear legislative intent.

Appeal from the District Court for Kearney County, STEPHEN ILLINGWORTH, Judge, on appeal thereto from the County Court for Kearney County, JACK ROBERT OTT, Judge. Exceptions sustained.

David G. Wondra, Kearney County Attorney, for appellant.

Andrew J. McMullen for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

After a trial in the county court for Kearney County, Rodney R. Blevins was convicted of discharging a firearm from a public highway, Neb. Rev. Stat. § 28-1335 (Reissue 1989), and hunting without permission, Neb. Rev. Stat. § 37-510 (Cum. Supp. 1992). Pursuant to the conviction for hunting without permission, Blevins was ordered to pay liquidated damages of $600, as required by Neb. Rev. Stat. § 37-614 (Cum. Supp. 1992). On appeal, the district court for Kearney County reversed Blevins' conviction for hunting without permission and the liquidated damages order.

This court granted the application of the county attorney to docket an appeal, as authorized by Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1992). The State claims that the district court erroneously held that the State must prove that the

property on which a defendant was hunting was posted. We find that the State is not required to prove that the landowner's property was posted in a prosecution under § 37-510, and the county attorney's exceptions are therefore sustained.

FACTUAL BACKGROUND

On November 15, 1992, Gary Younkin, a farmer in Kearney County, was exiting his driveway onto Highway 10 when he observed a white pickup truck parked about five-eighths mile away, on the west shoulder of the highway. The pickup was parked facing north, adjacent to land that Younkin farmed. Because it was the opening weekend of deer-hunting season, Younkin suspected that the pickup contained hunters. Younkin drove toward the pickup, intending to warn persons inside that the property adjacent to the pickup was private property and that they could not hunt on such property. There were no signs posted on the Younkin property reading "Hunting By Written Permission Only." As Younkin approached the pickup, he observed that the driver's-side door was open and that a person was standing beside the door with a rifle held to his shoulder in "a shooting position." Younkin looked in the direction that the rifle was pointed and observed three deer in the cornfield, about 150 to 175 yards from the road. When Younkin reached a point about 125 yards from the white pickup, he noticed that the rifle recoiled as if it had been fired. Younkin then saw one of the three deer, an antlered buck, fall.

Younkin proceeded to pull up behind the pickup and motioned for the persons inside to leave. As the pickup was pulling away, Younkin wrote down its description and license number on a sheet of paper. Younkin then reported what he had observed to Dayton Shultis, a Nebraska Game and Parks Commission conservation officer who was working at a deer checkpoint station in the area.

When Younkin returned to the farm, he sent his hired hand out into the cornfield to see whether there was a dead deer lying there. The hired hand discovered a dead antlered buck in the vicinity where Younkin had earlier observed the deer fall.

Meanwhile, Shultis contacted the Kearney County Sheriff's Department and discovered that the white pickup that Younkin

had described belonged to Rodney Blevins. That same morning, Shultis went to Younkin's farm and observed the deer that Younkin's hired hand had discovered in the field. Shultis observed that the deer had one bullet wound. Shultis also inspected the field where the deer had been found and observed a large pool of blood. Shultis testified at trial that he believed the deer had traveled less than 20 yards after it had been shot.

The following week, Shultis phoned Blevins and arranged to meet with him in Kearney on November 20. On that date, Blevins met with Shultis and told him that he had shot the deer on land owned by David Raffety and that he had trailed the deer to the Younkin property. Blevins stated that he assumed that the deer he shot at on the Younkin property was the same deer he had shot on Raffety's property. When Shultis told Blevins that the deer had only one bullet hole, Blevins replied, " 'Well, I'm wrong on that one.' " Shultis then issued Blevins a citation for hunting without permission, shooting from a public highway, and liquidated damages.

Trial was held in the county court for Kearney County on April 20, 1993. At the trial, Blevins pled guilty to shooting from a public road, and the court accepted the plea. During his testimony, Blevins admitted that he knew that he did not have permission to hunt on the Younkin property. At the close of evidence, the county court took the matter of the other two counts under advisement. On May 11, the court entered an order finding Blevins guilty of hunting without permission, in violation of § 37-510, and subsequently ordered him to pay liquidated damages of $600, as required by § 37-614.

Blevins appealed his conviction for hunting without permission and the liquidated damages order to the district court for Kearney County. After a hearing, the district court reversed Blevins' conviction and the liquidated damages order. The county attorney for Kearney County thereafter filed an application for leave to docket an appeal to this court, pursuant to § 29-2315.01.

ASSIGNMENTS OF ERROR

The State has assigned three errors on this appeal, but for purposes of our discussion, we have consolidated them into one

assigned error, namely, that the district court erred in applying the wrong statute and evidentiary standard in reviewing Blevins' conviction.

EFFECT OF THIS REVIEW

[1] This is an appeal by a county attorney, pursuant to § 29-2315.01, which states in part: "The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made." Neb. Rev. Stat. § 29-2316 (Cum. Supp. 1992) sets out the effect of the appellate court's ruling pursuant to § 29-2315.01:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

In the present case, Blevins was placed in jeopardy, and therefore, our decision does not affect the order entered by the district court, but affects similar cases that may presently be pending or arise hereafter.

DISCUSSION

The primary issue on this appeal arises out of the relationship between two statutes that make it a crime to hunt on private property without permission. The first statute, § 37-510, provides in part: "It shall be unlawful for anyone to hunt for any game, wild animal, or bird or fish upon any private lands

without permission of the owner." The second statute, Neb. Rev. Stat. § 37-213.04 (Reissue 1993), provides that the operator of property which has been posted with signs reading "Hunting By Written Permission Only" shall have the privilege of permitting or denying hunting privileges on such property. The specific posting requirements for such signs are set out in Neb. Rev. Stat. § 37-213.03 (Reissue 1993).

With regard to count II, Blevins was originally charged with hunting without permission under § "37-213.03," but the complaint was later amended to charge Blevins under § 37-510 on this count. In its order reversing Blevins' conviction, the district court agreed with Blevins' argument that in order to secure a valid conviction for hunting without permission under § 37-510, the State must prove as an element of the crime that the land was posted in accordance with § 37-213.03.

In its brief, the State asserts that § 37-510 defines a crime separate from that defined in § 37-213.04. The State points out that § 37-213.03 states that an operator of a farm or ranch *may* post his or her property with signs reading "Hunting By Written Permission Only." If the property is so posted, the State argues, an individual must have the requisite written permission before hunting on such property. However, if the property is not posted as set forth in § 37-213.03, then *written* permission is not required, but § 37-510 nonetheless requires an individual to secure some form of permission from the owner or tenant before a person may lawfully hunt on such nonposted property.

LEGISLATIVE HISTORY

[2] "One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 28, 430 N.W.2d 34, 39 (1988).

[3] "All statutes relating to the same subject are considered as parts of a homogeneous system, and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." *Id.*

at 30, 430 N.W.2d at 39. Accord *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975), *overruled on other grounds, First Assembly of God Church v. City of Scottsbluff*, 203 Neb. 452, 279 N.W.2d 126 (1979).

Section 37-510 was enacted in 1929, while §§ 37-213.02 to 37-213.06 were enacted in 1963. The legislative history of §§ 37-213.02 to 37-213.06 reveals the Legislature's intent with regard to the relationship between §§ 37-510 and 37-213.04.

The committee hearings and floor debate of 1963 Neb. Laws, ch. 199, §§ 1-5, pp. 646-47 (L.B. 420), which is codified at §§ 37-213.02 to 37-213.06, indicate that its purpose was to reduce the potential for retaliation against landowners and tenants from persons who were convicted of hunting on their land without permission. See Committee on Agriculture Hearing, L.B. 420, 73d Leg., 1st Sess. 2-3 (Feb. 7, 1963). Section 2, p. 646, of L.B. 420 permitted a landowner or tenant to post his or her land with signs marked "Hunting By Written Permission Only." If the land was posted in such a manner, anyone who hunted on the property was required to have a written permit, signed by the landowner or tenant, stating that the hunter had permission to hunt on such property. In passing L.B. 420, the Legislature intended to make it easier for the State to prosecute such violations without the participation of the landowner or tenant. Statement of Intent, L.B. 420, Committee on Agriculture, 73d Leg., 1st Sess. (Feb. 6, 1963). If an accused did not possess written permission to hunt, there would potentially be a reduced need to have the landowner or tenant appear in court to identify the accused and/or testify that he or she did not give the accused permission to hunt on the property. See Committee on Agriculture Hearing, *supra* at 2-3.

[4] The legislative history of L.B. 420 also makes it clear that the Legislature, in passing L.B. 420, did not intend to affect the validity or operation of § 37-510. "Courts should not give an interpretation to a statute which would have the effect of nullifying another statute, when obviously that was not the clear legislative intent." *Georgetowne Ltd. Part.*, 230 Neb. at 30, 430 N.W.2d at 40. Accord *Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn.*, 191 Neb. 1, 213 N.W.2d 443 (1973). The history indicates that there was an amendment

to L.B. 420 which would have repealed § 37-510, but the amendment was rejected. Floor Debate, 73d Leg., 1st Sess. 727-28 (Mar. 20, 1963). The reason for the rejection was that many landowners, particularly those who owned large farms or ranches, did not want to endure the burden of posting their property in order to protect it from hunters. *Id.* The legislative history of L.B. 420 thus establishes that persons who hunt on unposted private property are still required to obtain permission to hunt on such property under § 37-510.

In light of the above, we find that the district court erroneously held that the State was required to prove that the land was posted as required by § 37-213.03 in order to convict Blevins for hunting without permission under § 37-510.

CONCLUSION

Based upon the language of §§ 37-510 and 37-213.02 to 37-213.06, as well as the legislative history of §§ 37-213.02 to 37-213.06, we hold that persons who hunt on private property without permission are subject to prosecution under § 37-510 even if the property is not posted. The county attorney's exceptions are sustained.

EXCEPTIONS SUSTAINED.

WINIFRED F. WELLS, APPELLANT, V. DOUGLAS L. WELLS, APPELLEE.

523 N.W.2d 711

Filed November 8, 1994. No. A-93-077.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. _____: _____. When the evidence in a dissolution case is in conflict, an appellate court may consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Marriage: Loans: Presumptions.** There is no presumption of a loan from a wife to her husband when the wife invests her nonmarital funds into a business venture which benefits both spouses.

4. **Contracts: Specific Performance: Evidence: Proof.** The party seeking performance of an alleged oral contract has the burden of proving its existence by clear, satisfactory, and unequivocal evidence.
5. **Contracts: Parties.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
6. **Contracts.** In order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
7. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment.
8. _____: _____: _____: _____. Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to the property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Edward D. Hotz and Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Patrick A. Campagna and Steven J. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

In this divorce action, Winifred F. Wells appeals the decision of the Douglas County District Court which denied her request that she be reimbursed from her husband's future inheritance for investments that she made into the couple's failed business ventures with money from her own inherited funds. We affirm the decision of the district court, because (1) Winifred was unable to establish that the advances she made were loans, (2) Winifred was unable to prove the existence of a contract for repayment, and (3) Winifred failed to provide an equitable ground for establishing a constructive trust on her husband's inheritance.

I. BACKGROUND

Winifred married Douglas L. Wells on June 27, 1970, in Omaha, Nebraska. A son was born to the marriage on July 10, 1972. In 1977, the couple formed a corporation called Wells & Son, Inc., in which Winifred, Douglas, and their son were the only shareholders. The corporation acquired the exclusive right to run the Godfather's Pizza franchise in the State of Arizona. Both Winifred and Douglas made significant financial contributions to the corporation, and they soon opened and operated 12 Godfather's Pizza establishments in Arizona. In the process of opening the pizza parlors, Wells & Son incurred a number of financial obligations, which Winifred and Douglas personally guaranteed.

The tax returns of Wells & Son are not in the record, but the witnesses' testimony conclusively showed that Wells & Son was a successful and profitable venture. Though Winifred claimed that she never received a check which specifically designated the funds as being derived from the profits of Wells & Son, the family did a lot of things that the corporation paid for, such as taking trips and eating out. Then, in 1987 or 1988, Winifred and Douglas sold 40 percent of their stock in Wells & Son to the Yanney Hughes Capital Group (Capital Group) for $1 million. The proceeds from the sale were reinvested into Wells & Son. Approximately 18 months later, Winifred and Douglas sold their remaining interest in Wells & Son to the Capital Group in exchange for a 40-percent share of the stock in a company called Western International Pizza Corporation, which was also held by the Capital Group. Subsequent to this sale, and now under the corporate name of Western International Pizza, the Wellses' Godfather's Pizza operation grew to a chain of 25 restaurants.

Wells & Son and Western International Pizza began to experience financial trouble when the Capital Group broke up. Wells & Son, the operating company for the Godfather's chain in Arizona, filed for bankruptcy. The remaining assets of Western International Pizza were either sold or foreclosed upon by creditors.

Sometime during 1986 or 1987, the Wellses took out a second mortgage on their home for $50,000. Winifred did not sign the

mortgage papers for the second mortgage. The money was used to finance Douglas' next two business ventures: FBN Investments, a partnership formed to purchase an airplane, and DW Dog, a hotdog franchise. Both FBN Investments and DW Dog failed. Douglas, who had been making the mortgage payments on the Wellses' first mortgage, was unable to pay the larger installments required by the second mortgage, so Winifred took over the mortgage payments. Winifred does not make any claim for money related to either FBN Investments or DW Dog.

The Wellses' next business venture returned the family to the pizza business. A new corporation was formed, called Spectrum Management, Inc. Originally, Winifred was the sole stockholder in the subchapter S corporation. Douglas could not own stock or act as a director of the corporation because he had signed a noncompetition agreement with Godfather's. Thus, with Winifred as a figurehead president and sole shareholder, Spectrum Management opened four Oregano's pizza parlors. Spectrum Management was capitalized with a $100,000 loan from Zion's Camel Bank in Arizona. Winifred testified that she had reluctantly signed as a guarantor on the loan.

Winifred and Douglas did not experience the success with Oregano's that they had with Godfather's. Spectrum Management quickly fell into debt, and Douglas was forced to turn to Winifred, among others, as a source of cash inflow to keep the doors of the Oregano's parlors open.

This leads us to the transactions which are the subject of this case. Winifred claims that she was steadfast in her reluctance to put any more of her own inheritance into Spectrum Management. She testified that she refused to provide Douglas with any more funds for Spectrum Management until Douglas promised to repay her from two trusts in which Douglas was a vested beneficiary. The trusts had been set up by Douglas' maternal grandparents and were to pay income to Douglas' parents during their lives, with three-quarters of the income payable to Douglas and his two siblings upon the death of his mother, and with the remainder of the principal to be distributed upon the death of his father. The trust assets exceed $2 million, but Douglas claimed to have had no knowledge of how much was

coming to him until after this divorce action was filed.

Winifred alleged that Douglas first promised to repay her out of his future inheritance in 1987 or 1988. Winifred further stated at trial that Douglas reaffirmed this promise almost every time he asked Winifred for money to be infused into Spectrum Management and that the parties frequently discussed the terms and value of the trusts. Douglas, on the other hand, stated that, other than maybe one time during a heated argument over finances, he never promised any of his future inheritance to Winifred. Douglas acknowledged that he and Winifred discussed the trusts, and he further admitted that repayment on some terms could have been discussed. However, Douglas denied ever having discussed repayment to Winifred out of his trust-fund money.

Both Winifred and Douglas agreed that Winifred contributed considerable amounts of her nonmarital holdings to Spectrum Management. However, Winifred did not offer any documentation of her contributions to Spectrum Management into evidence except for exhibit 18, the workpapers for Spectrum Management's notes payable account prepared by Audrey McGinnis, Spectrum Management's bookkeeper. Winifred testified that when Douglas would ask for money for Spectrum Management, the money would be drawn from her accounts with Paine Webber and E.F. Hutton, as well as from an annuity at First Capital. The money did not go directly to Douglas. Rather, the money was taken out in the form of a wire transfer or check toward payment of Spectrum Management's bills.

Due to the failure of the Oregano's chain, Spectrum Management eventually folded. Douglas sold the restaurants and equipment, but the creditors were not completely paid off. Winifred was the sole personal guarantor on several of the outstanding loans, and she was forced to settle several claims with the creditors.

The parties subsequently filed for divorce in Douglas County, and the trial court granted the divorce and calculated an equitable distribution of the marital property. The trial court denied Winifred's claim that she should be repaid the money invested in Spectrum Management from her own inheritance

out of Douglas' trust funds because Winifred failed to provide an equitable ground for recovery.

II. ASSIGNMENT OF ERROR

The only error assigned by Winifred is that the district court erred in failing to include in the division of property to Winifred reimbursement from Douglas' inheritance for nonmarital inherited funds which Winifred invested in Spectrum Management.

III. STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). When the evidence in a dissolution case is in conflict, an appellate court may consider, 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. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994).

IV. ANALYSIS

Winifred argues three different theories as to why she should be entitled to reimbursement from Douglas' future inheritance. We will discuss each individually.

1. Presumption of Loan

Winifred's first argument is that in transactions where the wife advances money from her own separate, personal assets to a business that the husband manages, a loan from the wife to the husband is presumed. Winifred cites a number of cases from other jurisdictions as support for her argument. Though all of these cases support the notion that advances from a wife's separate funds to the husband should be presumed to be loans, each case is factually distinguishable from the case at bar, and thus each has limited persuasive authority.

For instance, in *Ustick v. Ustick*, 104 Idaho 215, 657 P.2d 1083 (Idaho App. 1983), the wife used over $53,000 of her own separate funds to pay the creditors of her husband's farm and to prevent foreclosure. The wife had apparently never participated in the farming operation and never derived any

direct economic benefit from the farm. The *Ustick* court held that when separate funds were used for the benefit of the community, such as payment of a debt arising from the acquisition of community property, the separate estate was entitled to reimbursement of the amount expended, unless there was clear and convincing evidence that a gift was intended.

Similarly, in *Sharpe v. Sharpe*, 202 So. 2d 822 (Fla. App. 1967), the wife advanced almost $7,000 of separate funds toward the purchase price of $15,543.38 for a grove that she and her husband purchased. The grove was subsequently sold for $45,000, from which the husband received half the proceeds and the wife received nothing. The *Sharpe* court held that the transaction should be construed as a loan from the wife to the husband or, alternatively, that the wife should have special equity in the money. Under either theory, the court held, the wife was entitled to reimbursement of her investment.

In another Florida case, *Allen v. Allen*, 123 So. 2d 355 (Fla. App. 1960), the wife advanced $25,000 to her husband to help him pay off various creditors and to purchase stock in the radio station where he worked. Given the confidential relationship between the parties, the *Allen* court presumed a loan from the wife to the husband and held that the wife was entitled to full reimbursement.

Winifred cites several other cases to support her argument that her advances to Spectrum Management should be presumed to be loans. See, e.g., *Estate of Abdale*, 28 Cal. 2d 587, 170 P.2d 918 (1946); *Van Inwegen v. Van Inwegen*, 4 N.J. 46, 71 A.2d 340 (1950); *Long v. Eddleman*, 22 N.C. App. 43, 205 S.E.2d 598 (1974), *cert. denied* 285 N.C. 660, 207 S.E.2d 755. However, *Ustick*, *Sharpe*, and *Allen* are the most factually similar to the case at bar, and each is distinguishable. The difference between the cases cited and Winifred's situation is that, in the cases cited, the wives' advancements were for the sole benefit of their husbands. In the instant case, the funds were advanced to a subchapter S corporation in which Winifred was the sole shareholder. Regardless of whether she was a mere figurehead president or an active participant, her ownership interest gave her the potential to earn profits and dividends from the corporation. The fact that she apparently let Douglas

operate the business, which eventually proved unsuccessful, does not change the fact that the funds she put into Spectrum Management were an investment in her business.

[3] Had Spectrum Management profited, Winifred would have shared in reaping the benefits of the success. The record indicates that in the Wellses' past business ventures, Winifred shared in or at least benefited from the profits of the ventures. When Winifred and Douglas sold part of their interest in Wells & Son to the Capital Group, the money, which totaled $1 million, was apparently reinvested into Wells & Son. Winifred testified that the family "lived very well" during this time period. The unavoidable inference from her statement is that she was enjoying the prosperity and success of Wells & Son. If Spectrum Management had been a similar success, Winifred surely would have enjoyed the good fortune once again. From our de novo review, we conclude that there is no presumption that the nonmarital funds Winifred infused into Spectrum Management were loans to her husband.

2. Contractual Obligation of Repayment

[4] Since we have determined that there is no presumption that the money Winifred invested in Spectrum Management was a loan, we next decide if the record shows a contractual agreement that Douglas, as a debtor, would repay Winifred the nonmarital funds advanced to Spectrum Management. Winifred, as the party seeking performance of the alleged oral contract, has the burden of proving its existence by clear, satisfactory, and unequivocal evidence. See, *Herrin v. Johnson Cashway Lumber Co.*, 153 Neb. 693, 46 N.W.2d 111 (1951). See, also, *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *Yates v. Grosh*, 213 Neb. 164, 328 N.W.2d 200 (1982).

There is evidence in the record that the parties did at one time contemplate and discuss an agreement for repayment out of Douglas' future inheritance. Winifred testified that she insisted on such an agreement from the very beginning and that she reaffirmed this agreement almost every time she advanced money to Douglas. Douglas, on the other hand, denies that he ever agreed to repay Winifred out of his inheritance. However, Douglas admits that the issue of repayment on some terms did

arise on at least a few occasions and that the parties did discuss the terms of the trusts. The question thus becomes whether, from our de novo review, we can say that there is clear, satisfactory, and unequivocal evidence in the record to find the existence of a contract for repayment. We hold that there is not.

[5] First, the record is devoid of any concrete evidence regarding an offer and acceptance necessary to prove the existence of the contract for repayment. "To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract." *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993). Accord *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990). The parties offered conflicting evidence as to whether there was an offer by Winifred to advance the money for Spectrum Management on the condition that Douglas repay her out of his future inheritance and as to whether Douglas accepted such an offer. While the record indicates that the parties discussed repayment, the record lacks any evidence of a "meeting of the minds."

The facts in this case are similar to the situation faced by the court in *Smith v. Smith*, 37 Md. App. 277, 376 A.2d 1164 (1977). In *Smith*, the wife had transferred $2,700 of her separate funds to her husband so that he could move his karate studio closer to where she worked. The karate studio did not prosper in its new location. The wife testified that no express agreement for repayment was made at the time of the transfer, but that there was an understanding that the husband would give her shares or make her an officer in the corporation. The husband testified that he felt a sense of responsibility to give the money back to his wife, but denied that he had ever agreed to repayment.

In denying the wife's claim for repayment, the *Smith* court made the following statement, which we find instructive:

> " ' "[T]he wife may become a creditor of the husband, in respect of money or property belonging to her as her separate estate, which the husband has *received under an express promise at the time of repaying to her*. But if such money or other separate property of the wife has been

> received by the husband, with the knowledge and acquiescence of the wife, without such express promise at the time, no implied assumpsit, either legal or equitable, will arise to support a claim against the husband or his estate. The wife having the *jus disponendi* of her separate property, if she thinks proper to let her husband have it, or appropriate it, without any express promise or agreement at the time to account for or repay her the amount so received or appropriated, she can not afterwards set up a claim against the husband upon the footing of a creditor. In such case she is taken to have acquiesced in the appropriation of the fund for the common benefit of herself and husband, or for the benefit of the family." . . .' "

(Emphasis in original.) *Smith*, 37 Md. App. at 283-84, 376 A.2d at 1168 (quoting *Nihiser v. Nihiser*, 127 Md. 451, 96 A. 611 (1916)).

The record in the case at bar does not strongly suggest that Winifred and Douglas expressly agreed to enter into a binding contract for repayment when Winifred transferred her nonmarital funds to Spectrum Management. Rather, the evidence is indicative of an investment by Winifred for the mutual benefit of the couple and their family and for the benefit of Spectrum Management.

[6] Even if we were to find that an offer and acceptance existed between Winifred and Douglas, the record would still not support enforcement of the contract because the terms of the contract would be entirely subject to conjecture. "It is a fundamental rule that in order to be binding, an agreement must be definite and certain, as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto." *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 197, 252 N.W.2d 142, 146 (1977). The record before us is packed with nothing but broad generalizations regarding this alleged agreement. The parties' estimates as to the amount of money that Winifred invested in Spectrum Management vary from $350,000 to over $800,000. Neither party could point to a single transaction and say with any certainty that that transaction was

subject to the alleged contract. The bookkeeper, whose records were the only evidence, other than Winifred's testimony, of Winifred's claimed contributions, testified that she had no idea where the money was coming from when she made entries in the ledger. Thus, even if an agreement were found to exist between Winifred and Douglas, enforcement of the agreement would be next to impossible because of the uncertainty surrounding the entire arrangement.

Upon our de novo review, we hold that Winifred did not offer clear, satisfactory, and unequivocal evidence of the existence of a contract for repayment between the parties, and we therefore hold that no such contract existed.

3. Constructive Trust

Winifred's final argument is that a constructive trust should be imposed on Douglas' future inheritance for the benefit of Winifred, on the grounds that Douglas was unjustly enriched by Winifred's contributions to Spectrum Management. The argument is without merit.

[7] A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

[8] Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to the property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Id.*; *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986).

Winifred's constructive trust argument fails because she has not shown any evidence, let alone clear and convincing evidence, of fraud, misrepresentation, or abuse of a confidential relationship. The only assertion Winifred makes

regarding abuse of a confidential relationship is her allegation that Douglas left the family temporarily when she initially refused to sign as a guarantor on a loan for Spectrum Management. Douglas testified that what Winifred referred to was a planned trip that both Douglas and Winifred knew Douglas was taking.

Likewise, Douglas did not perpetrate fraud or misrepresentation. We have already held that no enforceable agreement for repayment existed between Winifred and Douglas. If Douglas never agreed to reimburse Winifred for her contributions, then he certainly did not perpetrate any fraud against Winifred by accepting the money and investing it in Spectrum Management.

When the evidence in a dissolution case is in conflict, an appellate court may consider, 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. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). In finding that there were no equitable grounds to support Winifred's claim for relief, the trial judge necessarily believed Douglas' version of what happened over Winifred's. Our de novo review of the record leads us to the same conclusion. Therefore, we find that there was no fraud, misrepresentation, or abuse of a confidential relationship by Douglas.

Since Winifred does not allege any grounds for a finding of unjust enrichment on Douglas' part, we hold that this is not a proper case for imposition of a constructive trust.

V. CONCLUSION

Winifred has no legal or equitable claim to Douglas' future inheritance. The money that Winifred invested in Spectrum Management was an investment in a corporation of which she was the president and sole stockholder. No enforceable contract for repayment is evident from the record, because there is no clear, satisfactory, and unequivocal evidence of an offer, an acceptance, or any meeting of the minds. Even if there was an offer and acceptance, the agreement is too indefinite to be enforceable. Finally, Winifred cannot claim that Douglas must hold his future inheritance in a constructive trust for Winifred,

because there was no clear and convincing evidence of fraud, misrepresentation, or abuse of a confidential relationship by Douglas.

AFFIRMED.

PAULA K. HAFER, APPELLANT, V. DOUGLAS L. HAFER, APPELLEE.
524 N.W.2d 65

Filed November 8, 1994. No. A-93-127.

1. **Divorce: Appeal and Error.** In appeals involving actions for dissolution of marriage, an appellate court's review is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. When the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Alimony: Property Division.** The court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties; duration of the marriage; a history of the contributions to the marriage by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities; and the ability of the supported party to engage in gainful employment without interfering with interests of any minor children in the custody of such party.
4. _____: _____. While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.
5. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1993) make it appropriate.
6. _____. When a marriage of pronounced duration is linked with the significant difference in the income or earning capacity between the parties, an award of alimony is appropriate.

7. _____. Not only is the earning capacity of the spouse to be considered in determining if alimony is appropriate, but also the fact that one of the parties has received all of the income-producing property from the marriage.
8. _____. A court should look at the overall circumstances of the parties and attempt to provide for an award of alimony for a period of time and under such conditions as would minimize disruption in the lives of the parties caused by the divorce.
9. **Child Support: Rules of the Supreme Court: Presumptions.** Child support shall be established in accordance with the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced *sufficient evidence to rebut* the presumption that the application of the guidelines will result in a fair and equitable child support order.
10. **Property Division.** Property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.
11. **Divorce: Attorney Fees: Appeal and Error.** The allowance of attorney fees and costs in a dissolution of marriage case is discretionary with the trial court and depends upon a review of all the facts and circumstances presented. If there is no abuse of discretion, the decision of the trial court should be affirmed.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed as modified.

Richard L. Rice, of Kinsey Ridenour Becker & Kistler, for appellant.

Joseph H. Murray, of Germer, Murray & Johnson, and Gregory C. Damman for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

IRWIN, Judge.

This is an appeal from a divorce decree dissolving the marriage between appellant, Paula K. Hafer, and appellee, Douglas L. Hafer. The parties were married for approximately 19 years, during which time Paula contracted multiple sclerosis. She is conceded to be unemployable. Because the trial court ordered no alimony, ordered Paula to pay child support, and denied Paula's request to have Douglas pay certain expenses, we modify the trial court's ruling.

I. FACTUAL BACKGROUND

The facts are essentially without dispute. The parties were married on May 25, 1973. Two children were born of the marriage. The children were 13 and 17 years old at the time of trial and were residing in the family home.

At the time of their marriage, Paula was working as a dental technician. She continued working outside the home during the early years of the marriage. After 1977, she ceased employment outside the home in order to raise the children and to lend support to the family farming operation. Douglas was employed by Geneva Implement at the time of the marriage, and in 1974, he started the family farming operation, which he continues now with his brother.

Dr. Jeffrey Hollis, Paula's physician, testified at trial that Paula was first diagnosed with multiple sclerosis in 1984, although she had previously displayed some symptoms. When asked to opine as to a prognosis, the doctor stated that the disease can cause a variety of neurological impairments which vary from individual to individual. He testified that the illness had caused Paula significant impairment up to the time of trial and that her future scenario included worsening neurological impairments. Of particular note was the doctor's opinion that given the further debilitating effects associated with the disease, Paula would very possibly be required to have someone provide care for her in the future. He stated this was a probable result of multiple sclerosis. He concluded by testifying that he has no reason to believe that she should improve significantly in the future. The record implies, and the briefs confirm, that both sides agree Paula is unemployable because of the disease.

Paula's monthly income and expenses are as follows:

Income:		**Expenses:**	
Social Security benefits	$ 422	Monthly	$ 875
Medicaid benefits	47		
Avon sales	19		
TOTAL	$ 488		

Being a farmer, Douglas does not have a definitive yearly

income for the future. However, the tax returns for the 3 years preceding trial indicate a stable income varying by only a few thousand dollars each year.

Douglas' 1991 income and monthly expenses are as follows:

Income:		**Expenses:**	
Adjusted gross income from federal income tax return	$29,369	Monthly	$1,798
IRA add-back	2,000		
TOTAL	$31,369		
Federal income tax	$ 2,261		
State tax	961		
Self-employment tax	1,476		
TOTAL	4,698		
Net 1991 income	$26,671		
	($ 2,223 average monthly income)		

Douglas' 1991 tax return listed depreciation in the amount of $5,784. Douglas' expenses, listed on exhibit 17, reveal expenses of $200 per month for "Clothing purchases (Most is for ball shoes)," $200 per month for uninsured doctor and medical expenses, and $120 per month for "Labor paid to children." We will discuss some of these items later.

Neither of the parties disputes the division of property. While each expectedly valued the property differently, neither side appeals from the determination regarding the division of that property, and we will only discuss it as is necessary when it interfaces with the issues of alimony and nonmarital property. A trust fund was established by Paula, as revealed by the record, but neither party elicited evidence indicating what amounts, if any, are contained in that trust.

During the course of the marriage, Paula received two inheritances totaling $40,000. Paula testified that these moneys were used to build the family home. Douglas contends that he had a $15,000 inheritance which was received as forgiveness of a partnership debt.

Custody of the children was stipulated to by the parties, and it was agreed that Douglas and the children would reside in the family home so that the children would not be forced to change environments.

The court found that the total "net assets" of the parties were $177,940. According to the court's award, Douglas retained the majority of the assets, together with the corresponding liabilities, and is to pay Paula $87,620 as her share of the property, in 300 monthly installments of $564.52, which includes 6 percent annual interest compounded monthly.

Regarding the issue of alimony, the trial judge stated on the trial docket sheet:

> My first instinct was to grant [Paula] alimony for the rest of her life, i.e., to require [Douglas] to pay all of [Paula's] necessary and reasonable expenses. Ihave [sic] backed off because I believe that alimony would lead to periodic expense and bitter personalities in the end. Therefore, I have attempted to evenly divide those things that the parties have accumulated over this long marriage andto [sic] enable each to say that he or she did their part.

Douglas was not ordered to pay alimony.

The trial docket sheet also addressed the issue of child support. The judge's note states,

> To enable her to maintain her dignity and in an attempt to conform to the support guidelines, [Paula] is ordered to pay child support in the amount of $ 100 each month until there is only one child not of age, not emancipated or living and then $ 75 each month until both children are of age, are emancipated or deceased . . . .

Douglas was ordered to pay the costs of the action plus $500 of Paula's attorney fees. Paula had requested that appraisal expenses she incurred be assessed against Douglas, but the court declined to do so. A motion for new trial was filed and denied. This timely appeal followed.

II. ASSIGNMENTS OF ERROR

Paula has assigned four errors. She contends that the district court erred in (1) failing to award her alimony, (2) ordering her to pay child support, (3) failing to properly offset her

inheritance, and (4) not awarding her the expense for appraisals of property.

III. STANDARD OF REVIEW

[1] In appeals involving actions for dissolution of marriage, an appellate court's review is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. When the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Larimore v. Larimore*, 240 Neb. 13, 480 N.W.2d 192 (1992); *Policky v. Policky*, 239 Neb. 1032, 479 N.W.2d 795 (1992).

[2] A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. See, *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992).

IV. DISCUSSION

1. ALIMONY

[3,4] Paula claims that she is entitled to an award of alimony under Neb. Rev. Stat. § 42-365 (Reissue 1993), which states:

> When dissolution of marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .

> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately.

[5] The Nebraska Supreme Court has repeatedly stated, "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate." *Murrell v. Murrell*, 232 Neb. 247, 252, 440 N.W.2d 237, 241 (1989).

This case involves a marriage of long duration. Each party has made contributions to the marriage. Douglas has occupied the more traditional husband's role of principal income earner. Paula contributed her outside income during her years of employment and then contributed substantially to the care and education of the children, thus surrendering any personal career opportunities.

Paula's inability to engage in gainful employment is obvious and extreme. Diagnosed with multiple sclerosis in 1984, she can now move about only with the aid of a walker. Both parties concede that she is unemployable. Paula's income is also undisputed as being $488 per month, while her unreimbursed expenses total $875. The trial exhibit listing her expenses illustrates the dire straits her finances are in. Of the $875 in monthly expenses, $310 is spent providing rent and insurance. With obvious conservatism, she lists her monthly food expenses at $100. Douglas, on the other hand, has listed expenses totaling almost $1,800. The figure appears somewhat inflated by the entries for "Clothing purchases (Most is for ball shoes)" and "Labor paid to children" which total $320 per month.

[6,7] When a marriage of pronounced duration is linked with a significant difference in income or earning capacity between the parties, an award of alimony is appropriate. See *Wenger v. Wenger*, 200 Neb. 446, 263 N.W.2d 855 (1978). It is particularly appropriate in the present case because the income-producing assets of the parties were distributed exclusively to Douglas. The Nebraska Supreme Court has stated that not only is the earning capacity of the spouse to be considered in determining if alimony is appropriate, but also the fact that one of the

parties has received all of the income-producing property from the marriage. See *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988). In *Ritz*, the Supreme Court noted that the "[p]etitioner has nothing awarded on which to earn money, except her insurance policies and the property award hereunder." *Id.* at 867, 429 N.W.2d at 711. Paula's situation is nearly identical to the *Ritz* situation in this regard. The *Ritz* court went on to state, "Equitable consideration requires that petitioner not have to live like the proverbial church mouse while her ex-partner daily drives around his extensive holdings and observes his assets grow." *Id.* The same is true in the instant case.

[8] We are aware of the Supreme Court's ruling in *Cole v. Cole*, 208 Neb. 562, 567, 304 N.W.2d 398, 401 (1981), wherein the court stated, with regard to alimony, "requiring the husband to pay a fixed sum for an indefinite period of time is not favored, although we have on occasion upheld such awards where we deem them necessary." We are guided also by language from *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982). In *Pyke*, the Supreme Court noted that the Nebraska Legislature in 1980 amended § 42-365 and added a new paragraph which illuminated the Legislature's intent in adopting this section. The amendment in part provides that " '[t]he purpose of alimony is to provide for the *continued maintenance* or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.' " 212 Neb. at 118, 321 N.W.2d at 909. The court went on to state that the Legislature made it clear by this language that "in the first instance," *id.*, a court should look at the overall circumstances of the parties and attempt to provide for the award of alimony for a period of time and under such conditions as would minimize disruption in the lives of the parties caused by the divorce. The court noted that this should not be interpreted to stand for the proposition that in every instance one of the spouses should be granted a lifetime annuity; it was simply stating that a court in every situation must make an examination of the circumstances and attempt to enter an order which is fair and equitable.

In the case before us, the trial court's language is ambiguous

at best with regard to alimony. To iterate, the court stated, "My first instinct was to grant [Paula] alimony for the rest of her life, i.e., to require [Douglas] to pay all of [Paula's] necessary and reasonable expenses. Ihave [sic] backed off because I believe that alimony would lead to periodic expense and bitter personalities in the end." Periodic expense and bitter personalities are not criteria upon which to award or deny alimony. Given our de novo standard of review, we find that alimony should be awarded. Therefore, we modify the decree of dissolution to provide that Douglas pay Paula $300 per month until the death of either party. This award of alimony is not to terminate automatically upon the remarriage of the petitioner. This alimony may be modified upon a change of circumstances to be considered by the trial court at some future date, together with any other relevant circumstances. It should be noted that this language regarding the term and payment of alimony is similar to that approved by the Nebraska Supreme Court in *Pyke, supra*.

2. Child Support

[9] Paula claims that she should not have been ordered to pay child support in the amount of $100 per month, to be reduced to $75 per month upon the older child's reaching the age of majority. The Nebraska Supreme Court has held that the ultimate test in determining the appropriateness of an award of child support is reasonableness as determined by the facts of each particular case and that the trial court's determination will normally be affirmed in the absence of an abuse of discretion. *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990). The record reveals that the children were placed in the custody of Douglas due to Paula's disability and by the agreement of the parties. The trial judge's reasons for ordering Paula to pay support were "to enable her to maintain her dignity and in an attempt to conform to the support guidelines." The record contains a sheet of paper with handwritten notes and figures, which we interpret to be the trial judge's calculation of child support according to the guidelines, given the income of the parties as determined at trial. Neb. Rev. Stat. § 42-364.16 (Reissue 1993) provides:

> The Supreme Court shall provide by court rule, as a *rebuttable presumption*, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines unless the court finds that one or both parties have produced *sufficient evidence to rebut* the presumption that the application of the guidelines will result in a fair and equitable child support order.

(Emphasis supplied.) While child support payments should be set according to the guidelines, a trial court may deviate from these whenever application of them would be unjust or inappropriate. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). We find that given the respective incomes and expenses of the parties and the other surrounding circumstances, no child support shall be ordered in this case at this time. Therefore, we modify the decree of dissolution to eliminate the child support obligation of Paula.

3. Nonmarital Property

Paula argues that the trial court failed to offset her $40,000 inheritance when making its property division. It is difficult to determine the manner in which the trial court treated the undisputed $40,000 inheritance of Paula. A filing entitled "Journal Entry and Decree of Dissolution of Marriage" is found in the record. Paragraph 12 of the findings states:

> The Court finds that the accumulations made by the parties over their marriage should be divided evenly. The total value of the net assets of the parties is $177,940.00 and [Douglas] should be awarded all of the assets and liabilities except [Paula's] bank account, the Lincoln automobile, [Paula's] life insurance policy, [Paula's] individual retirement account, the personal property now in [Paula's] possession, and the debt due the Geneva State Bank by [Paula] which was incurred after the separation of the parties. In lieu of a further division of property, [Douglas] should pay to [Paula] the sum of $87,620.00 in monthly payments of $564.52, beginning February 1, 1993, and due the first of each month thereafter for 300 months. . . . *The Court has considered the inheritances*

received by each party and the property in possession of each to effect an equal distribution.

(Emphasis supplied.)

The trial docket sheet also addresses this subject matter. Paragraphs 2 and 3 state:

> 2. That the total value of the parties' net assets is $ 177,940 and that [Douglas] is awarded all the assets and liabilities except [Paula's] bank account (1380), her Lincoln auto, her insurance policy (cv 2,770), her IRA (7,200), all personal property now in her possession and the debt to the Geneva State Bank which was incurred after the parties' separation;
>
> 3. In lieu of a further division of property, [Douglas] shall pay [Paula] $ 87,620 in monthly payments of $ 564.52, beginning February 1, 1993, for 300 months (6% compounded monthly); (*inheritances and property in possession effect 50-50 distribution*)[.]

(Emphasis supplied.)

The term "net assets" does not have a universal definition, nor does the trial judge explain what he means by this term. In the context of this case, this phrase might mean the total assets of the parties minus any liabilities, or total assets of the parties minus liabilities plus or minus adjustments made for inheritance. A statement in the decree or in the judge's notes would have proven helpful to this court in deciphering the effect that the trial judge gave to the $40,000 inheritance of Paula.

[10] In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), the Nebraska Supreme Court held:

> "How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved." . . . [P]roperty acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. [Citations omitted.] An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of

> the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

The difficulty this court has in analyzing the trial court's decision is the vagueness and ambiguity in the record. As we mentioned above, the definition of net assets is uncertain. The decree and judge's notes would appear at first blush to be dividing the property of the parties in a nearly 50-50 fashion. However, parenthetical comments made in the judge's notes clearly indicate that the property division was tempered by other factors. The first is mentioned above where the trial court states that "inheritances and property in possession effect 50-50 distribution." It is unclear how any property inherited was factored into the division of property. A second example comes from the trial court's docket sheet stating that Douglas "shall pay the costs herein, including $ 500 towards [Paula's] attorney fees (*the balance having been considered in the property division*)." (Emphasis supplied.) Again, exactly how this was factored in the property division is unknown. Lastly, another remark in the judge's notes when he was addressing the issue of alimony states:

> Although a divorce is necessary, no one can find fault in this case. It just has to be. My first instinct was to grant [Paula] alimony for the rest of her life, i.e., to require [Douglas] to pay all of [Paula's] necessary and reasonable expenses. Ihave [sic] backed off because I believe that alimony would lead to periodic expense and bitter personalities in the end. *Therefore, I have attempted to evenly divide those things that the parties have accumulated over this long marriage andto* [sic] *enable each to say that he or she did their part.*

(Emphasis supplied.) This remark would seem to indicate the property was divided evenly, but the issue of inheritance was not addressed.

Being mindful of the language in *Van Newkirk* and the cases that have been decided since then, we find several factors critical. These factors include that both spouses have

apparently contributed to the improvement or operation of the family home. The record would indicate that while Paula invested her $40,000 worth of inheritances into the family home, there was also an "SBA" loan from which Douglas took $22,000 and invested in building the home. Another salient fact is that the Hafer family, Douglas' family, contributed labor to the construction of the home. Lastly, it would seem reasonable to conclude that given the preceding investments, the value of the home would exceed $62,000. However, Paula's own appraisal introduced into evidence at trial indicates that the present value of the home is only $44,000. It would be a harsh result indeed to award her the entire value of the house. Given these factors and the fact that the trial judge apparently awarded Paula approximately 50 percent interest in the home, we do not find the trial judge abused his discretion in dividing the property.

4. Appraisal Costs

[11] At trial, Paula introduced evidence showing that she spent $950 to obtain a real estate appraisal. In order to pay this debt, she obtained a loan from the Geneva State Bank. She requested that the trial court order her husband to pay for this expense, as well as attorney fees and court costs. She had been billed $4,234.89 for attorney fees, and there is reference in the record to court costs being $1,221. The trial court ruled that Douglas was required to pay $500 for attorney fees and to pay court costs, but was not obligated to pay the real estate appraisal. The allowance of attorney fees and costs in a dissolution of marriage case is discretionary with the trial court and depends upon a review of all the facts and circumstances presented. If there is no abuse of discretion, the decision of the trial court should be affirmed. *Schmer v. Schmer*, 211 Neb. 414, 318 N.W.2d 876 (1982). The allowance, amount, and allocation of a guardian ad litem fee is also a matter within the initial discretion of the trial court, necessarily involves consideration of the equities and circumstances of each particular case, and will only be set aside on appeal when there appears to be an abuse of discretion by the trial court. *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). The request for

payment of the appraisal expense is controlled by the two above propositions of law, and we therefore apply the standard of review mentioned above.

In *Smith, supra*, the Supreme Court stated that in determining these questions, a court should consider a variety of factors, including the amount of property divided and alimony granted, earning capacity of the parties, and general equities of each situation. In *Smith*, the wife was ordered to pay $240 of an $840 guardian ad litem fee. She appealed from that order. The Supreme Court noted that the wife had received a suitable property division, including an award of the family residence and an equal share in a $63,000 joint bank account. Her husband was employed by the Department of Roads and earned approximately $20,000 per year, while the wife earned money delivering phone books, which yielded an annual income of approximately $3,000. While the court found in that case that the trial court did not abuse its discretion, we find the facts of the instant case to be distinguishable. The disparity in earning capacity between Douglas and Paula is vast. She has no earning capacity, whereas his is in the range of $30,000 per year. Further, unlike the *Smith* case, Paula was not awarded an equal share in a $63,000 joint bank account which she could immediately tap to pay for monthly living expenses as well as expenses associated with the divorce, such as this appraisal. While Paula does not appeal the award of attorney fees in the amount of $500 from this contested divorce, we note that she has a substantial attorney fee to pay. We find that the equities of the situation require that Douglas pay the real estate appraisal fee.

V. CONCLUSION

We modify the decree of dissolution to eliminate the obligation of Paula to pay child support, to order that Douglas pay alimony in the amount and on the terms contained herein, and to order that Douglas pay the appraisal expense. We find no error regarding the offset of Paula's inheritance, and we affirm that portion of the decree.

AFFIRMED AS MODIFIED.

STEVEN R. BRACKHAN, APPELLEE, V. CARRIE K. BRACKHAN, APPELLEE, AND COUNTY OF YORK, NEBRASKA, APPELLANT.
524 N.W.2d 74

Filed November 8, 1994. No. A-93-229.

1. **Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no construction is necessary or will be indulged to ascertain their meaning.
3. **Statutes: Words and Phrases.** Generally, the word "shall" is considered mandatory, and inconsistent with the idea of discretion.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded.

Charles W. Campbell, York County Attorney, for appellant.

No appearance for appellee Steven R. Brackhan.

No appearance for appellee Carrie K. Brackhan.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

The County of York, Nebraska (County), appeals from a decision by the district court for York County in which the County was taxed the fees and costs associated with the court appointment of a guardian ad litem in a dissolution proceeding. The County alleges that under Neb. Rev. Stat. § 42-358 (Cum. Supp. 1992), the court must find that the parties are indigent before requiring the County to pay the costs of a guardian ad litem. For the following reasons, we reverse, and remand for a determination of whether the parties were indigent.

FACTS

A trial concerning the dissolution of the marriage of Steven R. and Carrie K. Brackhan was held July 22, 1992. Both parties sought custody of their minor daughter, Tesia Marie, born June 7, 1991. Upon the conclusion of the evidence, the court determined that the evidence was "conflicting and insufficient to determine custody upon the best interest of Tesia Marie

Brackhan." At that point, on August 26, 1992, the court appointed an attorney, Kevin Schlender, to investigate and report his findings to the court regarding custody of the child. Schlender filed his report on January 8, 1993, recommending custody be awarded to the child's father. On February 9, Schlender filed an application for guardian ad litem fees in the amount of $1,086.81. On February 17, the court issued a decree awarding custody of the child to Steven Brackhan.

A hearing was held on March 9 regarding the guardian ad litem's application for fees. The order of March 9 reflects that Steven Brackhan, his attorney, and the guardian ad litem were present. The application for fees had been served on the attorney for Carrie Brackhan and the York County Attorney by mail on February 9, but neither appeared at the March 9 hearing. The court found Schlender was entitled to fees and expenses, determined the fair and reasonable amount thereof, and ordered said amount to be paid by the County. The court further granted the County judgment against each of the parties to the dissolution action in an amount equal to one-half of the total amount ordered to be paid by the County. The record does not reflect any finding that the parties were indigent, nor does it reflect a request by either party to have the County pay the fees. The County appeals.

ASSIGNMENT OF ERROR

The County alleges the district court erred in taxing the fees and expenses of the guardian ad litem to the County, without first finding that the parties to the dissolution action were indigent.

STANDARD OF REVIEW

[1] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994); *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994); *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

ANALYSIS

We note initially that a brief on behalf of the appellees was not filed in this matter. In such event, Neb. Ct. R. of Prac. 10B (rev. 1992) provides that the appellant may proceed ex parte.

The County argues that pursuant to § 42-358(1), it may not be ordered to pay the fees and expenses of a guardian ad litem unless there is first a finding of indigence on the part of the party against whom such fees and expenses are taxed as costs. We recognize that although the County was not a party to the original dissolution action, this statute grants the County standing to appeal to this court an order requiring it to pay fees. See § 42-358(6).

Section 42-358, the statute authorizing the court to appoint a guardian ad litem, was amended in 1992 and became effective July 15, 1992. We observe that the amended version of this statute applies to the case at bar, as both the dissolution trial and the appointment of the guardian ad litem occurred subsequent to the effective date. Subsection (1) of this statute provides:

> The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, *which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs.*

(Emphasis supplied.)

[2,3] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no construction is necessary or will be indulged to ascertain their meaning. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994); *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993). The language of § 42-358 is plain, direct, and unambiguous, and no interpretation is needed to ascertain its meaning. The statute states that the fees and disbursements of an attorney appointed

in the circumstances of this case "shall" be taxed as costs and paid by the parties as ordered. Generally, the word "shall" is considered mandatory, and inconsistent with the idea of discretion. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). The statute clearly provides that the County "may" be ordered to pay the amount so taxed, but only "[i]f the court finds that the party responsible is indigent."

Although the record discloses that Schlender served a copy of his application for fees upon the York County Attorney by mail on February 9, 1993, that application makes no reference to the indigence of either of the parties to the divorce proceeding and provides no notice to the County that an order was being sought requiring the County to pay any portion of the fees and disbursements of the guardian ad litem. Neither of the parties to the dissolution proceeding had filed any request that such fees be taxed to the County. Indeed, the record discloses no notice whatsoever to the County that a hearing was scheduled to be held on the application on March 9. Neither the County nor the mother appeared or was represented at the March 9 hearing. No formal offer of evidence was made by those in attendance, i.e., the guardian ad litem, the father, and the father's attorney. Schlender merely submitted the issue "on the application," which contained an itemization of fees and disbursements. Although the father's counsel requested that the court "take note" of his client's financial problems in determining the division of the fees, no suggestion was made of indigence on the part of either of the parties to the dissolution proceeding, no objection was made to the application, and no request was made that the County be ordered to pay the amount so determined and taxed as costs. No finding of indigence was made by the trial court. Indeed, the court's granting of a judgment in favor of the County and against each of the parties for one-half of said fees suggests a contrary finding.

We believe the order of the district court requiring the County to pay the fees of Schlender was error under the circumstances presented. First, the County was given no notice of the hearing on the application in this case and no notice that the indigence of either of the parties was at issue. Fundamental principles of due process required such notice. Schlender's

sending the county attorney a copy of his application, although certainly necessary, was inadequate to advise the County of whether indigence was an issue and, if so, when any hearing was to be held on the application. In the case before us, neither the guardian ad litem nor the parties themselves raised the issue of indigence. However, whether indigence was put in issue by the guardian ad litem, by the parties, or by the court itself, the County must be given adequate notice and an opportunity to be heard in opposition to such issue. In the absence of such notice, the order of the court that the County pay the fees and disbursements of the guardian ad litem pursuant to § 42-358(1) was erroneous.

Second, and of equal import, a finding of indigence is a prerequisite to an order entered pursuant to § 42-358 requiring the County to pay the costs which have been fixed, taxed, and ordered to be paid by the parties. No such finding appears on the record in this case.

CONCLUSION

The language of § 42-358(1) requires that the fees and disbursements of an attorney appointed thereunder shall be fixed by the court and taxed as costs and paid by the parties as ordered. The County may be ordered to pay the amount so taxed as costs only upon a finding that the responsible party is indigent. The County is entitled to notice if the indigence of either party is at issue with regard to the payment of such costs and to an opportunity to be heard on said issue with adequate notice of the hearing thereon. It was error for the court to order the County to pay the costs of the guardian ad litem fees and disbursements without adequate notice and opportunity to be heard and without a finding that the responsible parties were indigent. We reverse the district court's March 9, 1993, order to the extent that it requires the County to pay the fees and expenses of Schlender and grants judgment in favor of the County against the father and the mother. We do so without prejudice to the district court's entering an order, after notice and hearing, taxing the fees and expenses to the parties as costs to be paid by the parties or, if the parties responsible are found indigent, to order the County to pay such costs.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. YELLI, APPELLANT.

524 N.W.2d 353

Filed November 8, 1994. No. A-94-206.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
2. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Paternity: Right to Counsel.** In a State-initiated paternity adjudication, the trial court must make an initial determination regarding whether the defendant is indigent and whether counsel should be appointed for the defendant.
4. **Final Orders: Paternity: Collateral Attack.** Collateral attacks on the final orders of prior paternity adjudications in subsequent proceedings are not permissible.
5. **Paternity: Right to Counsel.** A defendant in a State-initiated paternity action has an absolute right to be represented by counsel.
6. **Paternity: Right to Counsel: Waiver: Proof.** If the record does not affirmatively show that the defendant was represented by or waived his right to counsel in a prior State-initiated paternity adjudication, then the same defendant in a subsequent criminal nonsupport action may object to the use of the prior paternity adjudication as evidence of paternity.

Appeal from the District Court for Holt County: WILLIAM CASSEL, Judge. Reversed and vacated.

John Jedlicka, Holt County Public Defender, for appellant.

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

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

John W. Yelli appeals his convictions for criminal nonsupport on the grounds that the trial court erroneously admitted evidence in the form of records from past paternity cases, in which Yelli was adjudged to be the father of the two children in question and ordered to pay child support. Yelli argues that those prior adjudications should not have been admitted into evidence because he was not afforded his constitutional right to counsel in those prior proceedings. We reverse and vacate Yelli's convictions. The records of the prior

paternity adjudications should not have been admitted as evidence to establish his paternity in this criminal nonsupport action because the records of the prior adjudications do not affirmatively show that Yelli was informed of his right to counsel, that Yelli had counsel, or that Yelli waived counsel.

I. BACKGROUND

John W. Yelli was convicted by a jury on two charges of criminal nonsupport, a Class IV felony. The first charge arose from a December 27, 1988, order of the Holt County District Court in State ex rel. Beauchamp v. Yelli, case No. 18619, in which Yelli was adjudicated the father of and ordered to pay support for his alleged son, DeWayne Beauchamp. The second charge also arose from an order of the Holt County District Court, in State ex rel. Sobotka v. Yelli, case No. 18763, filed April 7, 1989, in which Yelli was adjudicated the father of and ordered to pay support for his alleged daughter, Christina R. Sobotka. Both of the above-referenced cases were State-initiated paternity actions.

Charges were filed in the instant case because Yelli failed to meet his child support payment obligations, in violation of Neb. Rev. Stat. § 28-706 (Reissue 1989). The child support payments at issue in the instant case arose from the above-mentioned Holt County District Court adjudications. Yelli filed a motion in limine, seeking to prohibit the State from introducing into evidence any records of those adjudications. As the basis for his motion in limine, Yelli argued that the court in the prior adjudications failed to offer him appointed counsel and that he never waived his constitutional right to counsel. Therefore, Yelli contends, the orders issued in those cases were unconstitutional, and any records of those proceedings should not have been admissible in the instant case. After a hearing on the motion in limine, the trial court denied the motion.

At trial, the mother of each child testified that Yelli was the father of her respective child. The State introduced the records from the prior paternity adjudications into evidence during the testimony of the mothers, over Yelli's objections. The jury was allowed to consider all the evidence and returned a verdict of guilty on both counts.

II. ASSIGNMENT OF ERROR

Yelli's only assignment of error is that the trial court erred in admitting evidence from the prior paternity adjudications, where Yelli did not have counsel and did not waive his right to counsel.

III. STANDARD OF REVIEW

[1,2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *White, supra.*

IV. ANALYSIS

Yelli complains that the records of the prior paternity adjudications, in which Yelli was found to be the father of the children in question and ordered to pay child support, should not have been admitted into evidence in the instant case because Yelli was not afforded counsel and did not waive his right to counsel in those prior adjudications.

As the primary basis of support for his argument, Yelli cites *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989). *Carroll* was a paternity action in which the defendant, the purported father of the child in question, was denied counsel in spite of his indigent status. The Nebraska Supreme Court in *Carroll* held that "due process requires that an *indigent* defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings." (Emphasis supplied.) 228 Neb. at 579, 423 N.W.2d at 767. In the instant case, Yelli argues that *Carroll* mandates a finding that the prior State-initiated paternity adjudications involving Yelli were unconstitutionally decided and, therefore, that the records of

those adjudications should be inadmissible in the present action.

Yelli is correct inasmuch as he argues that *Carroll* directs that indigent defendants must be afforded court-appointed counsel in State-initiated paternity adjudications. However, Yelli's arguments require us to determine two additional issues. First, we must decide whether the trial court in the prior paternity adjudications had a duty to affirmatively show on the record that Yelli was informed of his *Carroll* rights. Second, we must decide whether the validity of a paternity adjudication can be attacked in a subsequent criminal nonsupport proceeding.

1. Trial Court's Duty to Inform Defendant of *Carroll* Rights

In the case at bar, there is nothing in the record indicating that Yelli was indigent, and thus entitled to court-appointed counsel under *Carroll*, at the time of the prior paternity adjudications. Yelli argues that in paternity adjudications, the trial court has a duty to make a determination regarding the defendant's indigent status on the record and to determine whether counsel should be appointed for him. Yelli points to *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. App. 1982), which was relied on by the *Carroll* court for the following proposition:

> [T]he due process clause demands not only the appointment of counsel for *all* indigent paternity defendants, but also that "[b]ecause this right would be meaningless if such a defendant did not know of the right, we further hold that the court must advise the paternity defendant in this situation of his right to appointed counsel if he is indigent."

Carroll, 228 Neb. at 572, 423 N.W.2d at 763-64.

[3] Yelli argues that the cited language supports his contention that an indigent defendant's absolute right to counsel in State-initiated paternity actions is insignificant unless the defendant is advised of his right to counsel. We agree. In order to make the right to counsel mandated by *Carroll* meaningful, we hold that in a State-initiated paternity adjudication, the trial court must make an initial determination regarding whether the defendant is indigent and whether

counsel should be appointed for the defendant. See, *Kennedy, supra*; *Rees v. Heimberger*, 60 Ohio App. 3d 45, 573 N.E.2d 189 (1989), *cert. denied* 494 U.S. 1088, 110 S. Ct. 1827, 108 L. Ed. 2d 956 (1990); *Rodriguez v. Rodriguez*, 410 Pa. Super. 549, 600 A.2d 589 (1991). The records of the prior paternity actions in this case reflect that the trial court in each case did not make any determination regarding Yelli's indigent status. Therefore, the trial court in each case failed to properly inform Yelli of his right to counsel under *Carroll*.

2. ATTACKS ON VALIDITY OF PRIOR PATERNITY ADJUDICATIONS

[4] At first blush, Yelli's argument regarding the admissibility of the records from the prior paternity adjudications in this criminal nonsupport proceeding appears to be a collateral attack on those prior adjudications. Collateral attacks on the final orders of prior paternity adjudications in subsequent proceedings are not permissible. *Carroll, supra*.

However, we find Yelli's analogy to criminal enhancement proceedings persuasive. In order for a defendant's prior convictions to be used to enhance the punishment for a subsequent conviction, the record must affirmatively show that the defendant was either represented by or waived his right to counsel at the proceeding where the prior conviction was had. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). At the enhancement proceeding, the defendant is allowed to object to the validity of the prior convictions, but only on the grounds that the defendant neither was represented by nor had waived his right to counsel, in violation of the defendant's right to counsel under the Sixth Amendment. Convictions obtained in violation of the right to counsel are considered too unreliable to be admitted into evidence in enhancement proceedings. *Smith, supra*.

[5,6] We hold that the same is true when past State-initiated paternity adjudications are used as evidence of paternity in criminal nonsupport proceedings. Under *Carroll*, a defendant in a State-initiated paternity action has an absolute right to be represented by counsel. If the record does not affirmatively show that the defendant was represented by or waived his right

to counsel in the prior State-initiated paternity adjudication, then the same defendant in a subsequent criminal nonsupport action may object to the use of the prior paternity adjudication as evidence of paternity.

Turning to the case at bar, the records of the past paternity adjudications where Yelli was determined to be the father of the children in question did not affirmatively show that Yelli was represented by or waived his right to counsel. Yelli properly objected when the State attempted to introduce the records of the paternity adjudications into evidence. Under our holding in this case, those records were inadmissible to prove that Yelli is the father of the two children in question in the current criminal nonsupport proceeding. Had the records of the prior paternity adjudications not been admitted into evidence, the jury might have acquitted Yelli.

V. CONCLUSION

The records of the paternity adjudications where Yelli was found to be the father of the children involved in this case should not have been admitted as evidence to establish his paternity in this criminal nonsupport action, because the records of the prior adjudications do not affirmatively show that Yelli was informed of his right to counsel, that Yelli had counsel, or that Yelli waived counsel.

REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS W. REITER, APPELLANT.
524 N.W.2d 575

Filed November 8, 1994. No. A-94-210.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion.

3. **Courts: Appeal and Error.** In cases where the district court acts as an intermediate court of appeals, both the district court and the higher appellate court generally review appeals from the county court for error appearing on the record.
4. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** An officer may not properly stop a vehicle with visible in-transit tags to verify compliance with motor vehicle registration statutes.
5. **Constitutional Law: Motor Vehicles.** A motorist on a public highway or street has a legitimate expectation of privacy within the vehicle.

Appeal from the District Court for Hall County, JAMES LIVINGSTON, Judge, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Judgment of District Court affirmed.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

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

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Douglas W. Reiter was convicted in a bench trial in the county court for Hall County of driving under the influence of alcohol and driving while his license was suspended, both second offense, violations of Neb. Rev. Stat. §§ 39-669.07 (Cum. Supp. 1992) and 60-4,108 (Reissue 1993), respectively. His convictions were affirmed by the district court for Hall County. Reiter timely appealed to this court, claiming that the denials of his motions to suppress by the county court, as affirmed by the district court, were improper. For the reasons recited below, we affirm.

ASSIGNMENTS OF ERROR

Reiter claims that the district court's affirmance of the county court's overruling of his motions to suppress evidence and the county court's admission of such evidence at trial were error.

SCOPE OF REVIEW

[1-3] The Nebraska Supreme Court has recently repeated the appellate scope of review regarding claims involving motions to

suppress in *State v. Reimers*, 242 Neb. 704, 705, 496 N.W.2d 518, 520 (1993):

> "In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion." *State v. Thomas*, 240 Neb. 545, 547, 483 N.W.2d 527, 530 (1992). Accord, *State v. Childs, ante* p. 426, 495 N.W.2d 475 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

Further, in cases where the district court acts as an intermediate court of appeals, both the district court and this court generally review appeals from the county court for error appearing on the record. Neb. Rev. Stat. §§ 25-2733 (Reissue 1989) and 25-1911 (Cum. Supp. 1992).

FACTS

A review of the record shows that on May 7, 1993, around 3:30 a.m., Officer Tim Meguire of the Grand Island Police Department was on duty patrolling the area near 5th and Cedar Streets when he noticed a brown Buick Riviera proceeding eastbound on 5th Street. The vehicle did not have any license plates and did not appear to have any in-transit tags in the window. Meguire described the vehicle as having darkly tinted windows and a rear window with sharp curves on the sides which came to a point. The vehicle stopped at 5th and Walnut Streets. When the officer still did not see any in-transit tags in the window, he activated his overhead lights and stopped the vehicle in the 400 block of North Walnut. Meguire testified on direct examination that he turned on his spotlight, shined it into the back window, and then noticed a piece of paper in the rear window, but could not tell what the paper said at that point. On cross-examination, Meguire testified that he saw the in-transit tags prior to contact with the driver.

The driver of the vehicle was Reiter. When the officer approached Reiter, he noticed that a strong odor of alcohol was coming from within the vehicle and that Reiter's eyes were bloodshot and watery. Upon conversing with Reiter, Meguire noticed that Reiter's speech was slurred. The officer thereafter administered sobriety tests which the officer stated Reiter failed. Meguire then arrested Reiter. Reiter was charged with driving while under the influence of alcohol and driving while his license was suspended, both second offense.

Prior to trial in county court, Reiter filed two motions to suppress seeking exclusion of evidence and alleging that his arrest was made without probable cause and that the stop which led to evidence of the crimes charged was improper because it was made without a reasonable articulable suspicion of criminal activity in violation of U.S. Const. amend. IV and Neb. Const. art. I, § 7.

A suppression hearing was conducted in county court. Reiter argued that, although the initial stop may have been proper, because he did in fact have proper in-transit tags, the officer's contact with him after the stop revealed the tags was improper, and evidence obtained subsequent thereto should be suppressed. After reviewing the evidence presented at the suppression hearing, the county court judge stated, "I don't think the evidence was real clear when, if ever, the officer discovered that there were perfectly legitimate transit stickers properly affixed . . . ." The county court judge added that he believed that under Nebraska law, contact by the officer with Reiter after the legitimate stop was proper. The motions to suppress were denied. Trial was had by stipulation of evidence, and Reiter renewed his motions to suppress, which were denied. Reiter was convicted on both counts as indicated above.

Reiter appealed to the district court, which approved the county court's rulings on essentially the same grounds and affirmed the convictions. This appeal followed.

ANALYSIS

Nebraska statutes require registration of vehicles and the proper display of license plates or, for 30 days after purchase, in-transit tags. Neb. Rev. Stat. §§ 60-302 and 60-320 et seq.

(Cum. Supp. 1992 & Reissue 1993).

[4] Reiter relies on *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 2415, 124 L. Ed. 2d 638, in which the Nebraska Supreme Court concluded that an officer may not properly stop a vehicle with visible in-transit tags to verify compliance with motor vehicle registration statutes. The State responds that the instant case differs from *Childs* in that the officer in *Childs* observed in-transit tags prior to the stop, whereas in the instant case the officer saw neither license plates nor in-transit tags prior to the stop, and thus, the officer reasonably concluded he was witnessing the unlawful activity of improper display of plates or in-transit tags.

The statutory expression requiring "proper display" of plates and in-transit tags logically implies a display which is visible. We note that in other jurisdictions the requisite statutory "display" of plates or temporary registration requires a visible display. See, e.g., *Foster v. State*, 814 S.W.2d 874 (Tex. App. 1991) (holding that stop and detention of vehicle which appeared at time of stop to have no license plate was lawful even though vehicle had temporary paper license displayed in tinted rear window); *State v. Hayes*, 8 Kan. App. 2d 531, 660 P.2d 1387 (1983) (stating that stop for purpose of investigating illegible or obscured license plate was lawful under statute governing display of motor vehicle licenses); *Cheatem v. State*, 416 So. 2d 35 (Fla. App. 1982) (holding that officer had authority to arrest driver outside his jurisdiction during fresh pursuit for failure to display a plainly visible license plate).

[5] We recognize that a motorist on a public highway or street has a legitimate expectation of privacy within the vehicle. *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). However, because of the officer's reasonable, articulable suspicion that he was witnessing a violation of Nebraska criminal law requiring the proper display of license plates or in-transit tags, we conclude that the initial stop of Reiter's vehicle by Meguire was constitutionally proper. See, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991).

Reiter claims that the record establishes that he had proper in-transit tags and that the officer knew this prior to contacting him and becoming aware of his impaired driving condition and his driving under suspension. Thus, Reiter argues that although the initial stop may have been proper, after the officer became aware of registration compliance, he should not have had contact with Reiter. Reiter relies on a case from another jurisdiction to this effect, *State v. Farley*, 308 Or. 91, 775 P.2d 835 (1989). See, also, *State v. Chatton*, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984), *cert. denied* 469 U.S. 856, 105 S. Ct. 182, 83 L. Ed. 2d 116.

Reiter's argument rests on the pivotal factual assumption that Meguire determined that Reiter had proper in-transit tags prior to making contact with him. We note from the record, however, that the county court, after observing the officer as witness, found that it was not clear when, if ever, the officer became aware of the in-transit tags. The county court was the trier of fact, and based on the record, we cannot conclude that this finding was clearly erroneous. See *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993). Given this finding, Meguire was properly situated where he subsequently and naturally observed evidence of Reiter's impairment and driving under suspension, and the evidence relating to these two offenses need not be suppressed. See *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

Following our review of the record, we conclude that the county court's denial of the motions to suppress as affirmed by the district court was proper, and the convictions are therefore affirmed.

AFFIRMED.

SHARON K. MULLER, NOW KNOWN AS SHARON K. KASPAR, APPELLEE, V. LON R. MULLER, APPELLANT.

524 N.W.2d 78

Filed November 15, 1994. No. A-93-1060.

1. **Modification of Decree: Appeal and Error.** Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning the modification.
2. **Appeal and Error.** Where the evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
4. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
6. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
7. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
8. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in an initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
9. **Child Support.** Earning capacity of *each* parent, and not merely the actual income, is to be considered in determining the amount of child support to be paid by a parent.
10. **Child Support: Rules of the Supreme Court.** Generally, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation, but the

court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.

11. **Divorce: Visitation: Appeal and Error.** In a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.
12. **Visitation.** Child visitation rights for a parent are considered and determined in relation to the best interests of the children.
13. **Visitation: Proof.** The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.
14. **Child Support.** Neb. Rev. Stat. § 42-371(5) (Reissue 1993) authorizes the posting of security to insure the payment of child support.
15. _____. Reasonable security to insure payment of child support should be invoked only when compelling circumstances require it.
16. **Modification of Decree: Appeal and Error.** An appellate court does not treat an action to modify a decree as a retrial of the original case or a review of the equities of the decree.
17. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Susan Koenig-Cramer for appellee.

IRWIN, MILLER-LERMAN, and MUES, Judges.

MUES, Judge.

Lon R. Muller appeals the judgment of the Douglas County District Court modifying the decree of dissolution which terminated his marriage to Sharon K. Muller, now known as Sharon K. Kaspar. On appeal, Muller assigns as error the district court's order as it pertains to child support, visitation, a life insurance policy to secure his child support obligation, and attorney fees. We affirm.

FACTS

The district court for Douglas County dissolved the marriage of Muller and Kaspar on February 1, 1988, after approximately

6 1/2 years of marriage. The decree of dissolution provided that Kaspar was awarded custody of the parties' two minor children, Eric, born November 25, 1984, and Kirk, born July 5, 1986, subject to Muller's rights to visitation. Muller was ordered to pay a total of $550 per month in child support for both children and to maintain a life insurance policy to secure those payments, naming the children as irrevocable beneficiaries. Muller's visitation rights were set forth in the original decree, but have since been modified on several occasions.

On July 27, 1992, Muller filed a petition to modify the decree, requesting that the court award him the tax exemption for the children, increase his visitation rights, and vacate the requirement that he maintain a life insurance policy as security for the child support, along with other requests not pertinent to this appeal. On August 25, Kaspar filed a cross-petition for modification, requesting the court, among other items, to increase Muller's child support obligation, alter the visitation schedule, and order payment of attorney fees.

On November 5, 1993, the district court entered its order, which in relevant part included an elimination of Muller's overnight visitation on Wednesdays during the summer if the children were on an out-of-town vacation with their mother, an increase in Muller's child support obligation from $550 to $650 per month for both children, a requirement that Muller continue maintaining a life insurance policy to secure his child support obligation, and an order that Muller pay $1,500 of Kaspar's attorney fees. The court denied Muller's request for additional, uninterrupted visitation during the Christmas holiday or spring break. Muller has appealed this order.

ASSIGNMENTS OF ERROR

Muller alleges the district court erred in the following respects: (1) by increasing his child support obligation without proof of a material change in circumstances; (2) by failing to base the child support calculations on Kaspar's reasonable earning capacity; (3) by failing to consider all sources of income available to Kaspar in the child support calculations; (4) by modifying his visitation without proof of a material change in

circumstances; (5) by failing to grant him additional visitation at Christmas and spring break; (6) by requiring him to continue a life insurance policy to secure his child support obligation; and (7) by awarding Kaspar attorney fees in the amount of $1,500.

STANDARD OF REVIEW

[1,2] Appellate review of a judgment concerning modification of a marital dissolution decree is de novo on the record to determine whether the trial court abused its discretion concerning the modification. *Schmale v. Schmale*, 240 Neb. 499, 482 N.W.2d 268 (1992). Where the 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. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

ANALYSIS

Child Support.

[3,4] Modification of the amount of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka, supra*; *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Sabatka, supra*; *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

[5-8] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Sabatka, supra*. In the context of marital dissolutions, a

material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991); *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991). Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Sabatka, supra*; *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987). The paramount concern and question in determining child support, whether in an initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. *Sabatka, supra*; *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Dobbins, supra*.

Both parties claimed a material change in circumstances warranting a modification in the court's original order with regard to matters pertaining to the support of the children. Muller did not directly seek a decrease in the amount of his child support, but rather sought, inter alia, to be granted the tax exemption for the children and elimination of his obligation to maintain life insurance on his life for the benefit of the children. Kaspar sought a direct increase in the dollar amount of the support.

This was the first modification of child support sought by either party since the decree was entered in February 1988. At that time, Muller's net monthly income was $2,190. Shortly before the divorce decree, Kaspar's employment had been terminated, and she was on severance pay when the decree was entered. However, the record supports the conclusion that Muller's child support obligation of $550, as determined in the original decree, was based on calculations from the Nebraska Child Support Guidelines, using Kaspar's salary from the employment from which she had just recently been severed. Her salary in that position had been virtually the same as that of Muller. Child support was set, according to the testimony of

Muller at the modification hearing, by a slight upward deviation ($550 rather than $512) from the strict application of the guidelines due to Kaspar's questionable situation and the uncertainty of her job future.

By the time of the modification hearing, Muller's net monthly income had increased to approximately $2,420 per month. Kaspar was not yet employed. She testified that despite efforts following the divorce, she was unable to find a job doing the type of work she had previously done before her layoff. She further testified that only two similar jobs existed in Omaha when she was laid off, hers and one other. After several attempts, she lowered her salary expectations, and 2 months before remarrying, in March 1989, she voluntarily stopped seeking employment. Kaspar had been unemployed for 6 years as of the time of the modification hearing.

In August 1991, Kirk was diagnosed with a medical condition requiring ongoing medical treatment and periodic monitoring. This treatment, together with routine medical treatment for Eric, resulted in Kaspar's making numerous trips with them to doctors and hospitals in the 2-year period preceding the modification hearing. The record also reflects that at the time of that hearing, Kaspar had a 2-year-old child from her current marriage. Kaspar testified that she initially chose not to work because she and her new husband believed it was in the best interests of the children for her to remain at home. Now, with her son's illness, she claims she could not work if she wanted to because of the need to constantly take him for medical treatment. Kaspar's current spouse earns approximately $57,000 gross income per year, an income which she admits is partially used to make up the deficit between the expenses of Eric and Kirk and Muller's child support obligation. She admits to being "able-bodied and able to work," although she estimates her current earning capacity at $7 per hour, for a net monthly amount of only $1,014. This is compared to a net monthly income of approximately $2,200 at the time of the decree. The uniqueness of her former employment, her 6 years out of the job market, and her "outdated" college business degree are all cited as reasons for such decrease in capacity to earn. In addition to the foregoing,

the evidence shows that Eric and Kirk are now attending school and that the overall expense for such schooling and related expenses have increased since the date of the initial divorce decree.

Muller alleges that the district court erred by increasing his child support obligation (1) without finding a material change in circumstances and (2) without considering Kaspar's reasonable earning capacity and all of Kaspar's sources of income.

Muller first claims that Kaspar's unemployment was contemplated at the time of the entry of the initial decree. Therefore, her current unemployment is not a material change sufficient to justify a modification under the well-known rule stated in *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). We disagree. It is apparent from the record that at the time of the decree Kaspar anticipated returning to employment, but such plans were subsequently altered by a number of circumstances. The main thrust of Muller's appeal centers on his claim that the trial court failed to attribute a sufficient earning capacity to Kaspar for purposes of calculating each party's support obligation pursuant to the Nebraska Child Support Guidelines.

Muller argues that since Kaspar has remarried and has voluntarily chosen to remain at home with their children and a child of her new marriage rather than working, an amount should be attributed to Kaspar as her reasonable earning capacity. He argues that amount should be equivalent to his earnings, since each party was earning approximately equal amounts just prior to the divorce decree, which was the last time Kaspar was employed. Muller contends that Kaspar, as a custodial parent, should be held to the same standard as a noncustodial parent who is obligated to actually remit child support payments for the support of a child. He draws our attention to Supreme Court cases illustrating disfavor toward parents obligated to pay child support who seek to lessen their support obligation by voluntarily reducing actual earnings below their capacity to earn. See, e.g., *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). He argues that Kaspar's reducing

her earnings by electing an "alternative means of providing financially for her children," i.e., ceasing outside employment and relying upon her new husband's income, should not result in her contributing a lesser share to the support of her children. Brief for appellant at 13.

[9] We do not disagree with Muller's logic. The fact that a custodial parent is not ordered to remit a monthly dollar amount for child support does not release him or her from the obligation to contribute to the support of the children. Earning capacity of *each* parent, and not merely the actual income, is to be considered in determining the amount of child support to be paid by a parent. See, e.g., *Sabatka, supra*; *Schulze, supra*. See, also, Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992). The Nebraska Child Support Guidelines, paragraph A, expressly recognize "the *equal* duty of *both* parents to contribute to the support of their children in proportion to their respective net incomes." (Emphasis supplied.) Kaspar cites us to no authority which would compel different rules to be applied to a custodial "nonpaying" parent than to the parent obligated to make child support payments with regard to the "earnings versus earning capacity" issue. Although the cases presented to the Supreme Court customarily involve a discussion of this issue in the context of the "paying" parent's earning capacity, see, e.g., *Sabatka, supra*; *Knippelmeier v. Knippelmeier*, 238 Neb. 428, 470 N.W.2d 798 (1991); and *Schulze, supra*, we find no indication in such opinions that a different rule would be applied merely because of the status of custodial versus noncustodial parent. Thus, we agree with Muller that the earning capacity of Kaspar, and not merely her actual earnings, was a relevant consideration by the district court in determining the amount of child support to be paid by Muller.

[10] Generally, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation, but the court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). See, also, *Sabatka, supra*; Nebraska Child Support Guidelines, paragraph C. The

Nebraska Supreme Court has approved of such deviation from the guidelines in cases where the actual earnings of a spouse obligated to pay child support were less than such spouse's earning capacity as determined by the circumstances of individual cases. Such "deviation" generally takes the form of attributing to the spouse an amount representing his or her capacity to earn and then calculating child support by factoring such amount, rather than actual earnings, into the worksheet provided for by the child support guidelines.

What Muller fails to acknowledge is that Kaspar took this approach at trial. She did not seek to have Muller's support obligation determined by a strict application of the child support guidelines. Such strict application would mean that Muller's share of child support would be computed with Kaspar's income at $0 and his at $2,420. Rather, Kaspar readily accepted that an amount should be attributed to her for her capacity to earn. Kaspar's child support calculation worksheet offered at the modification hearing showed $1,014 as her net monthly income (based on $7 per hour) and $2,420 as Muller's net monthly income. She concluded that Muller's child support should be $650 for two children and $425 for one child. Muller's worksheet shows each party with a net monthly income of $2,420, with his monthly obligation to be $573 for both children. The trial court's order is consistent with accepting Kaspar's calculation and her testimony that her earning capacity of $7 per hour was appropriate.

Thus, we view the dispositive issue to be whether the trial court abused its discretion in attributing an earning capacity to Kaspar of $7 per hour (net monthly income of $1,014) as opposed to $2,420. We conclude that it did not. The only direct evidence of Kaspar's earning capacity was the testimony of the parties. Kaspar estimated it to be as stated. She reached this conclusion because she had not worked for 6 years, her prior employment had been a unique position, and her degree was outdated. On the other hand, the only evidence presented by Muller was his conclusion that Kaspar's capacity to earn should be the same as his because their earnings were equivalent at a point just prior to the 1988 decree. Where the 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. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The decision of the trial court involved more than a blind determination of Kaspar's current earning capacity. Granted, she removed herself from the job market 2 months before she remarried and within 11 to 12 months following the decree of February 1988. Moreover, for the next 2 1/2 years, up to August 1991, she continued to be unemployed, at her apparent election, based on the joint decision of her and her new husband. Thereafter, upon the diagnosis of Kirk's medical condition and at least up through the date of the modification hearing, her employability was affected due to necessary medical care of the children. Although Kaspar's voluntary nonemployment through August 1991 would not have been looked upon with favor had she attempted an increase in Muller's child support obligation by reason thereof, she did not make such application. Muller's child support of $550 per month, based on calculations using a net income figure for Kaspar of approximately $2,200 per month, continued until the recent order of the district court, despite her actual earnings throughout that time period of $0 per month. Although not directly relevant to the trial court's determination of child support at the modification hearing, it does mitigate against Muller's argument that Kaspar's unemployment was motivated by bad faith in an effort to reduce her earnings so that Muller's obligation would be increased. In light of the paucity of evidence offered by either party on Kaspar's actual earning capacity and considering that the trial court had the opportunity to observe the parties at trial and accepted Kaspar's version of the circumstances surrounding this issue, we are not inclined to disturb that court's determination.

We believe that the district court's attributing of an amount for Kaspar's earning capacity was proper. Under the circumstances of this case, although we may have been less receptive to Kaspar's "estimate" of her reduced earning capacity than was the district court, we cannot say that the amount attributed to her by that court was an abuse of

discretion. We also note that because of Kaspar's nonemployment, child-care expense was not addressed. Had Kaspar enjoyed *actual* employment, whether netting $1,014 or $2,420 per month income, child-care expense necessitated by such employment would have been subject to allocation between the parties. See Nebraska Child Support Guidelines, paragraph N. See, also, *Knippelmeier v. Knippelmeier*, 238 Neb. 428, 470 N.W.2d 798 (1991); *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987). The court's calculation attributed income to Kaspar, without a corresponding child-care expense obligation being allocated to Muller. All things considered, the award was not untenable under the circumstances presented in this case.

Visitation.

[11-13] Muller contends the district court abused its discretion when it modified his Wednesday night visitation during Kaspar's 6 weeks of custody in the summer and when it failed to award him extra visitation during Christmas and spring break. In a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). Child visitation rights for a parent are considered and determined in relation to the best interests of the children. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child. *Schulze v. Schulze*, 238 Neb. 87, 469 N.W.2d 143 (1991); *Norris v. Norris*, 2 Neb. App. 570, 512 N.W.2d 407 (1994).

October 17, 1989, was the last time visitation was modified between the parties before the modifications involved in the present action. At the time of the modification hearing, Eric and Kirk were 4 years older than they were when visitation was last modified. They had a new sibling from the remarriage of Kaspar. They expressed a desire to take extended vacations with both parents.

We must affirm the district court's determinations regarding modification of visitation unless the court abused its discretion. As we previously stated, an abuse of discretion is found only where the decision made by the district court is untenable and unfairly deprives a litigant of a substantial right or a just result. See, *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993). After our review of the record, we cannot say the district court abused its discretion by eliminating Muller's Wednesday night visitation during the summer when Kaspar has their custody and the children are out of town. This allows Kaspar to have uninterrupted vacation periods during the summer, the same as Muller enjoys during his 6 weeks of summer visitation. Regarding the denial of an extended period of visitation for Muller over the Christmas or spring break holidays, the record reflects an already somewhat complicated shifting of the children during the Christmas holiday to accommodate Christmas Eve, Christmas Day, New Year's Day, Kaspar's December birthday, and Muller's Wednesday night and weekend visitations. We cannot say that the trial court abused its discretion by refusing to define yet another scheduled visitation during this timeframe.

Life Insurance Policy.

In the original decree, Muller was ordered to maintain a life insurance policy in an amount "sufficient to fund his child support obligation," naming his children as irrevocable beneficiaries as their interests may appear. Muller argues it was error for the court to continue this requirement in its modification order. The purpose of the order was apparently to secure Muller's child support obligation. As such, it is a form of child support and is a proper issue for modification. However, as with child support, in order to warrant a modification, the party seeking the modification must demonstrate that there has been a material change in circumstances. See, *Sabatka, supra*; *Wulff, supra*.

[14] Muller argues there is no statutory authority to justify the ordering of security to insure a child support obligation. We disagree. On the date of the decree, Neb. Rev. Stat. § 42-371(5)

(Reissue 1988) (currently Reissue 1993) authorized the posting of security to insure the payment of child support. Section 42-371 (Reissue 1993) provides in pertinent part:

> Under the Uniform Interstate Family Support Act and sections 42-347 to 42-379, 43-290, 43-512 to 43-512.10, and 43-1401 to 43-1418:
>
> . . . .
>
> (5) The court may in any case, upon application or its own motion, after notice and hearing, order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts. Upon failure to comply with the order, the court may also appoint a receiver to take charge of the debtor's property to insure payment. Any bond, security, or other guarantee paid in cash may, when the court deems it appropriate, be applied either to current payments or to reduce any accumulated arrearage[.]

[15] In *Casselman v. Casselman*, 204 Neb. 565, 284 N.W.2d 7 (1979), the court recognized that payments for child support and alimony were included under this statute. The Supreme Court, citing § 42-371(5), held that it was valid to order a person to post security to insure payment of a child support obligation. However, the court limited its holding by stating that "reasonable security for payment of . . . child support should be invoked only when *compelling* circumstances require it." (Emphasis supplied.) *Casselman*, 204 Neb. at 568, 284 N.W.2d at 9, citing *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975).

[16] The record is unclear as to what "compelling circumstances" existed at the time the decree was entered to warrant an order requiring Muller to provide security for his child support obligations. Moreover, the type of "security" ordered, i.e., an insurance policy on Muller's life, seems to do more to settle an estate upon the children at Muller's death than to secure payment of his support obligation while he is alive. Nevertheless, Muller did not appeal that portion of the original decree. An appellate court does not treat an action to modify a decree as a retrial of the original case or a review of the equities

of the decree. See, e.g., *Olmer v. Olmer*, 2 Neb. App. 178, 507 N.W.2d 677 (1993). Muller directs us to no material change in circumstances which has occurred since the entry of the decree, not anticipated at the time of the decree, that would alter the propriety of this requirement. Therefore, we must conclude that this assignment is without merit.

Child Support Calculation.

Muller points out that even by using Kaspar's monthly income figure, the child support guidelines provide that his obligation should be $642.90 for two children and $414.58 for one child, based upon the combined net income shown on Kaspar's worksheet of $3,433.49. The guidelines provide that with a net income of $3,450, total monthly support for two children should be $915. Muller's income, using Kaspar's worksheet, is 70 percent of the total income. His share would thus be $641 by a strict mathematical computation.

He also argues that if required to maintain a life insurance policy for the benefit of his children, he should be entitled to deduct the premium costs associated with that policy from his gross income for purposes of the child support calculations. He testified that he maintained two insurance policies with a total value of $60,000 at a cost of approximately $25 per month. The Nebraska Child Support Guidelines and the worksheet do not specifically authorize such a deduction, but deviations from a strict application of the guidelines are expressly permitted to avoid an unjust result. Kaspar's worksheet does not include a deduction for the premiums from Muller's income.

We observe that the benefit to Muller from being awarded the tax exemption for one of the children was also not included in the foregoing calculations on Kaspar's worksheet. The evidence suggests that the increase in Muller's net monthly income as a result of the additional tax exemption offsets the monthly insurance premium. In fact, it appears that it will exceed that premium. We cannot conclude, therefore, that the $9 deviation, arrived at without consideration of either of these figures, was an abuse of discretion under the facts of this case.

Award of Attorney Fees.

[17] Muller's final assignment of error is that it was error to

award Kaspar attorney fees in the amount of $1,500. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986).

The amount of attorney fees and costs awarded by the district court is supported by sufficient evidence. The amount is not untenable. We find that the district court did not abuse its discretion in its award.

AFFIRMED.

GARY W. LOGAN, APPELLEE, V. ROCKY MOUNTAIN RENTAL, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEE.

524 N.W.2d 816

Filed November 29, 1994. No. A-94-469.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that an appellate court also does not substitute its view of the facts for that of the trial judge.
2. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
3. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Wages.** Allowances made to an employee for board, lodging, or similar advantages can be considered as wages for purposes of the Nebraska Workers' Compensation Act, if so fixed by the parties at the time of hiring and if the allowance represents a real and reasonably definite economic gain to the employee.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

David L. Wilson, of Burke & Wilson, for appellee Logan.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

On November 19, 1991, Gary W. Logan, while driving a semi-trailer truck for Rocky Mountain Rental (RMR), was involved in an accident when his vehicle left the road and he was thrown out of the cab. The nature and extent of his injuries are not involved in this appeal, nor is the basic compensability of the accident. Rather, we are presented with the limited question of whether the trial judge properly determined Logan's average weekly wage when he arrived at the figure of $543.04 per week. The trial judge's determination in that regard was upheld by the review panel without opinion.

[1-3] Findings of fact made by the Workers' Compensation Court trial judge are not to be disturbed upon appeal to the review panel unless they are clearly wrong, and if the record contains evidence which substantiates the factual conclusions reached by the trial judge, the review panel should not substitute its view of the facts for that of the trial judge. It naturally follows that an appellate court also does not substitute its view of the facts for that of the trial judge. See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). When testing the sufficiency of the evidence to support findings of fact by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

RMR seeks to have us approach this case as a question of law

and to render our independent conclusion thereupon. Logan asserts that the matter of deciding his average weekly wage is a question of fact entailing limited review by this court.

The evidence showed that after Logan answered a newspaper advertisement, he started work for RMR on October 8, 1991, as an interstate truckdriver. He was hired by Ray Palser, and Logan testified that he and Palser talked about his rate of pay, which was agreed to be "[t]wenty cents a mile, both loaded and unloaded miles." In the course of Logan's testimony, he reiterated a number of times that the agreement for pay was 20 cents per mile. RMR does not dispute Logan's testimony that it agreed to pay Logan 20 cents per mile. Logan's pay for the short time that he worked for RMR is summarized in exhibit 8, and the category on the pay summaries entitled "Road Expense" gives rise to the controversy in this appeal.

We use the summarization from exhibit 8 for Logan's third paycheck as our working example. It shows 1,493 miles at 20 cents per mile, equaling $298.60. That total earnings figure is recast in exhibit 8 by calling $122.60 of it "Gross Pay" and $176 "Road Expense." FICA, state taxes, federal taxes, etc., are only calculated on and deducted from the $122.60. The evidence is that for tax purposes, trucking companies are allowed to pay a per diem of $44 per day to the driver, upon which the company does not pay FICA or taxes, and which the driver does not report as income. Thus, in the case at hand, RMR argues that from the total wages which Logan received there needs to be deducted the sum of $44 per day for 29 days of work, which would reduce Logan's average weekly wage to $242.04.

Logan testified that this money was his and that "[i]t had no tax because it was reimbursement to me for expenses incurred out of my pocket." However, there was no evidentiary showing that Logan needed to actually incur $44 per day in road expenses in order to receive this reimbursement or that he actually did incur that amount of road expenses each day, or any other amount, for that matter. In our view, such matters bear on the question of whether this $44 per day represented any economic benefit to Logan.

RMR uses the case *Solheim v. Hastings Housing Co.*, 151 Neb. 264, 37 N.W.2d 212 (1949), as authority for its proposition

that since the $44 per day did not represent " 'real and reasonably definite economic gain to' " Logan, it should not have been included in Logan's wages. Brief for appellant at 11. We do not disagree that *Solheim* is the case to read and apply in this appeal. In *Solheim*, the employee wished to include expense reimbursement in his salary calculation for workers' compensation purposes. The evidence was that the employee was paid $200 per week as salary plus $100 per week for hotel, meals, and other incidental expenses. Solheim lived in Lincoln, but would spend Monday through Friday nights in a hotel while working in the field. The evidence was that he actually stayed in the hotel. The court said that it was "anticipated that his expenses for these items would probably be about that much and the allowance was intended to compensate him therefor but it was not intended that he should make any profit therefrom." *Id.* at 280, 37 N.W.2d at 221. The court in *Solheim* stated:

> We think the quoted provisions of section 48-126, R. S. 1943, with reference to allowances made to an employee for board, lodging, or similar advantages, although the money value of such advantages is fixed by the parties at the time of hiring, contemplate that such allowances shall represent a real and reasonably definite economic gain to the employee, and so intended by the parties, before it can be considered as wages for the purpose of computing compensation under the act.

Id. at 281, 37 N.W.2d at 222.

[4] In the present case, Palser testified that the road expense was for "[w]hatever it takes to live out on the road," acknowledging that "there's sleepers on trucks. I don't know — I know what I spend my money on. What they spend their money on, I don't know." It would appear to be a reasonable conclusion from the evidence that the road expenses would include "board, lodging, or similar advantages." The Nebraska statute on wages for workers' compensation purposes, Neb. Rev. Stat. § 48-126 (Reissue 1993), uses such terms and provides:

> Wherever in the Nebraska Workers' Compensation Act the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed

> under the contract of hiring in force at the time of the accident. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring . . . .

There is, however no evidence whatsoever that there was any discussion of Logan's pay beyond 20 cents per mile, loaded or unloaded, or any discussion of the road expenses or of "board, lodging, or similar advantages" at the time of hiring. Thus, there is no evidence in this record to establish that the road expenses, to the extent that they may be considered "advantages," were fixed by the parties at the time of Logan's hiring.

Additionally, *Solheim* makes it clear that even if the value of the expenses was fixed at the time of hiring, that is not of itself sufficient to support RMR's argument, as the question is still whether the allowance represents "a real and reasonably definite economic gain" to Logan. The trial judge of the Workers' Compensation Court stated: "The fact that the IRS allows a per diem to be deducted for purposes of defendant's creative accounting does not diminish the fact that this sum is actually the plaintiff's standard rate of pay at $.20 per mile and is a real economic gain." Admittedly, the compensation court trial judge wrote four sentences later: "This is *not* a 'real economic gain' to plaintiff and the Court declines to deduct it in computing the average weekly wage." (Emphasis supplied.) However, this sentence obviously contains an author's error with the addition of the word "not" when it is clear from the context of the entire paragraph that the trial judge was making a factual finding that there was real economic gain.

In our view, the burden of proof fell to RMR to establish that Logan's wages, for workers' compensation purposes under § 48-126, should be considered less than what he was actually paid. RMR argues that the burden of proving real economic gain rests on Logan, citing *Solheim*, where the burden was imposed upon the employee. However, the difference between *Solheim* and this case is that in *Solheim*, the employee sought to include the extra allowance, and here the employer seeks to exclude a portion of the admittedly agreed-upon wage of 20

cents per mile as reimbursement because it is not a real economic advantage to Logan. Under these circumstances, we think it appropriate that the burden of proof be imposed upon RMR, not to prove the average weekly wage, but, rather, to overcome Logan's evidence that the agreement was simply that he would be paid 20 cents per mile for his labor.

In the case at hand, RMR would need to show that the road expenses of $44 per day were not a real and definite economic gain to Logan and that the parties, including Logan, so understood when he was hired. There is no evidence to support this proposition. Rather, the evidence shows only accounting entries on Logan's pay documents wherein a portion of his 20 cents per mile gross wages are relabeled "Road Expense" and then taxes are not calculated thereupon. Since the evidence fails to establish that the $44 per day by which RMR seeks to reduce Logan's wages constituted actual reimbursement for actual incurred expenses, it logically follows that such amount, at least in part, represented a real and definite economic gain to Logan.

As should be apparent from our discussion, we consider that in this case the question is a factual one. In other words, the question of what is included within the word "wages" depends upon the facts as shown by the evidence in the record to satisfy the test of real economic gain to Logan. The evidence does not show a dollar-for-dollar reimbursement for meals and lodging or anything close to it. It simply shows an accounting entry to take advantage of an apparent tax benefit available to trucking companies and their drivers. Under the applicable standard of review, we must view the facts, and the inferences to be drawn from them, most favorably to Logan.

RMR relies upon an Iowa case, *D & C Exp., Inc. v. Sperry*, 450 N.W.2d 842 (Iowa 1990). *Sperry* involved an owner-operator of a semi-trailer truck who leased it to D & C Express and who, when injured, claimed employee status. He succeeded on his claim of employee status, and in his appeal, the question of the calculation of his wages was involved. The industrial commissioner calculated wages on the basis of the total amount which Sperry was paid each week under his lease agreement, which was 78 percent of the gross revenues hauled for D & C and 94 percent of the gross revenues received from other

carriers. Sperry testified that of the revenues received, approximately 25 percent of the 78 percent represented compensation for his services and the balance was for the use of his equipment. In affirming the reversal of the commissioner's decision, the Iowa Supreme Court adopted the language in the district court's decision. The first two sentences of the reasoning of the district court are set forth in RMR's brief, but we include the entire quote:

> "It is not absurd to deduct known expenses to arrive at actual wages. It seems quite unreasonable to pay the same amount whether or not expenses are incurred. There is no basis to say that [Sperry] would receive no compensation because he showed a net loss on his tax return. Many factors, such as interest paid, depreciation, [and other matters] enter into a determination of taxable income that would not be applicable to determine actual wages. The court is not persuaded that an attempt to determine the amount paid which was actually wages would be so difficult as to make the system unworkable. If [Sperry] averaged $955 per week in gross earnings and still showed a net loss on his income tax return, then there must have been considerable expenses involved. It would be unreasonable to pay the same amount when those expenses were not in fact being incurred."

450 N.W.2d at 845. The Iowa Supreme Court imposed the burden on Sperry to show his actual earnings.

The difference between *Sperry* and the instant case is that although Sperry was legally found to be an employee for compensation purposes, he stood in a materially different position than Logan. Sperry was an owner-operator who was being paid both for his truck and his services as driver. Thus, when the amount of money received by Sperry obviously included compensation for the equipment which he owned, it was appropriate to impose upon him the obligation to establish the portion of the money which represented compensation for his services in driving the truck, i.e., wages, as distinguished from what he received for providing the truck, i.e., lease payments. We find *Sperry* distinguishable from the case at hand.

We cannot say that the compensation court was clearly wrong on the evidence when it found Logan's average weekly wage to be $543.04. Thus, we affirm.

RMR has appealed and not obtained a reduction in the award. Accordingly, after an appropriate showing under Neb. Ct. R. of Prac. 9F (rev. 1992), the court will allow fees for Logan's counsel.

AFFIRMED.

IN RE ADOPTION OF KASSANDRA B. AND NICHOLAS B. TIMOTHY L. SAVAGE AND KAREN M. SAVAGE, APPELLANTS, V. MARTIN G., INTERVENOR-APPELLEE.

524 N.W.2d 821

Filed December 6, 1994. No. A-94-101.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by a district court and an appellate court for error appearing on the record.
2. **Appeal and Error.** As to questions of law, an appellate court is obligated to reach its conclusions independent of the determinations of the trial court.
3. **Adoption: Courts: Jurisdiction.** Each county court has exclusive original jurisdiction in all matters of adoption.
4. **Statutes: Parental Rights: Adoption.** Adoption statutes will be strictly construed in favor of the rights of natural parents in controversies involving termination of the relation of parent and child.
5. **Statutes: Legislature: Intent.** A collection of statutes pertaining to the same subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Statutes: Legislature: Intent: Presumptions.** An appellate court presumes that the Legislature intended a sensible rather than an absurd result.
7. **Juvenile Courts: Jurisdiction: Parental Rights.** Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose.
8. **Parental Rights: Adoption: Courts: Jurisdiction.** A county court does not have jurisdiction to terminate parental rights using the Nebraska Juvenile Code in an adoption proceeding. Rather, it is the adoption itself, if ordered upon the proper consent, which serves to terminate parental rights.
9. **Child Custody: Parental Rights.** The parental preference principle is recognition that the relationship between parent and child is constitutionally protected.

10. _____: _____. A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.

Appeal from the District Court for Cass County, RANDALL L. REHMEIER, Judge, on appeal thereto from the County Court for Cass County, WILLIAM B. ZASTERA, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Herbert J. Elworth and Roger K. Johnson, of Casey, Elworth & Johnson, for appellants.

Catherine Mahern, of Creighton Legal Clinic, for intervenor-appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

During the 6 years that Anita B. and Martin G. lived together, but unmarried, two children, Nicholas B. and Kassandra B., were born. After the parents separated, Anita relinquished custody of the children to K.E.S.I.L. International Adoption Services without Martin's knowledge. The two children were placed for adoption with Timothy L. and Karen M. Savage. This case involves the Savages' attempt to adopt the children and Martin's attempt to gain custody of his children. The county court for Cass County, where the Savages' petition for adoption was filed, found a valid relinquishment of the children by Anita, terminated the parental rights of Martin, and placed custody of the children with K.E.S.I.L. The district court, upon Martin's appeal, reversed the order of the county court which terminated his parental rights, and remanded the matter to the county court for further proceedings. The Savages have properly perfected their appeal of the district court order to this court. For the reasons set forth herein, we affirm in part the order of the district court for Cass County, but also order that Martin shall have custody of his children.

FACTUAL BACKGROUND

In November 1980, when Martin was 15 years old, he met Anita, and in 1982, a child was born to them, but that child is

not involved in these proceedings. Martin and Anita began living together in 1984, and during the period of time that they lived together, Kassandra was born in May 1986 and Nicholas was born in July 1989. While they lived together, Martin performed many fatherly duties for the children, including attending parent-teacher conferences and school carnivals, preparing meals, bathing the children, and providing financial support.

Martin and Anita separated on August 10, 1990. From the time of the separation until Anita's relinquishment on November 2, 1991, Martin maintained contact through visitation with the children. He also testified that he bought some clothing, diapers, toys, and groceries for the children. Martin also said that he gave Anita about $500 for support of the children during the time period following the separation until November 1991, when he learned of the relinquishment of the children.

In approximately October 1991, Anita broached the subject with Martin of placing the two youngest children for adoption. He was opposed to any adoption and refused to discuss it with her. Anita testified that in the summer and fall of 1991, she had begun thinking about adoption because she was having a hard time financially, and she wanted "a better home, more stable family, you know, a dad" for the children. During this time, Anita had been in contact with a California adoption agency whose name she secured from a newspaper advertisement. She provided Martin's name to them as the father of the children, and when he was contacted, he expressed his opposition, which apparently ended that agency's interest in the children. Anita then found K.E.S.I.L. in the phone book and relinquished the children to K.E.S.I.L. on November 2, 1991, by written agreement, which was accepted on the same date. However, Anita did not disclose Martin as the father of the children when she relinquished them to K.E.S.I.L. On that same day, November 2, Kassandra and Nicholas were placed with the Savages, and a copy of the child acceptance agreement from the Savages is in evidence, indicating that the "adoptive placement" was "term[ed a] 'legal risk' because the birth fathers of the children have not been named, identified on the

child's birth records or signed a relinquishment of parental rights."

On November 11, Martin telephoned Anita to discuss the children's attendance at his upcoming wedding to another woman on November 15. Anita told Martin that the children had been placed for adoption, but refused to divulge with whom or where they were presently located. In Anita's testimony, she admitted that she had not disclosed Martin as the father of the children because she knew he would refuse an adoption. Anita admitted that she lied in order to get the children adopted.

After Martin received this information, he attempted, without success, to locate the children by calling the adoption agencies he found listed in the phone book. The following day, on November 12, after consulting with counsel, he faxed signed notices of intent to claim paternity with respect to Kassandra and Nicholas to the Department of Social Services (DSS), and the parties stipulated during this litigation that such notices were filed then for the first time.

The Savages were informed of Martin's identity in July 1992 by an agent from K.E.S.I.L. and made inquiry to DSS in October 1992, at which time they discovered that Martin had filed a notice of intent to claim paternity. The Savages filed their petition for adoption of the two children on October 20, alleging that the claim of paternity filed by Martin should not be recognized pursuant to Neb. Rev. Stat. § 43-104.02 (Reissue 1993) for the reason that the claim was barred as not having been filed within 5 days after the birth of each child and, further, that his claim of paternity should be barred by reason of abandonment.

Martin filed a pleading in the county court entitled "Motion in Opposition of Adoption and Request for Custody" in which he requested an order "pursuant to Neb.Rev.Stat. 43-104.06 (reissue 1988) granting him care, custody, and control" of the children.

COUNTY COURT DECISION

The county court, citing *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987), declined to hold

Martin to the requirement of filing a notice of his claim of paternity with DSS within 5 days of the children's birth pursuant to § 43-104.02 on the ground that there was evidence of filiation, and thus, the statute would be unconstitutional as applied to Martin. The county court then turned to Neb. Rev. Stat. § 43-104.06 (Reissue 1993), finding that subsection (1) of that statute was not applicable, since it dealt with claims of paternity in the event of a "proposed relinquishment," whereas the relinquishment by Anita was completed November 2, 1991. Thus, the county court found that § 43-104.06(2) was the applicable statute. That subsection provides:

> (2) Except as otherwise provided in the Nebraska Indian Child Welfare Act, upon relinquishment by the mother to a child placement agency licensed by the State of Nebraska, or upon a finding that the child's best interests would not be served by granting custody to the claimant, together with the recommendation by the guardian ad litem, and a finding that termination of the rights of the mother and the father is in the best interests of the child, the court shall terminate the rights of the mother and father and confer such rights upon the licensed child placement agency to whom the relinquishment has been given.

The county court interpreted the statute so that the court considered whether there was sufficient evidence to terminate parental rights before it considered the question of the best interests of the children. The county court used Neb. Rev. Stat. § 43-292 (Reissue 1993), which sets forth various statutory grounds for termination of parental rights under the Nebraska Juvenile Code. The county court found that there was "clear and convincing evidence the conditions are [sic] set out in paragraphs 2, 3, and 4 of § 43-292 exist." Those statutory grounds for termination of parental rights are set forth as follows:

> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give 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.

§ 43-292.

The county court then considered the best interests of the children, finding that since the time of Anita's relinquishment the children had been in a stable and nurturing environment, both emotionally and financially, and that to place the children with Martin would create instability in their lives and would not be in their best interests. The county court then ordered three things: (1) the termination of the parental rights of Anita by reason of her valid relinquishment; (2) the termination of the parental rights of Martin under § 43-292; and (3) that custody of the children be placed with "K.E.S.I.L. Adoption Agency for suitable placement."

DISTRICT COURT DECISION

Martin appealed to the district court and filed a statement of errors in which he alleged, among other errors, that § 43-104.06(1) was unconstitutional as applied by the county court and that subsection (2) of that statute was unconstitutional on its face.

The district court agreed with the county court that under *In re Application of S.R.S. and M.B.S., supra*, application of the statute providing for a 5-day period in which to claim paternity and file with DSS would be unconstitutional given the facts of this case. However, the district court then parted company with the county court, finding that since the 5-day requirement of § 43-104.02 was not applicable, neither were Neb. Rev. Stat. §§ 43-104.03 through 43-104.06 (Reissue 1993). The district court further held that the county court was without jurisdiction "in the adoption case to consider termination of

parental rights under the Juvenile Code." Additionally, the district court held that Martin's due process rights were violated, as he was not put on notice by the pleadings, or otherwise, that his parental rights might be terminated under the Nebraska Juvenile Code. The district court also concluded that "although [Martin] may not be the perfect parent, the record does not support that [Martin] was unfit. Even [Anita] testified that she did not think [Martin] to be unfit." Consequently, the judgment of the county court was reversed and the matter remanded for further proceedings.

ASSIGNMENTS OF ERROR

In their appeal to this court, the Savages claim that the district court erred in reversing the judgment of the county court by finding §§ 43-104.06(2) and 43-292 inapplicable. Second, the Savages contend that the district court erred in holding that the county court's use of § 43-292 of the Nebraska Juvenile Code violated Martin's right to due process. Third, the Savages assign error in the district court's conclusion that the evidence was insufficient to terminate Martin's parental rights.

STANDARD OF REVIEW

[1,2] These proceedings were initiated for the ultimate purpose of the adoption of Nicholas and Kassandra by the Savages. Appeals in adoption proceedings are reviewed by a district court and an appellate court for error appearing on the record. *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990); Neb. Rev. Stat. § 25-2733 (Reissue 1989). As to questions of law, an appellate court is obligated to reach its conclusions independent of the determinations of the trial court. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

ANALYSIS

Five-Day Paternity Claim Statute.

Although the Savages do not argue directly that § 43-104.02, which prevents the recognition of the rights of an alleged father unless he has filed a notice of intent to claim paternity with DSS within 5 days, is determinative, it is nonetheless important as a preliminary matter that we consider the law relating to this

statute. In *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), the court upheld the constitutionality of the statute, even though it treated mothers and fathers differently, as it enabled a speedy determination of the rights of the father so as to make it possible for the State to achieve a legitimate end: the placement of children born out of wedlock as soon as possible after birth. However, as noted in a subsequent decision, *Shoecraft* was not a case where the father had lived with the child and its mother and provided support and nurturing. See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

In re Application of S.R.S. and M.B.S. involved an attempt by a natural father to stop an adoption, even though he had not filed the 5-day notice contemplated in § 43-104.02. The court observed that the father had provided for and had daily contact with his child for the first 19 of the 24 months of the child's life, before the mother had placed the child with the Child Saving Institute. The court stated:

> We found in *Shoecraft* the 5-day filing requirement for unwed fathers to be a legitimate means of attaining a worthy end, the rapid placement of newborns in families that could commit to raising them. However, the 5-day requirement secures no such result in cases such as this one, where the child is no longer a newborn and has already established strong ties with a father who has acknowledged and supported him. The effect of the requirement is to allow a mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is.

225 Neb. at 768-69, 408 N.W.2d at 278.

The court found § 43-104.02 unconstitutional as applied in *In re Application of S.R.S. and M.B.S.* The Supreme Court's rationale had a number of predicates, including the constitutionally protected relationship between parent and child found in *Shoecraft, supra*, and that such right was fundamental in nature, which requires that a statute interfering with such right be subjected to strict scrutiny. Additionally, the Nebraska Supreme Court quoted from *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983):

> "[T]he mere existence of a biological link does not merit equivalent constitutional protection." The Court recognized the importance of familial bonds, stressing that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation omitted] his interest in personal contact with his child acquires substantial protection . . . ."

225 Neb. at 768, 408 N.W.2d at 278.

From these predicates, the court in *In re Application of S.R.S. and M.B.S.* concluded that there was no compelling interest which the State secures by allowing a 2-year familial relationship to be severed for failure to file within 5 days of birth that would justify, on the grounds of gender and marital status, the disparate treatment of the appellant father from those similarly situated.

The factual situations in *In re Application of S.R.S. and M.B.S.* and the instant case are remarkably similar in that Martin had a familial relationship from the time of the birth of Nicholas and Kassandra, lived with them and their mother, and provided support and nurturing. To cut off all of his rights under the 5-day claim statute would be no less offensive here to constitutional principles than it was in *In re Application of S.R.S. and M.B.S.* The Supreme Court in *Shoecraft* made § 43-104.02 inapplicable in cases where there was an established familial relationship. This is the situation here, and we hold that § 43-104.02 may not be applied to Martin.

Termination of Parental Rights in an Adoption Proceeding.

As we understand the county court's opinion and order, the court applied § 43-104.06(2), but the court acknowledged the obvious due process difficulty with terminating parental rights solely on the basis of the best interests of the children, as the statute appears to allow, without regard to parental fitness and the doctrine of parental preference. Thus, to address that perceived deficiency in the statutory language of § 43-104.06(2), the county court used the termination of parental rights provisions of the Nebraska Juvenile Code found at § 43-292. Using this procedure, the county court terminated

Martin's parental rights. The district court reversed the judgment, finding that the county court was without jurisdiction in an adoption case to terminate parental rights under the Nebraska Juvenile Code.

[3,4] Neb. Rev. Stat. § 24-517(8) (Cum. Supp. 1994) provides that each county court shall have "[e]xclusive original jurisdiction in all matters of adoption." It is also worthy of note as we begin our analysis that the Supreme Court has previously said:

> In the case of In re Petition of Ritchie, 155 Neb. 824, 53 N. W. 2d 753, this court said: "The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. S. R. 685. * * *
>
> "The applicable rules are:
>
> " 'A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.' State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 148, 258 N. W. 260. * * *
>
> "Adoption proceedings do not depend upon equitable principles. Where the essential statutory requirements have not been met, equity cannot decree an adoption. 2 C. J. S., Adoption of Children, § 1, p. 368. See, also, St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 189 Wis. 483, 206 N. W. 921; Borner v. Larson, 70 N. D. 313, 293 N. W. 836; In re Francis, 82 Ohio App. 193, 77 N. E. 2d 289; Rivers v. Rivers, 240 Ala. 648, 200 So. 764."

McCauley v. Stewart, 177 Neb. 759, 768-69, 131 N.W.2d 174, 179-80 (1964). Moreover, adoption statutes will be strictly construed in favor of the rights of natural parents in controversies involving termination of the relation of parent and child. *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).

On appeal, the Savages argue that Martin invoked § 43-104.06(2) and that as a result he is subject to "the best

interests test, and the possible termination of his parental rights." Brief for appellants at 13. The Savages' argument is that the district court's interpretation "simply excises Section 43-104.06 from the statute books." Brief for appellants at 13. The Savages claim that the parental preference rule in *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992), was abrogated when Martin invoked § 43-104.06(2) in his request for custody. We cannot agree with this argument.

The *Stuhr* court held that in the absence of a statutory provision to the contrary, in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. See, also, *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992) (holding that although husband and wife were both fit and proper persons to have custody of the child, custody in a dissolution action should have been awarded to wife, the biological parent, in light of blood test showing that husband was not the child's biological father).

[5,6] We are convinced that § 43-104.06 does not abrogate the doctrine of parental preference. Instead, the statute must be strictly scrutinized and narrowly applied because it impacts the constitutionally protected parent-child relationship. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). The statute, § 43-104.06, is headed "Paternity claim; request for custody by *claimant* . . . ," and the language therein expressly refers to "the claimant." (Emphasis supplied.) We examine §§ 43-104.02 through 43-104.06 together, as they were collectively enacted as part of 1975 Neb. Laws, L.B. 224. A collection of statutes pertaining to the same 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. See *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993). We also presume that the Legislature intended a sensible rather than an absurd result. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991).

Sections 43-104.02 through 43-104.06 deal with claims of

paternity to be made by an alleged father within 5 days of the birth of the child, the entity with whom the claim is to be made and filed, the effect of the lack of such a claim, the procedure for a mother to contest a claim of paternity, and the procedure for the "*claimant* . . . to oppose any proposed relinquishment of a child by the mother" and to gain custody. (Emphasis supplied.) § 43-104.06(1).

Given the language used throughout these statutes, it is clear that they apply only to a "claimant," i.e., one who is without a familial relationship, see *Shoecraft, supra*, and who has filed a paternity claim under § 43-104.02. An alleged father who makes a claim of paternity within the first 5 days of the child's life is a "claimant" for purposes of § 43-104.06. Therefore, under the undisputed evidence in this case, Martin is not a "claimant."

The Savages' argument that § 43-104.06(2) has been invoked by Martin's pleading, which, therefore, allows the termination of his parental rights so as to allow the adoption to proceed over his objections, ignores three fundamental precepts: (1) All adoptions require parental consent, except in the limited circumstances specified in Neb. Rev. Stat. § 43-104 (Reissue 1993); (2) the county court in an adoption proceeding is not authorized to order the termination of parental rights under the Nebraska Juvenile Code, but may appoint a guardian ad litem who may execute a substitute consent; and (3) it is the adoption itself which terminates parental rights. See *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982). Additionally, the claim that Martin has invoked § 43-104.06(2), which allows the county court to terminate his parental rights, runs counter to the rule that the parties cannot confer jurisdiction upon a court to do what it otherwise lacks the power to do. See *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

Section 43-104 sets forth that consent to an adoption is required of

> (3) both parents if living, the surviving parent of a child born in lawful wedlock, or, subject to sections 43-104.02 to 43-104.06, the mother of a child born out of wedlock, except that consent shall not be required of any parent who (a) has relinquished the child for adoption by a

> written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

Martin has not relinquished the children, he is not incapable of consenting, and the parties stipulated at trial that he has not abandoned the children. Moreover, the need for his consent is not obviated by his failure to file a claim of paternity under §§ 43-104.02 through 43-104.06, since we have determined that those provisions do not apply to him. Accordingly, his consent could have been rendered unnecessary under category (c) only; however, the record is abundantly clear that at the time of the filing of the adoption proceeding, his parental rights had not been terminated by any court. Therefore, this takes us directly to the second issue: Could the county court, in the adoption proceeding, terminate Martin's parental rights using the Nebraska Juvenile Code provisions for termination of parental rights found in § 43-292?

[7] The Nebraska Supreme Court has held in *Sosso v. Sosso*, 196 Neb. 242, 243-44, 242 N.W.2d 621, 623 (1976), that "[u]nder the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. See § 43-209, R. S. Supp., 1974." Most of the language of § 43-292, which now provides for termination of parental rights by juvenile courts, was previously found at Neb. Rev. Stat. § 43-209 (Reissue 1978). In *Sosso*, the order of the district court terminating parental rights to the minor children in a divorce proceeding was reversed because of a lack of jurisdiction. Since *Sosso* was decided, the Legislature has amended the divorce statutes to allow termination of parental rights on specific grounds in a divorce action by either the district court or the juvenile court, whichever court is the "more appropriate forum." Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1994).

In *Rejda v. Rejda*, 198 Neb. 465, 253 N.W.2d 295 (1977), the Supreme Court had an occasion to revisit its holding that termination of parental rights can be ordered only by a juvenile court in a proceeding brought for that purpose. The court in

Rejda did not abandon *Sosso*, but Justice White announced his opposition to the *Sosso* holding. Nonetheless, we read *Sosso* as still being binding authority, except as modified by § 42-364(7), which is not applicable here.

We next turn to *In re Guardianship of Sain, supra*, which involved an attempt by a mother's new husband to adopt the child of her former marriage, custody of whom had been awarded to her in the divorce. The Supreme Court stated that

> [t]he principal issue we are asked to address by this appeal is the appropriate procedure to be followed when one seeks permission to obtain substitute consent on the basis that one of the parents has abandoned the child, thereby eliminating the necessity of obtaining the natural parent's written consent to the adoption as required by § 43-104.

211 Neb. at 510-11, 319 N.W.2d at 103.

The court reviewed § 43-104 as to when a consent is required for an adoption and held that a guardian must be appointed for a minor who has been abandoned by one of his parents, and, if appropriate, the guardian may execute the consent required by § 43-104. The Supreme Court then concluded that jurisdiction was in the county court, and not the juvenile court, to determine abandonment for the purposes of permitting the use of a substitute consent and appointing a guardian, who thereafter is authorized to execute the consent.

The Supreme Court, recognizing that in 90 of the 93 counties in Nebraska the county court is already the juvenile court, found that "[t]he county court, having been granted exclusive original jurisdiction in all matters involving adoptions, is likewise the proper court to determine whether a parent has abandoned his child so as to permit the use of substitute consent provided for by § 43-105." 211 Neb. at 514-15, 319 N.W.2d at 105.

The court then addressed the question of whether a guardian must be appointed in order to secure substitute consent and who should be appointed guardian. Discussing that issue, the *In re Guardianship of Sain* court held:

> The county court, unlike the juvenile court, does not terminate parental rights upon a finding of abandonment,

> but only authorizes the execution of substitute consent. It is the adoption itself which terminates the parental rights, and until the adoption is granted the parental rights are not terminated.
>
> . . . The effect of a finding of abandonment under the adoption statute does not result in the termination of parental rights, as it does under the juvenile act, and therefore implies that the guardian is intended to protect the interests of the child and not the adopting parents.

211 Neb. at 516, 319 N.W.2d at 105-06.

[8] Thus, we conclude that even though *In re Guardianship of Sain* deals with the alleged abandonment of a child by a divorced father, the case, nonetheless, also prevents a county court in an adoption proceeding from terminating parental rights under the Nebraska Juvenile Code. A county court does not have jurisdiction to terminate parental rights using the Nebraska Juvenile Code in an adoption proceeding. Rather, it is the adoption itself, after proper consent has been given, which serves to terminate parental rights.

Since the county court decreed the termination of Martin's parental rights in an adoption proceeding, the district court was correct when it reversed and set aside the county court's order. None of the four circumstances of § 43-104 which would obviate the need for Martin's consent to the adoption existed when the county court entered its order. Thus, no adoption could be decreed by the county court. Therefore, we affirm this portion of the district court's decision.

Parental Preference and Custody Determination.

The district court, as stated previously, reversed the termination of Martin's parental rights, but remanded the matter to the county court "for further proceedings consistent with this opinion and decision." In its decision, the district court found that Martin was not an unfit parent. It may well be that the district court contemplated upon remand precisely what we expressly order; nonetheless, we believe the district court, having reached the correct conclusions in the case, should have ordered the custody of Kassandra and Nicholas restored to their father pursuant to his request for "care, custody, and

control of the . . . children."

[9,10] In reaching this conclusion, we rely upon the doctrine of parental preference pronounced by the Nebraska Supreme Court in *Stuhr v. Stuhr*, 240 Neb. 239, 246, 481 N.W.2d 212, 217 (1992):

> The parental preference principle, reflected in *Nielsen* [207 Neb. 141, 296 N.W.2d 483 (1980)] and *Peterson* [224 Neb. 557, 399 N.W.2d 792 (1987)], is recognition that "the relationship between parent and child is constitutionally protected." See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). Accordingly, a court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.

Parental unfitness has been defined as " 'a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.' " *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992). As the district court found, the record does not support any conclusion that Martin is an unfit parent.

In the widely publicized case of *Petition of Doe*, ____ Ill. 2d ____, 638 N.E.2d 181 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 499, 130 L. Ed. 2d 408 (1994) (case No. 94-236), and *cert. denied* ____ U.S. ____, 115 S. Ct. 499, 130 L. Ed. 2d 408 (1994) (case No. 94-615), the Supreme Court of Illinois addressed many of the same issues which we face here. In that case, a natural father, unmarried to the mother of his child, was deprived of custody and contact with his child for over 3 years by the proposed adoptive parents to whom the mother had relinquished the child. The Illinois court held that the fact that the proposed adoptive parents could improve the child's future financial, social, and emotional atmosphere is not relevant in judging the fitness of the natural parent. The court in *Petition of Doe* made it clear that the child's best interests cannot justify termination of parental rights where the parent has not been found unfit.

The Illinois Supreme Court in *Petition of Doe* rejected the argument that the child's custody cannot be restored to a natural parent when the child has resided with proposed adoptive parents during lengthy litigation, since such a change would be disruptive to the child and thus not in the child's best interests. The court relied upon the words of Justice Stevens of the U.S. Supreme Court when he wrote in another highly publicized case:

> "Applicants' claim that [the child's] best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they were not entitled to adopt her. Neither [state] law * * * nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: '[C]ourts are not free to take children from parents simply by deciding another home appears more advantageous.' [Citation.]" (*DeBoer v. DeBoer* (1993), 509 U.S. ____, ____-____, 114 S.Ct. 1, 1-2, 125 L.Ed.2d 755, 757.)

____ Ill. 2d at ____, 638 N.E.2d at 185 (McMorrow, J., concurring).

The sanctity of a parent-child relationship and the degree to which it must be protected by courts under Nebraska law have been articulated in *Uhing*, 241 Neb. at 374-75, 488 N.W.2d at 371-72:

> A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. Hence, the parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or

her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (both parents and children in a familial relationship are protected by the U.S. Constitution). Establishment and continuance of the parent-child relationship " 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.' " *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) (quoting from *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979)). See, also, *In re Adoption of A.G.K.*, 728 P.2d 1 (Okla. App. 1986) (a child has a constitutionally protected right in preserving parent-child relationship); *Com., Dept. of Social Services v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989) (a child has a fundamental right in establishment and continuation of the parent-child relationship).

Thus, we believe the law is clear that Martin, the natural parent of Kassandra and Nicholas, who did not consent to their adoption and who is not an unfit parent, is entitled to the immediate custody of his children.

CONCLUSION

Accordingly, the county court should have dismissed the petition for adoption, as the required consent of the natural father was not present, and should have ordered that the custody of Nicholas and Kassandra be awarded to him as he asked. We remand this matter to the district court, which shall issue its mandate directing the county court to take the steps we have outlined herein.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

JOEL E. BISGARD, APPELLANT, V. JERRY R. JOHNSON, APPELLEE, AND MOTOR CLUB INSURANCE ASSOCIATION, GARNISHEE-APPELLEE.

525 N.W.2d 225

Filed December 13, 1994. No. A-93-241.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting summary judgment, an appellate court views the evidence in a light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to a judgment as a matter of law.
3. **Appeal and Error.** In considering questions of law, an appellate court has the obligation to reach conclusions independent of the determination made by the trial court.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
5. **Insurance: Contracts: Motor Vehicles: Words and Phrases.** Some causal relation must exist between the injury and the use of the vehicle to come within the ambit of the phrase "arising out of the use of a vehicle."
6. **Insurance: Contracts: Motor Vehicles: Liability.** When an automobile liability policy provides coverage for liability because of an automobile accident, coverage extends only to injuries caused by an accident involving the insured vehicle.
7. **Summary Judgment: Appeal and Error.** An appellate court may affirm a grant of summary judgment on any ground available to the trial court, even if it is not the same reasoning relied upon below.
8. **Insurance: Estoppel.** An insurer that gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground.
9. **Estoppel.** A person is held to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon.
10. **Collateral Estoppel.** Four conditions must exist in order for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in the 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 action.
11. **Actions: Parties.** Privity requires, at a minimum, a substantial identity between

the issues in controversy and showing the parties in the two actions are really and substantially in interest the same.

12. **Due Process: Collateral Estoppel: Parties.** Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a privy.
13. **Parties.** There is no identity of interest when two parties have diametrically opposed interests in the determination of an essential element.
14. **Intent: Weapons.** The intent to injure can be inferred as a matter of law, especially when guns are involved, based on the nature of the act involved and the accompanying reasonable foreseeability of harm.
15. _____: _____. The intentional firing of a gun in the direction of an individual qualifies as an act which carries with it the reasonable foreseeability of harm, from which a court may infer the intent to injure.
16. **Trial: Intent.** Where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Robert M. Slovek, of Sodoro, Daly & Sodoro, for appellant.

David L. Welch, of Gaines, Mullen, Pansing & Hogan, for garnishee-appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

The appellant, Joel E. Bisgard, was shot in the stomach by appellee Jerry R. Johnson while Johnson was a passenger in an automobile that was insured by the garnishee-appellee, Motor Club Insurance Association. Bisgard obtained a default judgment against Johnson for $100,000 for his damages. This is an appeal from the dismissal of a garnishment proceeding in which Bisgard sought to collect the judgment by garnishing Motor Club. Bisgard maintains that the insurance policy Motor Club issued covering the automobile in which Johnson was riding insured Johnson against liability for his act of shooting Bisgard. After Motor Club answered the interrogatories of garnishment, both parties moved for summary judgment. The trial court denied Bisgard's motion, granted Motor Club's motion, and dismissed the garnishment proceedings. Bisgard appeals. We conclude as a matter of law that the policy did not insure Johnson against liability for his act of shooting Bisgard

for the following reasons: (1) The policy covered damages from an automobile accident only, (2) the policy covered damages only from the "use" of an automobile, and (3) the policy excluded intentional injuries. We also conclude that Motor Club is not estopped from denying coverage; the principle of issue preclusion does not prevent Motor Club from establishing that Johnson intentionally injured Bisgard as a matter of law. We therefore affirm.

SUMMARY OF PLEADINGS AND EVIDENCE

On December 1, 1990, at about 12:15 a.m., Bisgard, then a 19-year-old man, was "hang[ing] out" and "cruising" with his friends in the general area of the Burger King restaurant situated near 76th and Dodge Streets in Omaha, Nebraska. Fred Pederson, Jr., and Johnson (the record does not show their age) were cruising in the same area in an automobile that was owned by Fred Pederson, Sr. Bisgard was led to believe that Pederson, Jr., and Johnson had assaulted a friend of Bisgard's. Angry and obscene words were yelled by Bisgard toward Pederson, Jr., and Johnson sometime before the shooting. These events are immaterial and will not be further described. While Bisgard was standing by the sidewalk near Dodge Street in front of the Burger King establishment, Pederson, Jr., was driving the insured vehicle west on Dodge Street with Johnson in the passenger seat. When the vehicle came abreast of Bisgard, it slowed and perhaps stopped. Johnson took out a .25-caliber pistol and shot Bisgard in the stomach from a distance of approximately 7 feet. Johnson was severely injured and spent a considerable amount of time in the hospital recovering from the gunshot wound.

Johnson pled nolo contendere to the charges brought against him and was sent to prison for his crimes.

On March 18, 1992, Bisgard sued Johnson for damages for personal injuries arising from the shooting, alleging that Johnson "was negligent in the discharge of a firearm in the direction of the Plaintiff," and on May 12, he obtained a default judgment against Johnson for $100,000.

On May 21, Bisgard's attorney wrote to Motor Club, demanding that it pay the judgment. A claims superintendent

for Motor Club, Phil Fried, answered that letter, denying the claim. Bisgard's attorney wrote again, and Fried replied. Since the terms of this correspondence bear directly on the issue of estoppel, the content of the correspondence will be summarized when that issue is considered later in this opinion. Fried's statement that Motor Club did not know about Bisgard's claim until after he received the attorney's letter of May 21 is not disputed.

On September 30, Bisgard's attorney filed an affidavit and praecipe of garnishment on the judgment Bisgard held against Johnson, alleging that Motor Club had property of or was indebted to Johnson. In Motor Club's "Answers to Additional Interrogatories" that it filed in response to the garnishment summons, Motor Club denied it owed Johnson any money or property. Motor Club admitted it issued an automobile policy to "Fred C. Pedersen [sic], Sr.," which was in force on December 1, 1990, providing liability insurance to covered persons legally responsible because of an auto accident with Pederson's vehicle. In the answer, Motor Club further alleged that the policy did not cover Johnson's act of shooting Bisgard because (1) Bisgard's gunshot injury was not the result of an automobile accident, (2) Johnson was not using the insured automobile within the meaning of the term "use," and (3) the policy does not provide liability coverage for any person who intentionally causes bodily injury or property damage.

Bisgard's attorney filed an "Application to Determine Garnishee Liability." In that document, Bisgard alleged the judgment; the garnishment; a summary of the answer; and the allegations that Motor Club's policy provided coverage for the reason that the accidental shooting arose out of the use and operation of a motor vehicle, and the shooting was committed by a person who is insured under the policy. The answer in garnishment and the application served as the pleadings to bring the matter before the court. Motor Club and Bisgard both filed motions for summary judgment.

Through attached affidavits, the following evidence was offered and received on the motions: the judgment, the petition upon which it was based, the insurance policy, the correspondence described below, a deposition of Johnson taken

before the default judgment was obtained, and a deposition of Bisgard taken during the garnishment proceedings. The aforementioned facts are gleaned from that evidence.

In Johnson's deposition taken in the original action, he testified that he was shooting at Bisgard to scare him. He did not testify that the gun discharged accidentally, but that in shooting the gun in Bisgard's direction he did not intend to hit him. The specific testimony on the issue is contained in the following questions propounded by Bisgard's attorney and answered by Johnson:

> Q. With regard to the shot that hit Joel in the abdomen, what were you trying to do in discharging this gun in the direction of Joel?
>
> A. Basically, to scare him.
>
> Q. You didn't intend to cause him any personal injury?
>
> A. No.
>
> . . . .
>
> Q. You were riding around, you'd had this confrontation, and you were going to, before you left, scare Joel and his friends by shooting the gun in their direction?
>
> A. Right, yes.
>
> Q. All right. When I say, "in their direction", did you specifically intend to shoot Joel Bisgard in the abdomen with the .25 caliber?
>
> A. No.

Johnson went on to testify that the gun he was using was one of the most "unaccurate [sic] guns," and he did not think it was possible to hit Bisgard because he was drunk. He testified that the injury was the result of "some drunken carelessness on [his] part."

For purposes of the motions for summary judgment, the significant part of Bisgard's testimony is his description of the shooting. He testified that he was standing 5 to 8 feet from the street when the Pederson automobile drove by slowly and stopped or almost stopped. The passenger window was open, and Bisgard saw Johnson stick his hand out the window and point a gun at him. At that time, Johnson was looking directly at Bisgard. The gun fired, and Bisgard was hit in the stomach.

Bisgard gave no testimony that would support a finding that Johnson negligently shot Bisgard, although Bisgard did not and could not dispute Johnson's self-serving statement that he did not intend to hit Bisgard when he shot in Bisgard's direction.

TRIAL COURT'S ORDER

In the trial court's docket note granting Motor Club's motion for summary judgment and denying Bisgard's motion for summary judgment, the court found there was no causal connection between the use of the vehicle and Bisgard's injury, that Motor Club's defense of "no coverage" was clear from the beginning, and that Motor Club was not estopped from raising its defenses.

ASSIGNMENTS OF ERROR

Bisgard alleges the district court erred in (1) granting Motor Club's motion for summary judgment, (2) finding no causal connection between the use of the insured vehicle and Bisgard's injuries, (3) finding Motor Club was not estopped from raising the defense that there was not automobile "use," and (4) overruling Bisgard's motion for summary judgment. A motion for summary judgment should only be granted when the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1989). Ultimately, these assignments raise only the question of whether Motor Club was entitled to a judgment of dismissal as a matter of law or whether Bisgard was entitled to a judgment as a matter of law. This question presents four issues: (1) Did the insurance contract by its terms provide liability insurance to Johnson when he shot Bisgard? (2) If not, is Motor Club estopped from denying coverage for the reasons pled in its answer to the garnishment interrogatories because these reasons differed from the reasons Motor Club gave for denying coverage before the garnishment proceedings commenced? (3) Is Motor Club bound by the fact that Bisgard obtained judgment against Johnson under an allegation of negligence? (4) Does Johnson's testimony that he shot at Bisgard deliberately but did not intend to hit him raise a material issue of fact as to whether he intentionally injured Bisgard?

STANDARD OF REVIEW

[1,2] In reviewing an order granting summary judgment, an appellate court views the evidence in a light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences deducible from the evidence. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to a judgment as a matter of law. *Id.*

[3] In considering questions of law, an appellate court has the obligation to reach conclusions independent of the determination made by the trial court. *Id.*

DISCUSSION

Coverage of Insurance Policy.

[4] We start this section with a summary of the principles by which an insurance contract is to be construed:

> An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the policy.

Katskee, 245 Neb. at 812-13, 515 N.W.2d at 649.

The significant portion of the liability section of the policy issued by Motor Club to Pederson provides:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. . . .
>
> "Covered Person" as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto or trailer.
>
> 2. Any person using your covered auto.
>
> 3. For your covered auto, any person or organization

> but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

(Emphasis omitted.)

The trial court ruled that Pederson's automobile insurance policy did not cover Johnson's actions in injuring Bisgard because there was no causal connection between the use of the insured vehicle and Bisgard's injury. We find this ruling was not in error.

[5] The meaning of the words "arising out of the ownership, maintenance or use of the owned automobile" in automobile insurance policies has been analyzed a number of times by the Nebraska Supreme Court. In *Dairyland Ins. Co. v. Esterling*, 205 Neb. 750, 751, 290 N.W.2d 209, 211 (1980), the policy granted coverage for damages " 'arising out of the ownership, maintenance or use of the owned automobile . . . .' " The wife of the named insured left children that she was caring for unattended in the insured vehicle, and during that time, one child started the coat of another child on fire with a cigarette lighter. The injured child sued the insured's wife on the basis of negligent supervision. In *Dairyland Ins. Co.*, the court quoted *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966), saying, " 'It seems patent, however, that some causal relation must exist between the injury and the use of the vehicle to come within the ambit of "arising out of the use of a vehicle." ' " *Dairyland Ins. Co.*, 205 Neb. at 754, 290 N.W.2d at 212. In *Dairyland Ins. Co.*, the injury clearly was not caused by the use of the automobile, but arguably might have arisen out of using the automobile as a playhouse for children. The Supreme Court held that using the automobile as a playhouse for children was not the type of use that was intended within the meaning of the policy and thus was not covered.

In *Bruecks*, a passenger riding in a car attempted to unload his gun and, in the process, accidently shot and injured the driver of the vehicle. The court held that although the negligent person was riding in and thus using the automobile at the time the injury occurred, the injury did not arise out of the use of the vehicle.

In a similar fashion, it can be argued that Johnson was using

Pederson's automobile by riding in it at the time he shot Bisgard. However, Johnson's act of using the automobile was not causally related to Bisgard's injury. Instead, the injury resulted from the bullet coming from Johnson's gun. Accordingly, we hold the trial court did not err in finding that Bisgard's injuries were not related to the use of the insured automobile and that the insurance policy did not cover Johnson's actions.

Also, in Motor Club's answer to the garnishment proceedings, it pled that Bisgard's injury was not the result of an auto accident. We observe that the policy provides coverage only when "any covered person becomes legally responsible because of an auto accident." (Emphasis omitted.) The trial judge did not rule on whether that pleaded defense was valid, but instead ruled that there was no causal connection between the use of the insured vehicle and Bisgard's injuries.

The effect of a provision limiting coverage of liability to damages "because of an auto accident" has not been decided by the Nebraska Supreme Court, but it has been considered by other jurisdictions. These jurisdictions have considered the effect of such insurance provisions when the injury resulted from crimes committed in the insured auto.

In *Farmers Insurance v. Grelis*, 43 Wash. App. 475, 718 P.2d 812 (1986), a stranger entered a parked vehicle with the owner's consent and then injured the owner while robbing him. The owner claimed to have been accidentally injured by the knife when the assailant tripped. The Washington court concluded that the average person would not consider the stabbing to be an automobile accident and held the liability provision did not cover the owner. The Washington court observed that the parties had cited numerous cases construing the words "arising out of the ownership, maintenance, or use of the owned automobile" and stated it felt those cases are not applicable in interpreting the meaning of the phrase "caused by an automobile accident." We agree. These provisions do have different meanings.

In *Allied Mut. Ins. Co. v. Patrick*, 16 Kan. App. 2d 26, 819 P.2d 1233 (1991), the insured was sued for "negligent sexual molestation" of children who were passengers in the auto. The

Kansas court held that " '[w]hatever else a negligent sexual molestation may be, it is not in plain, ordinary and popular sense an automobile accident.' " *Id.* at 27, 819 P.2d at 1234.

[6] In *Jordan v. United Equitable Life Insurance Company*, 486 S.W.2d 664 (Mo. App. 1972), the policy provided coverage for accidental bodily injury caused solely by reason of an automobile accident. The insured was a taxicab driver who was robbed and shot by a passenger while in the cab. The Missouri court held the injury was not caused by an automobile accident. We conclude that when an automobile liability policy provides coverage for liability because of an "automobile accident," coverage extends only to injuries caused by an accident involving the insured automobile.

[7] The above holding does not contradict the trial court's holding that there was no causal connection between Johnson's use of the covered automobile and Bisgard's injuries, but, rather, it provides another reason why Pederson's policy did not cover Johnson's act of shooting Bisgard. This court may affirm a grant of summary judgment on any ground available to the trial court, even if it is not the same reasoning relied upon below. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991). See, also, *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). Thus, in our judgment, the provision for coverage "because of an auto accident" clearly excludes coverage in this case.

We conclude that under the terms of Pederson's policy, Johnson was not insured against liability when he shot Bisgard, even if we assume that Johnson either negligently shot or negligently hit Bisgard, because Johnson's use of the insured vehicle was not causally related to Bisgard's injuries and because the injury was not caused by an auto accident.

Binding Effect of Motor Club's Denial of Coverage.

On May 21, 1992, the attorney representing Bisgard wrote Motor Club, informing it of Bisgard's $100,000 judgment and demanding that it pay the judgment. In the letter, Bisgard's attorney stated the injuries "arose out of the use and operation of the motor vehicle" and cited *National Union Fire Ins. Co. v.*

Bruecks, 179 Neb. 642, 139 N.W.2d 821 (1966), and a case decided in a federal court to support his position that Johnson was using Pederson's vehicle within the meaning of Pederson's liability insurance. He also cited *Dairyland Ins. Co. v. Esterling*, 205 Neb. 750, 290 N.W.2d 209 (1980), and argued his position. He further argued on the basis of cited authority that a minimal causal connection is all that is required. Bisgard's attorney also stated that in Johnson's deposition, he stated that he had no intent to shoot Bisgard, only to scare him. Therefore, any exclusion in the policy for intentional acts was inapplicable.

On June 15, Fried responded for Motor Club, stating:

> How does one shoot another and only plan to scare him? If he had hit him in the foot I could possibly buy a story that he was shooting to scare him. I doubt that [sic] the case here.
>
> I find that Fred C. Pederson Jr. was an excluded driver under the policy insuring the 1989 Mercury Cougar at the time this occurred.
>
> We don't have any grounds to provide coverage for this event. Therefore, we will make no voluntary payment!

On July 15, Bisgard's attorney acknowledged receipt of the letter and stated, "You have declined to provide coverage for this occurrence for two reasons: (1) the act of shooting was intentional; and (2) Fred C. Pedersen [sic], Jr. was an excluded driver . . . ." He then explained that the evidence at the trial, from which the judgment was obtained, showed Johnson shot Bisgard negligently, not intentionally. He further explained that in his opinion the fact that the driver was not covered was immaterial. He ended by claiming Bisgard could collect attorney fees if Motor Club failed to pay the judgment in bad faith.

On July 17, the claims superintendent answered, stating, "I would think the thing that is most important in this case is does coverage extend and if it does was this an intentional act. I also think the answer to both of these questions is no and yes in that order." The remainder of the letter addressed the attorney fees issue.

When Motor Club answered in the garnishment proceedings, it denied coverage in summary because (1)

Bisgard's injury was not the result of an automobile accident, (2) Johnson was not using the insured automobile, and (3) the policy on the automobile does not provide liability coverage for any person who intentionally causes bodily injury or property damages. The third reason was clearly included within the claim superintendent's denial before litigation. However, Bisgard argues that the other pleaded reasons were not mentioned by Motor Club until after the litigation was started.

[8] In Bisgard's brief, he argues that the rule in this state is that an insurer that gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground. Bisgard cites the following cases in support: *Howard v. State Farm Mut. Auto. Ins. Co.*, 242 Neb. 624, 496 N.W.2d 862 (1993); *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983); *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N.W. 397 (1933); and *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N.W. 81 (1900).

The aforementioned rule is mentioned in the above cases; however, it has not been literally applied. After recognizing the above rule and citing the same cases, Justice Caporale stated the following in *Howard*: "However, unlike the situation presented here, the cases applying this rule dealt with circumstances whereunder an insurer altered its position in an attempt to defend upon an entirely separate and different ground." *Id.* at 637, 496 N.W.2d at 870.

Justice Caporale cited *Chisholm* and explained how the insurer in *Chisholm* had altered its position in an amended petition. In *Chisholm*, the insurance company changed its position after the deposition of its own officer showed there was no merit to the grounds it was using to deny coverage. In *Chisholm*, three justices concurred because the majority did not base its decision on estoppel. In the case at hand, Bisgard does not point out any claimed change of position due to Motor Club's "altered" statement of reasons.

[9] In *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966), the Supreme Court applied the rule to estop an insurer from denying coverage. However, in that case

the insurer's attorneys had taken charge of the insured's case for 17 months and then denied coverage. The court applied the doctrine of equitable estoppel and stated the rule that

> " 'a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' . . ."

Id. at 653-54, 139 N.W.2d at 829.

The evidence shows that Bisgard's attorney had obtained a judgment against Johnson without notifying Motor Club. In so doing, he took the trouble to base liability on unspecific negligence, and he took Johnson's deposition when he was not represented. He did so without giving notice to Motor Club, the company that was the most likely insurer.

Bisgard does not claim that Motor Club changed its position after it answered the garnishment interrogatories. Furthermore, Motor Club is not bound by the summary of the grounds for denying coverage contained in the letter from Bisgard's attorney. In his second letter, Fried denied coverage, but did not specify the reasons. In the first letter, Bisgard's attorney recognized the possible weaknesses of his case. Fried did not waive these grounds, but, rather, ignored arguments about the use of the automobile.

If Motor Club did change its position from that expressed by its agent, we can find no basis for denying it the right to state those reasons in its answer. Accordingly, we find that Motor Club was not estopped from denying coverage on the basis of the two grounds discussed in the preceding section of this opinion.

Bisgard does not dispute that Motor Club's denial was based on the claim that Johnson intentionally injured Bisgard. However, Bisgard argues that this defense is not available in this case for the following two reasons: (1) Motor Club is bound by the previous finding that Johnson's actions were negligent and not intentional, and (2) there is no evidence controverting Johnson's testimony that he did not intend to injure Bisgard,

and thus, the exclusionary provision should not apply as a matter of law. We shall now consider these arguments.

Possible Collateral Estoppel.

The petition Bisgard filed to obtain a judgment against Johnson alleges that Johnson was "negligent in the discharge of a firearm in the direction of the Plaintiff" as the basis of liability. In the order of the judgment, the court found Bisgard is entitled to a judgment in the sum of $90,000 on his first cause of action, negligence, and in the sum of $10,000 on his second cause of action, negligent infliction of emotional distress. Bisgard maintains that under the doctrine of collateral estoppel, Motor Club cannot question the finding that Johnson negligently injured Bisgard.

[10] The following are four conditions that must exist in order for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in the 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 action. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994); *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993).

[11] The controlling issue on collateral estoppel in this case is whether Johnson was in privity with Motor Club while Bisgard was obtaining his judgment. The Supreme Court has defined the word "privity" as follows: " 'Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same.' " *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 505, 500 N.W.2d 566, 573 (1993).

In *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990), the Supreme Court also quoted Black's Law Dictionary 1079 (5th ed. 1979), stating privity has also been defined as

> "[m]utual or successive relationship to the same rights of property. In its broadest sense, "privity" is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one

> person with another as to represent the same legal right. . . . Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest."

235 Neb. at 838, 458 N.W.2d at 457.

[12] In *Gottsch*, the Supreme Court also recognized the following:

> "[D]ue process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and, where not so, that at least the presently asserted interest was adequately represented in the prior trial."

Id. at 837, 458 N.W.2d at 457 (quoting *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975)).

[13] In this particular case, the issue on privity is whether Johnson and Motor Club had such an identity of interest in the issue of whether Bisgard's injury was intentionally or negligently caused. We are unable to locate any Nebraska cases which consider whether a person who would benefit from liability insurance coverage has an identity of interest with the insurance carrier. It seems clear, however, that there is no identity of interest when two parties have diametrically opposed interests in the determination of an essential element.

In *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991), the Supreme Court did hold that a person claiming to be covered by a liability policy was not in privity with injured parties when the insured brought a declaratory judgment against his insurance carrier for a determination as to whether the insurance company's policy covered liability for the damage suffered. The Supreme Court stated, " '[F]or the purpose of issue preclusion . . . the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants.' " *Id.* at 464, 471 N.W.2d at 395 (quoting *Gottsch, supra*). In the case at hand, the parties do not even have the same desire to prove the same facts.

State Farm Fire & Cas. Co. v. Byrd, 729 F. Supp. 1265 (N.D. Cal. 1990), a California case considered by the federal court under its diversity jurisdiction, was a case quite similar to the case at hand. In that case, a person by the name of Byrd caused

the death of a woman while holding her head under water during a sexual encounter in a partially filled bathtub. The victim's survivors obtained a judgment against Byrd by stipulation for $200,000. In that case, Byrd admitted liability for negligently causing the death of the woman, and in consideration, the survivors agreed not to levy execution upon Byrd's personal assets. The federal court granted a motion for summary judgment, determining as a matter of law that the homeowner's policy covering Byrd did not cover the event because the policy contained an exclusion for " 'bodily injury or property damage which is expected or intended by the insured.' " *Id.* at 1266. The court held the insurance company was not collaterally estopped on the issue of intent versus negligence. In making its decision, the court stated, "In particular, the manifest conflict between State Farm and Byrd on the issue of Byrd's intent destroys any privity which might have been inferred from State Farm's retention of counsel for Byrd." *Id.* at 1267. The court observed that any finding of willfulness or intent would have expanded Byrd's personal liability and would have been in State Farm's best interests. The court went on to hold that the defendant's conviction for murder established that the crime was intentional, and denied recovery.

We conclude as a matter of law that on the issue of whether Johnson intentionally or negligently injured Bisgard, the interests of Johnson and Motor Club are adverse. Therefore the doctrine of collateral estoppel does not apply, and the issue remains to be settled in this case.

Exclusion of Intentional Injury.

In his brief, Bisgard's attorney argues that the only issue before the trial court was the question of whether the acts of Johnson were intentional and thus not covered due to the exclusionary provision contained in the policy. Bisgard's attorney states that no evidence exists which contradicts Johnson's testimony that he did not intend to shoot Bisgard. He further argues that there is no factual dispute concerning the accidental nature of the occurrence. Thus, Bisgard's attorney argues the trial court erred in not finding there was coverage as

a matter of law and in denying Bisgard's motion for summary judgment.

The trial court granted Motor Club's motion for summary judgment by concluding there was no causal connection between the use of the automobile and Bisgard's injury. However, the trial court did not address whether the shooting was intentional. While such a determination was not necessary in order for the trial court to properly grant Motor Club's motion for summary judgment, this exclusion gives an additional reason why the motion for summary judgment should have been granted.

The " 'intended purpose of [exclusionary] clauses is to prevent extension to the insured of a license to commit whatever wanton and malicious acts he [or she] wishes, yet still fall under the coverage of [the] insurance policy.' " *State Farm Fire & Cas. Co. v. Geary*, 869 P.2d 952, 956-57 (Utah App. 1994) (citing *Barton v. Allstate Ins. Co.*, 527 So. 2d 524 (La. App. 1988)).

In the present case, the pertinent portion of the exclusionary clause contained in the policy is as follows: "EXCLUSIONS[:] A. We do not provide Liability Coverage for any person: 1. Who intentionally causes bodily injury or property damage." (Emphasis omitted.)

[14,15] We are convinced that under the facts in this case, Johnson's intent to injure Bisgard can be inferred as a matter of law. Numerous jurisdictions have recognized that the intent to injure can be inferred as a matter of law, especially when guns are involved, based on the nature of the act involved and the accompanying reasonable foreseeability of harm. *Geary, supra*. See, also, *American Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783 (Iowa App. 1992); *Barton, supra*; *Allstate Ins Co v Freeman*, 160 Mich. App. 349, 408 N.W.2d 153 (1987); *Auto-Owners Ins. Co. v. Smith*, 376 N.W.2d 506 (Minn. App. 1985); *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661 (Mo. App. 1982); *Landis v. Allstate Ins. Co.*, 546 So. 2d 1051 (Fla. 1989). In *Geary*, the Utah court found that the insured may have truly intended subjectively to only frighten the party who got shot. The court stated that the insured's intentional firing of a shotgun in the injured party's direction two times rises to the level of an act which contains a " 'substantial probability that

certain consequences will result.' " *Id.* at 957 n.11. The court concluded that "the intentional firing of a gun in the direction of an individual qualifies as an act which carries with it the reasonable foreseeability of harm, from which we may infer the intent to injure." *Id.* at 957-58.

In *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973), the Supreme Court analyzed whether intent can be inferred to invoke exclusionary clauses in insurance policies. In that case, a young boy fired a BB gun from a slow-moving automobile, and a pellet struck another person, causing loss of eyesight. The homeowner's policy provided that it did not apply " 'to bodily injury or property damage which is either expected or intended from the standpoint of the insured.' " 190 Neb. at 249, 207 N.W.2d at 365. The case came before the trial court as a declaratory judgment action, and the trial court found that when the boy caused the gun to discharge in the direction of the victim, he did not intend or expect to do bodily injury. The boy testified that he pointed the gun at the victim's feet without taking careful aim and that his intention was to scare somebody. There had been no conflict between the boy and the victim.

In deciding *Muth*, the Supreme Court stated the following:

> In accordance with the usual rule that the judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong, we feel ourselves bound by the findings of the trial judge that [the boy] did not intend to injure [the victim]. Belek v. Travelers Ind. Co., 187 Neb. 470, 191 N. W. 2d 819. While we might ourselves have come to a different conclusion than did the trial judge, we cannot say his findings were clearly wrong.

190 Neb. at 251, 207 N.W.2d at 365-66.

In *Muth*, the Supreme Court stated the following rule should be utilized when deciding whether an act is intentional in the context of exclusionary clauses in insurance policies:

> We hold on the basis of the authorities which we hereinafter cite that, under the language of the exclusion in question, an injury is either expected or intended if the insured acted with specific intent to cause harm to a third

> party. It seems to us to be immaterial whether the injury which results was specifically intended, i.e., the exclusion would apply even though the injury is different from that intended or anticipated. We find it difficult to precisely delineate the scope of the rule and recognize that there will be difficulties in applying the rule in concrete cases.

Id. at 252, 207 N.W.2d at 366.

Thus, the court in *Muth* did not specifically rule on the situation in which someone pointed a gun directly at another, but claims he did not intend to hit the person fired upon.

In *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979), the Supreme Court again dealt with the issue of implied intent in the context of insurance exclusionary clauses. In that declaratory judgment action, the policy contained an exclusion for " 'bodily injury or property damage which is either expected or intended from the standpoint of the Insured.' " *Id.* at 551, 279 N.W.2d at 390. The insured went to his victim's house to talk about certain derogatory remarks the victim had allegedly made to the insured's girl friend. The court stated that the insured's "testimony was that although he intended to hit [the victim], he only intended to cause a sting or a bruise but not a serious injury that would require medical attention." *Id.* at 550-51, 279 N.W.2d at 390. The victim was seriously injured, and the trial court directed a verdict against the insurance company for the amount of the judgment for the assault. The court held the following:

> Although [the insured] may not have intended the specific injury which resulted, such specific subjective intent is not required to exclude coverage under the policy. The "intent" which is necessary to exclude coverage is not the intent to act nor the intent to cause the specific injury. Instead it is the intent to cause bodily injury to the person acted upon and it makes no difference if the actual injury is more severe or of a different nature than the injury intended.

Id. at 555, 279 N.W.2d at 392.

The court also stated, "The public policy against 'licensing' intentional and unlawful assault bolsters our conclusion. In the case before us the direct and inferential evidence from the very

nature of the act permits only one conclusion, that [the insured] intended to injure the plaintiff." *Id.* The court held the policy provision excluded coverage under these circumstances.

More recently, in *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989), the Supreme Court affirmed the rule as expressed in *Jones*, stating that

> *Jones* stands for the proposition that "an injury is 'expected or intended' from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury *or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.*"

(Emphasis in *Victor*.) 232 Neb. at 945, 442 N.W.2d at 882-83.

In *Victor*, the insured went to the house of a person whom he suspected of stealing money from others in attendance at his neighbor's birthday party for which the insured was the host. After a scuffle with another individual at the suspected thief's residence, the insured shot and killed a person who was standing in the doorway of the home. The insured testified that he thought the person in the doorway was the suspected thief, which it was. The court held that from the insured's actions, it could only be concluded that as a matter of law, the insured expected or intended to injure the suspected thief. As a result, the insured's liability to the suspected thief's estate was not covered by the insured's policy.

[16] We think the following quote from Prosser cited in *Raby v. Moe*, 153 Wis. 2d 101, 450 N.W.2d 452 (1990), properly expresses the rationale of this rule as applied to this case:

> Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. . . . The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. *The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.*

(Emphasis supplied.) William L. Prosser, Handbook of the Law of Torts § 8 at 31-32 (4th ed. 1971).

In the case at bar, Johnson testified that he did not intend to injure Bisgard, but he admitted shooting in his direction. Bisgard testified that Johnson was approximately 7 feet away and was looking right at Bisgard when Johnson fired the gun. Johnson did not claim the gun fired accidentally.

We conclude that any reasonable man who shoots a gun directly at another person standing only 7 feet away, while looking directly at that person, has to know there is a high probability that the bullet from that gun could hit that person. Therefore, as a matter of law, we find the wounding of Bisgard was substantially certain to follow from Johnson's act of shooting at him under the undisputed facts in this case. Hence, the exclusionary clause contained in Pederson's automobile insurance policy will preclude coverage to Johnson in this case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. BARTLETT, APPELLANT.

525 N.W.2d 237

Filed December 13, 1994. No. A-93-885.

1. **Appeal and Error.** Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. While an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not objected to at trial or assigned as error on appeal but which is plainly evident from the record and is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Statutes.** When the words of a statute are plain, direct, and unambiguous, no construction is necessary to determine the statute's meaning.
3. **Criminal Law: Drunk Driving: Proximate Cause.** The material elements of the crime of driving while intoxicated and causing serious bodily injury are (1) the

defendant must have been operating a motor vehicle; (2) the defendant must have been operating the vehicle in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (driving while intoxicated); and (3) the defendant's act of driving while intoxicated, in violation of § 39-669.07, must proximately cause serious bodily injury.

4. **Proximate Cause: Words and Phrases.** An efficient intervening cause or superseding cause is a new and independent act of a third person or another force which breaks the causal connection between the original wrong and the injury.
5. **Criminal Law: Drunk Driving: Proximate Cause.** Only if the jury concludes that a victim's actions were the sole proximate cause of injury could a defendant be relieved from criminal responsibility for driving while intoxicated and causing serious bodily injury.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded for a new trial.

Russell W. Harford, of Crites, Shaffer, Connealy, Watson, Wefso & Harford, for appellant.

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

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Michael G. Bartlett appeals from his conviction of driving while intoxicated and causing serious bodily injury. Bartlett was driving a pickup truck in Chadron on May 1, 1993, when he ran into Kristi Olson as she crossed the street. Olson suffered internal injuries and a broken femur as a result of the incident. Bartlett assigns several errors. However, since we conclude that plain error occurred in the giving of the jury instruction on the material elements of the crime and that remand for retrial is necessary, we reach only those errors likely to recur at said retrial.

I. STATEMENT OF FACTS

On April 30, 1993, Michael G. Bartlett; John Mejia, Jr.; and Don Quinn visited several bars in Chadron. After the bars closed, Bartlett, Mejia, and Quinn left in Quinn's pickup truck. Quinn drove to a convenience store, where Bartlett then moved to the driver's seat and drove the three men west of Chadron in the direction of Crawford. Bartlett then drove back to Chadron and, after driving around the town, headed west on 10th Street.

Mejia sat between Bartlett and Quinn in the cab of the truck. About one and one-half to two blocks from the intersection of 10th and Main Streets at approximately 1:30 a.m., Mejia saw about five or six people get out of a car parked on the south side of the street. Included in the group was the victim, Kristi Olson. Mejia saw two or three of the people from the car run north across 10th Street. Mejia testified he saw another two or three people from the car cross the eastbound lane of 10th Street. Mejia testified he saw Olson, who was standing in the middle of the street, take several steps into the lane in which Bartlett was driving and then lunge back. Staci Starkebaum, who was one of the members of the group, testified that three people who got out of the car crossed 10th Street, walking north. Starkebaum stated that she and Olson followed the three and crossed 10th Street to the middle. Starkebaum testified that Olson was about two steps in front of her when Starkebaum saw an approaching pickup truck. Starkebaum stated that she called out to Olson, who looked up, hesitated, and then ran for the north curb of 10th Street. Starkebaum stated that Olson was about 3 feet north of the centerline of 10th Street when Olson began to run across the lane. The pickup was about half a block away from Olson. Starkebaum stated that at the same time, the pickup truck swerved to the north curb, and Olson was struck. Starkebaum stated that Olson was carrying a plastic drinking container in her hand, and when Olson was hit, the container burst open on the pickup's windshield. Olson was hit by the left front corner of the pickup and suffered internal injuries and a broken femur.

Officer Michael Samp investigated the accident scene and interviewed the witnesses. Samp testified that he found skid marks, a plastic squeeze-type drink container, and fragments of a bug shield from the front of the pickup. Samp testified that from the skid marks left on the pavement, he calculated that the pickup was traveling at roughly 24 miles per hour. The speed limit on 10th Street at the location of the accident was 20 to 25 miles per hour. At the point that Olson was hit by the truck, the truck was traveling at approximately 15 1/2 to 16 miles per hour.

Samp testified that Olson's drinking container was tested for the presence of alcohol and that the test was positive. Samp

testified that it smelled as though the container held whiskey and Coke. Samp stated that he observed a bottle of Jack Daniels between the front seats in Olson's car. Dale Thurston, a passenger in Olson's car, testified that earlier in the evening she, Olson, and the other passengers bought soft drinks at Taco John's, using their refillable squeeze-type drink containers.

Witnesses at the scene told Samp that Bartlett was the driver of the pickup. Bartlett had left the scene of the accident at some point prior to Samp's arrival. Bartlett was eventually pulled over as he and his wife were driving in town at about 4 a.m. Samp testified that Bartlett told him he had not had any alcohol to drink after 12:30 a.m. Samp testified that when he talked to Bartlett, he could detect an odor of alcohol on Bartlett's breath and Bartlett's eyes were slightly bloodshot. Bartlett was arrested, and his blood was tested for the presence of alcohol. Bartlett's blood alcohol content at 5 a.m. was .12 percent.

Bartlett was charged with driving while under the influence and causing serious bodily injury, second degree assault, leaving the scene of an accident, and willful reckless driving. After a jury was passed for cause and each side exercised its peremptory challenges, the county attorney's motion to appoint a special deputy county attorney was granted over the objection of Bartlett. Trial was held, and the jury found Bartlett guilty of violating Neb. Rev. Stat. § 39-669.39 (Cum. Supp. 1992), driving while intoxicated and causing serious bodily injury. Bartlett was sentenced to 1 year's imprisonment in the penitentiary.

II. ASSIGNMENTS OF ERROR

Bartlett alleges that the district court erred (1) when it granted the county attorney's motion to appoint a special prosecutor; (2) when it omitted the word "proximate" from the jury instruction on the material elements of driving while intoxicated and causing serious bodily injury; (3) when it did not define "proximate cause" as Bartlett requested in his proffered jury instruction; (4) when, during a sentencing hearing, it questioned Bartlett's expert witness regarding Bartlett's blood alcohol content; and (5) when it imposed an excessive sentence upon Bartlett.

III. SCOPE OF REVIEW

If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

An appellate court has an obligation to reach an independent, correct conclusion on a statute's interpretation, irrespective of the determination made by the court below, as statutory interpretation is a matter of law. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

IV. ANALYSIS

1. Plain Error

Because it was plain error to omit from the jury instructions that it is a material element of the crime that the act of driving while intoxicated must proximately cause serious bodily injury, Bartlett's conviction must be reversed and the cause remanded for a new trial. We will first address the error in the instruction given to the jury on the material elements of the crime.

[1] Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *State v. Myers, supra*; *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). While an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not objected to at trial or assigned as error on appeal but which is plainly evident from the record and is of "such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process." *State v. Myers*, 244 Neb. at 908, 510 N.W.2d at 62. Accord *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

> It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the

> omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous.

State v. Myers, 244 Neb. at 909, 510 N.W.2d at 63. Accord *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

[2] When the words of a statute are plain, direct, and unambiguous, no construction is necessary to determine the statute's meaning. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). An appellate court has an obligation to reach an independent, correct conclusion on a statute's interpretation, irrespective of the determination made by the court below, as statutory interpretation is a matter of law. *Anderson v. Nashua Corp., supra.* In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Bartlett was charged with and convicted of driving under the influence and causing serious bodily injury in violation of § 39-669.39. Under § 39-669.39, "[a]ny person who, while operating a motor vehicle in violation of section 39-669.07 or 39-669.08, proximately causes serious bodily injury to another person shall be guilty of a Class IV felony . . . ."

In the case at hand, the district court gave the following jury instruction regarding the charge of driving while under the influence and causing serious bodily damage:

> The material elements of this charge are:
>
> 1. Mr. Bartlett was operating a motor vehicle; and,
>
> 2. when he did so, he caused serious bodily injury to Kristi Olson; 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; and,
>
> 4. he did so on or about May 1, 1993, in Dawes County, Nebraska.

[3] We find under a "plain meaning" interpretation of the statute that the material elements of the crime of driving while intoxicated and causing serious bodily injury are (1) the defendant must have been operating a motor vehicle; (2) the defendant must have been operating the vehicle in violation of

Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (driving while intoxicated); and (3) the defendant's act of driving while intoxicated, in violation of § 39-669.07, 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. 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.

Even if we were to find the statute ambiguous, the legislative history regarding the intent of the Legislature supports our finding that a material element of the crime is that the defendant's act of driving while intoxicated must proximately cause the injury. Motor vehicle homicide is criminalized under Neb. Rev. Stat. § 28-306 (Cum. Supp. 1992), which provides:

> (1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.
>
> . . . .
>
> . . . If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01 or 39-669.03 [or 39-669.07], motor vehicle homicide is a Class IV felony.

In order to find a defendant guilty of felony motor vehicle homicide under § 28-306 by driving while intoxicated, the State must prove that the defendant's intoxication was the proximate cause of the accident and resulting death. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989).

The introducer of the legislation creating the offense of driving while intoxicated and causing serious bodily injury, State Senator Hoagland, stated that the legislation

> sets out a different set of criminal penalties for those who will injure someone while drunk driving, as distinguished from mere drunk driving. Under the current law, you can be charged with a homicide offense, motor vehicular homicide, if you kill somebody while drunk. Anything short of that is simple drunk driving. In other words, if you seriously injure someone in an auto accident so they lose a leg or lose an arm, the penalty is no different than if you are simply weaving down the road. So this would fill that space in the criminal law that other jurisdictions, most other jurisdictions, have taken care of.

Floor Debate, L.B. 631, Judiciary Committee, 89th Leg. 2d Sess. 7769 (Jan. 17, 1986).

Causing serious bodily injury by driving while intoxicated and motor vehicle homicide by driving while intoxicated are both Class IV felonies and thus carry the same potential penalty. As stated above, to convict one of motor vehicle homicide by driving while intoxicated, the State is required to prove a nexus between the death and the defendant's law violation, i.e., the State must prove that the defendant's driving while intoxicated proximately caused the death of a person. We believe that if the Legislature adopted § 39-669.39 in an effort, inter alia, to create a criminal statute to fill the space between the offenses of motor vehicle homicide by driving while intoxicated and simple driving while intoxicated, it intended to criminalize the same act of the defendant as is criminalized under the motor vehicle homicide statute, when the result is serious bodily injury rather than death. Therefore, proof of a nexus between the defendant's driving while intoxicated and the serious bodily injury is required. We do not believe the Legislature intended to punish someone whose conduct causes serious bodily injury with the same penalty as that imposed upon someone whose conduct kills a person and, at the same time, require less proof of causation to convict of the former crime than to convict of the latter. We believe such a construction is unconscionable, if not absurd.

In sum, the court's instruction omitted the material element that Bartlett's action of driving while intoxicated proximately caused Olson's serious bodily injury. The omission of a material element of the crime from the instruction is plain error, and therefore Bartlett's conviction must be reversed.

The jury instructions were made even more confusing by the addition of the following language which appeared on the same page as the instruction on the material elements of the crime:

> The law of the State of Nebraska also provides:
>
> No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to stop.
>
> Every pedestrian who crosses a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
>
> Notwithstanding the other provisions, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary and shall exercise proper precaution upon observing an obviously confused or incapacitated person upon a roadway.

The instructions do not tell the jury what to do with these rules of the road. Furthermore, because the instruction on the material elements of the crime does not name the act which must cause the bodily injury, the last paragraph arguably suggests to the jury that Bartlett could have been found guilty of a Class IV felony because he failed to honk his horn. The instructions regarding the rules of the road, although commonplace in a civil negligence trial, could only mislead and confuse the jury, and therefore, it was error to include them. See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

2. Assigned Errors

Because we have concluded that a new trial is necessary, we now address only those errors assigned which appear relevant to such retrial. Thus, the assigned errors which pertain to the appointment of a special prosecutor, the sentencing hearing, and the sentence itself will not be discussed.

(a) Use of the Word "Proximate" in the Jury Instructions

Bartlett argues that in paragraph 2 of the above instruction on the material elements of the crime, the instruction should read "when he did so, he *proximately* caused serious bodily injury to Kristi Olson." The district court refused to so instruct, stating, "I think the fact that I don't use proximate cause is in keeping with my own theory of the instructions to the jury without using legalise [sic] . . . ." While inserting the word "proximately" into paragraph 2 would still not have correctly set forth the material elements of the crime, we would emphasize upon retrial that § 39-669.39 provides that "proximate cause" is part of the crime. Legalese or not, proximate cause is a material element; therefore, the words "proximate cause," as opposed to "cause," should be used in an instruction on the elements of § 39-669.39. In addition, proximate cause should then be defined within the instructions. *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984).

(b) Jury Instruction on Efficient Intervening Cause

Bartlett alleges that the trial court erred when it did not give the jury his tendered jury instruction on the definition of proximate cause. Bartlett requested that the trial court give the following instruction regarding proximate cause: "Defendant's conduct is the proximate cause of Kristi Ols[o]n's injury if the conduct came in a natural and continuous sequence, unbroken by an efficient intervening cause, and without which the injury would not have occurred." Instead, the court's jury instruction regarding the issue of causation was: "Mr. Bartlett caused injury to Kristi Olson if the injury occurred in a natural and continuous sequence from his acts and if without those acts the injury would not have occurred."

Bartlett alleges that the trial court erred when it instructed the jury on causation, because the court's definitional instruction of cause omitted the phrase "unbroken by an efficient intervening cause." Bartlett claims that had the court given the jury his tendered instruction on proximate cause, the jury "could have found that Kristi Ols[o]n's darting into the path of the vehicle being driven by Mr. Bartlett was an 'efficient intervening cause' that broke the causal connection between

[Bartlett's driving and Olson's injuries]." Brief for appellant at 24.

[4] As stated, Bartlett relies upon Olson's actions as breaking the causal connection between his driving and her injuries. He characterizes her acts as constituting an efficient intervening cause. An efficient intervening cause or superseding cause is a new and independent act of a third person or another force which breaks the causal connection between the original wrong and the injury. It is itself a proximate cause and, indeed, is *the* proximate cause of the injury in question. See, e.g., *Mundt v. Northwestern Bell Tel. Co.*, 230 Neb. 192, 430 N.W.2d 530 (1988); *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987). Thus, proving that a defendant's conduct was *a* proximate cause necessarily proves that another cause (intervening or superseding cause) was not the *sole* proximate cause. See NJI2d Civ. 3.43 comment.

Bartlett does not argue the existence of any evidence in this case of any new or independent act of third persons or another force which intervened as the sole proximate cause of the injury to Olson. There is no such evidence. Olson was directly and contemporaneously involved in the incident which gave rise to her bodily injury. In short, Bartlett's argument, when carefully examined, is not that the facts justified the giving of an efficient intervening cause instruction. They clearly do not. He did not request an instruction on the definition of efficient intervening cause at trial, nor does he urge on appeal that the trial court erred in failing to give such an instruction. Such a definitional instruction would have been required had the phrase been included in the proximate cause instruction. See *Mundt v. Northwestern Bell Tel. Co., supra*. Rather, in essence, what Bartlett is actually proposing is that Olson's own negligence contributed to cause this injury and that the inclusion of the disputed phrase would have aided his argument to the jury.

The defendant in *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976), within the context of a motor vehicle homicide charge, argued that the jury should have been allowed to consider the victim's behavior when deciding upon whether the defendant's conduct proximately caused the victim's death. The *Rotella* court found:

> However, contributory negligence is not a defense to a charge of motor vehicle homicide. The issue is whether defendant's violation of law was a contributing factor to the death. See Vaca v. State (1948), 150 Neb. 516, 34 N. W. 2d 873, in which we held: "When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility." See, also, Hoffman v. State (1956), 162 Neb. 806, 77 N. W. 2d 592. We there held: "In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another."

196 Neb. at 743-44, 246 N.W.2d at 76.

[5] Olson's actions were not a defense to this charge so long as Bartlett's conduct was a contributing factor, i.e., also a proximate cause. Only if the jury had concluded that the victim's actions were the *sole proximate cause* of her injury could the defendant have been relieved from criminal responsibility for driving while intoxicated and causing serious bodily injury. See, e.g., *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990).

Omission of the phrase "unbroken by an efficient intervening cause" did not render the definition of proximate cause defective. Although the definition of proximate cause is often accompanied with this language, see, e.g., *State v. Ruyle, supra*, such phrase is not included in the proximate cause instruction recommended by NJI2d Crim. 4.1, and its omission in no way lessens the State's burden of proof. The State is still required, under a correct instruction, to prove beyond a reasonable doubt that Bartlett's conduct was a proximate cause

of Olson's injuries.

For clarification purposes, we note that because of our initial conclusion that the instruction on the material element of the crime was erroneous and must be corrected upon retrial, the language which instructs the jury on the issue of proximate cause must be consistent and should instruct that the conduct which proximately causes the serious bodily injury must be the defendant's act of driving while intoxicated. Thus, our conclusion on the instant assignment of error is limited to finding no error in omitting the phrase "unbroken by an efficient intervening cause" from the instruction on proximate cause.

V. CONCLUSION

We find that the jury instruction on the material elements of the crime of driving while intoxicated and causing serious bodily injury did not include the element that the act of driving while intoxicated must proximately cause the serious bodily injury. As a result, we hold that there was plain error and must reverse on that basis. In addition, we find that in an instruction on the material elements, the trial court should use the words "proximate cause" rather than "cause." The trial court should omit instructions on certain rules of the road from an instruction on the material elements of the crime. Finally, we find that there was no error in omitting the phrase "unbroken by an efficient intervening cause" from the instruction on causation.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARSTON L. DOOLITTLE, APPELLANT, V. MARY BETH DOOLITTLE, APPELLEE.

525 N.W.2d 245

Filed December 13, 1994. No. A-94-340.

1. **Modification of Decree: Appeal and Error.** On appeal, an application for modification of a decree of dissolution is reviewed de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.

2. **Divorce: Child Custody.** A custodial parent in a marital dissolution proceeding normally has the right to control the religious training of a child legally affected by the proceeding unless there is a demonstrated serious threat to the health or well-being of the child.
3. _____: _____. A custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Ronald A. Ruff, of Ruff, Nisley & Lindemeier, for appellant.

Lori A. Zeilinger for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

The petitioner, Marston L. Doolittle, filed an application asking the court to modify a previously entered dissolution decree to require the respondent, Mary Beth Doolittle, to enroll the parties' minor children in the public school system or, in the alternative, to award him custody of the minor children. After a hearing, the trial court denied the petitioner's application, but ordered the respondent to ensure that the minor children comply with the compulsory school attendance laws of Nebraska as administered by the Perkins County superintendent of schools. The petitioner appeals to this court. Upon a de novo review, we conclude that the trial court did not abuse its discretion, and we therefore affirm.

BACKGROUND AND FACTS

The parties were married May 3, 1970, in Denver, Colorado. For approximately 20 years they lived on a farm near North Platte, Nebraska. Between May 31, 1971, and August 2, 1989, 10 children were born to them. At the time of the divorce on October 24, 1990, 10 of these children were minors. At the time of the modification hearing on March 9, 1994, three of the children were adults, one was 17 years of age, and the two youngest were 4 and 6 years of age.

When they married, the parties were members of the Episcopal Church. Thereafter, they did not renew their membership in that church and did not attend any church for a number of years. The respondent attended church occasionally and in later years attended more frequently and attempted to provide some religious education for the children in the home. The petitioner attended church only occasionally on Christmas Eve and resisted the religious education for the children in the home.

The petitioner is 57 years of age. He was disabled after coming into contact with a high voltage powerline. As a result, the family is principally supported by Social Security disability benefits. He testified that he is currently attending college, but did not state where.

The respondent is 47 years of age and had attended 1 year of college before attending and completing nursing school. She is a registered nurse, but the record does not show when she last practiced.

During the parties' marriage, the children attended home school, apparently in compliance with the wishes of both parents. Within a year after the divorce, the respondent joined the Church of God in Christ, Mennonite. The respondent currently lives approximately 3 miles northwest of Grant in a home that members of the church helped her find.

The court appointed a guardian ad litem in response to the application for modification of decree filed on behalf of the petitioner. The guardian ad litem's report was admitted into evidence without objection. This report shows that the branch of the Mennonite church the respondent belongs to believes that an eighth grade education is the maximum extent to which a person should be educated in a school setting. Five of the Doolittle children currently attend the Golden Plains School in Madrid, Nebraska. This school is organized under the church and was founded in 1981. The current school building was erected in 1990. According to the guardian ad litem's report, there are approximately 45 students enrolled in this school. The school provides an education through the eighth grade. The children in this school usually finish the eighth grade when they are approximately 14 years of age. Golden Plains is an exempt

school under rule 13 of the State Department of Education (92 Neb. Admin. Code, ch. 13 (1984)).

The guardian ad litem reported that by all accounts, Golden Plains is a good school that is teaching a curriculum required by the State Department of Education. The report stated that the younger Doolittle children are doing well in school as shown by their performance on the standardized tests that are required by the State of Nebraska. The report also stated that the older Doolittle children's test results revealed that they were behind when they were first enrolled in Golden Plains, but that they are catching up. The report further stated that the guardian ad litem spoke with the Perkins County superintendent of schools, who said that the school is doing a good job of educating children through the eighth grade.

The respondent testified that in her view, children should be educated through the eighth grade, with further education being up to the individual child. She does not believe the education provided by the public school system would be good for her children's religious faith because it teaches subjects such as evolution and sex education. She also thinks her children's peers in the public schools would be a bad influence due to their bad language, conduct, and disrespectful attitude. She feels the atmosphere of the public school might endanger her children's Christian faith. In addition, she believes that further education, such as that required for professions, endangers the likelihood that a person will lead a Christian life. She believes that a Christian should live a life of humble service and that education beyond the eighth grade leads a person to become self-promoting with a goal of getting as high as possible on the ladder of success. She believes this goal interferes with the Christian approach to life. She realizes that education through only the eighth grade deprives her children of some opportunities, but she believes the young people of her faith who have been educated in such a manner make a very adequate living. She admits she does not encourage further education, but testified she has no objection to her children's obtaining further education if they so choose.

The petitioner formerly favored home schooling, but now thinks home schooling is wrong, particularly since his older

children dropped out of school at age 15 with no encouragement to continue their education. His testimony indicates, but does not clearly state, that he objects to his children being indoctrinated in the Mennonite faith. He wants his children to attend public school because he now thinks it is "pretty decent."

The petitioner has visitation rights on the first and third weeks of each month in the summertime and on the first and third weekends of each month during the rest of the year. Much of the evidence relates to difficulties the petitioner has with his children's desire not to visit him. However, no issues on visitation were litigated or appealed, and therefore, evidence of the difficulties with visitation will not be summarized in this opinion.

There is no claim that the children are not bright and happy children. The record indicates the children are respectful to their parents, hard working, and have never been in trouble. The petitioner admits to being proud of them. Mark, who is 22 years of age, is married and employed by a farmer near Grant. He has received an education through the eighth grade at home by his mother and by teachers and has been working on his GED. He lived with his father for a year after the divorce. Martin, who is 19 years of age, works in construction, earning $6.75 per hour. He has taken a welding course since finishing the eighth grade and is a member of the Mennonite church. He still lives with his mother. Molly is age 20 and now lives in Kansas, working in a nursing home. Minnie is 17 years of age and is working as a waitress. Elkana is 16 years of age and finished the eighth grade the year before the hearing. He works for the same construction crew as his brother Martin and receives $5 per hour. He also lives with his mother. Miranda is 13 years old and is in the seventh grade. She has also joined the Mennonite church.

TRIAL COURT'S ORDER

The trial court denied the petitioner's application, except that it required the respondent to ensure that the minor children comply with the compulsory attendance school laws of the State of Nebraska as administered by the Perkins County

superintendent of schools.

ASSIGNMENTS OF ERROR

Marston assigns four errors. However, two of these errors are merely arguments and his explanation of how the alleged errors occurred. The properly assigned errors are (1) that the court abused its discretion by failing to require the respondent to enroll the children in an accredited high school or by changing the custody to him and (2) that the court abused its discretion in failing to order the children to continue their education past the minimum statutory age of 16.

STANDARD OF REVIEW

[1] On appeal, an application for modification of a decree of dissolution is reviewed de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992); *Eisenmann v. Eisenmann*, 1 Neb. App. 138, 488 N.W.2d 587 (1992).

DISCUSSION

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the U.S. Supreme Court held that members of the Amish faith were exempt from mandatory education past the eighth grade due to their strongly held religious belief that education beyond the eighth grade was an absolute threat to their faith and to their community. The petitioner argues that the respondent's Mennonite faith does not clearly hold that children should not be educated beyond the eighth grade. Therefore, unlike the Amish, the respondent's desire not to promote her children's education past the eighth grade is based on mere personal preference. On that basis, the petitioner argues that the respondent is not entitled to constitutional protection for her desire not to promote the children's education past the eighth grade. This argument is simply not applicable to the situation before this court. This is not an action by the state to enforce the compulsory attendance law, but is an action between parents based on the best interests of their children.

[2,3] This case is controlled by the holding in *Von Tersch v.*

Von Tersch, 235 Neb. 263, 272, 455 N.W.2d 130, 136 (1990), which stated the following:

> We have previously stated that a custodial parent in a marital dissolution proceeding normally has the right to control the religious training of a child legally affected by the proceeding unless there is a demonstrated serious threat to the health or well-being of the child. *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966). [Other citations omitted.] . . . Accordingly, we hold that a custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

Under these two closely related rules, the only questions before this court are whether there is a demonstrated serious threat to the health or well-being of the children by raising them in the Mennonite faith and whether there is an affirmative showing that the custodial parent's decision on the nature and extent of the children's education has injured or harmed or will jeopardize their safety, well-being, or health, whether physical or mental.

The evidence in this case in no way supports a finding that the religious training selected by the respondent is a serious threat to the health and well-being of the children. We think it is inappropriate to attempt to judge whether the system of values recognized by the respondent as a member of the Mennonite faith is either more or less beneficial to the parties' children than any other religious persuasion. Clearly there is no evidence in the record on this case that would support a finding that the Mennonite faith is a demonstrated threat to the health and well-being of the parties' children.

The petitioner did not attempt to make any showing that the educational practices espoused by the respondent are in any way detrimental to the children. Rather, the petitioner relies upon statements espoused by various courts which recognize the importance of education, such as *Brown v. Board of*

Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Owens v. Heckler*, 753 F.2d 675 (8th Cir. 1985); and *Jenks v. Jenks*, 385 S.W.2d 370 (Mo. App. 1964). The petitioner argues that in our society, education beyond high school is considered to be desirable. The members of this court and most people would agree with this proposition. However, such an argument does not constitute "an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the children's safety, well-being, or health, whether physical or mental" that is required under *Von Tersch, supra*.

Indeed, as compared to the home school the children attended while the parties were married, the record supports a finding that the older Doolittle children's education improved after they started attending the Golden Plains School.

The petitioner argues that the situation in this case is distinguished from the situation in *Von Tersch*. He argues that in *Von Tersch*, the Supreme Court was comparing the education of a private school with that of a public school, whereas in the case at hand, we are essentially comparing the children's attending a public school with their not attending any school beyond the eighth grade. In making this argument, the petitioner ignores the part of the rule laid out in *Von Tersch* that states the custodial parent may determine "the nature or extent of the education for a child." The extent of the education refers to the length of time the child attends school. Unless the parent does not adhere to the compulsory school attendance laws of this state, the parent is complying with the law and is entitled to make that selection.

In considering this matter, it is well to remember that the evidence shows that some of the children have chosen to become members of the Mennonite church and therefore presumably subscribe to that church's belief regarding the nature and extent of a person's education. The trial court ordered the respondent to comply with the compulsory school attendance laws of the State of Nebraska. She did not appeal that part of the decision; thus, it is final.

The trial court did not abuse its discretion in this case, and its decision is therefore affirmed.

AFFIRMED.

HAWKINS CONSTRUCTION COMPANY, APPELLANT, V. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL #21 OF OMAHA, NEBRASKA, APPELLEE.

525 N.W.2d 637

Filed December 20, 1994. No. A-93-021.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. **Actions.** A theory of recovery is not itself a cause of action.
5. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another.
6. **Negligence: Fraud: Words and Phrases.** The Nebraska Supreme Court has officially adopted the definition of "negligent misrepresentation" found in Restatement (Second) of Torts § 552 (1977).
7. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.
8. **Federal Acts: Labor and Labor Relations: States: Contracts: Torts: Claims.** State law tort claims which have their roots in contract, and which imply duties to one party or the other based on a contract, are preempted by the Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1988), when the contract at issue is a collective bargaining agreement.
9. **Federal Acts: Labor and Labor Relations: States: Contracts: Claims.** To be preempted by the Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1988), and thereby converted into federal actions, state claims must fall into one of two categories: claims substantially dependent on interpretive analysis of a collective bargaining agreement, or claims based on rights created by a collective bargaining agreement.
10. _____: _____: _____: _____: _____. State law actions which merely involve factual issues identical to those being tried in a grievance proceeding under a collective bargaining agreement, but which do not involve interpretation of the collective bargaining agreement, are not preempted under the Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1988).
11. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.

12. **Federal Acts: Labor and Labor Relations: Courts: Jurisdiction.** Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1988), does not divest state courts of jurisdiction over actions involving collective bargaining agreements. Rather, state courts have concurrent jurisdiction with federal district courts to hear § 301 actions.
13. **Limitations of Actions: Courts.** The statute of limitations on a federal claim in Nebraska state courts is 3 years. Neb. Rev. Stat. § 25-219 (Reissue 1989).

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Eugene L. Hillman and John S. Lingo, of McCormack, Cooney, Hillman & Elder, for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

Hawkins Construction Company brought an action against the International Association of Bridge, Structural and Ornamental Iron Workers, Local #21 of Omaha, Nebraska (union), for indemnification for the amount of workers' compensation benefits Hawkins paid to an employee supplied by the union. Hawkins appeals the decision of the Douglas County District Court which sustained the demurrer filed by the union and dismissed Hawkins' amended petition. We affirm because (1) Hawkins' amended petition failed on its face to state a cause of action for negligent misrepresentation and (2) Hawkins' negligence action was preempted by § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1988) (LMRA), and therefore barred by the Nebraska statute of limitations for federal claims, Neb. Rev. Stat. § 25-219 (Reissue 1989).

I. FACTUAL BACKGROUND

As we are required to do, we accept as true all facts which were well pled in Hawkins' amended petition and any proper and reasonable inferences of law and fact which can be drawn therefrom. See *Robinson v. Cushman, Inc.*, 242 Neb. 830, 496 N.W.2d 923 (1993). Having done so, we find that the record shows the following:

On August 14, 1985, Hawkins and the union entered into a collective bargaining agreement (CBA) which governed the terms and conditions of employment for Hawkins' employees. The preamble to the CBA stated that one of the purposes of the agreement was "securing for the Employer sufficient skilled workmen insofar as possible to provide for labor's continuous employment." In May 1987, pursuant to this language in the preamble, Hawkins requested that the union provide a construction worker to perform the customary duties of an ironworker. The union obliged by providing one Harold DeBrie.

Sometime later, DeBrie injured his back in the course and scope of his employment with Hawkins. DeBrie filed a claim with the Workers' Compensation Court, which issued an award in DeBrie's favor. At the time the instant action was filed, Hawkins had paid $162,964 in workers' compensation benefits on behalf of DeBrie.

Hawkins filed its petition in the case at bar seeking indemnity from the union for the workers' compensation benefits paid to DeBrie. The union filed a general demurrer alleging that Hawkins' amended petition failed to state a cause of action upon which relief could be granted and failed to confer jurisdiction on the district court. The district court sustained the demurrer, citing three grounds: (1) Hawkins' claims were preempted by LMRA § 301 and therefore barred by the Nebraska statute of limitations for federal claims found in § 25-219; (2) Hawkins' claims ran afoul of the exclusive remedy for employers in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-118 (Reissue 1993); and (3) Hawkins' claims were unsupported by the language of the CBA.

Following the district court's order sustaining the union's demurrer, Hawkins elected to stand on its amended petition. Subsequently, the district court dismissed Hawkins' amended petition with prejudice. This appeal followed.

II. ASSIGNMENTS OF ERROR

Hawkins lists five assignments of error, all of which allege that the district court erred in sustaining the union's demurrer and in dismissing Hawkins' amended petition.

III. STANDARD OF REVIEW

[1] Whether a petition states a cause of action is a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

[2,3] In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994). In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Gibb v. Citicorp Mortgage, Inc., supra*; *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

IV. ANALYSIS

1. Defining Hawkins' Causes of Action

[4,5] In its amended petition, Hawkins sets forth what purports to be three separate causes of action. In reality, Hawkins' amended petition stated two causes of action and three theories of recovery. A theory of recovery is not itself a cause of action. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., supra*. A cause of action consists of the fact or facts which give one a right to judicial relief against another. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., supra*. Our reading of Hawkins' amended petition reveals only two alleged causes of action: negligence and negligent misrepresentation. Hawkins pled two theories of recovery for its negligence cause of action, each of which was labeled a "cause of action": (1) negligence for breach of an implied duty to provide a physically

fit and healthy worker and (2) active liability on the union's part, as opposed to passive or constructive liability on Hawkins' behalf.

2. NEGLIGENT MISREPRESENTATION

In its amended petition, Hawkins alleged that the union negligently misrepresented DeBrie's condition. As support for this cause of action, Hawkins asserted the following:

> 13. That in addition to the duties set forth in the First Cause of Action the defendant undertook the duty to furnish employees who were reasonably fit, healthy, and able to perform jobs without unreasonable risk of serious harm for the normal work of the construction business of the plaintiff.
>
> . . . .
>
> 15. That on or before providing Mr. DeBrie to fill the position with plaintiff, defendant knew or should have known: (1) the extent of plaintiff's usual and customary work as a construction company and what the duties of an ironworker with plaintiff would be; (2) that Mr. DeBrie was specifically hired to do such work and that such work would include physical exertion which would involve the use of and exertion of Mr. DeBrie's back; and (3) that plaintiff was relying on defendant to provide a reasonably physically fit worker, free from any physical disabilities which would cause the worker problems in performing the intended job.
>
> . . . .
>
> 17. That before sending Mr. DeBrie to work for plaintiff, defendant knew or should have known that Mr. DeBrie had a physical condition to wit: a weakened back, which would not permit him to safely perform his intended work for plaintiff and that such condition would put him at risk for further severe injury while performing his work for plaintiff. That the defendant negligently misrepresented the physical abilities and health condition of Harold DeBrie when referring him to plaintiff.
>
> . . . .
>
> 20. That the defendant is liable to the plaintiff for its

> breach of the duty it undertook and its negligent misrepresentation in the following particulars to wit: (1) in failing to provide a reasonably fit worker for the intended work; (2) in failing to warn plaintiff of DeBrie's condition; (3) in representing that Mr. DeBrie could safely perform the intended work without exposure to additional injury when it knew or should have known he could not safely do said work; and (4) in failing to reasonably and adequately ascertain the nature and extent of Mr. DeBrie's health and physical ability to perform the work for which he was hired.

[6] The allegations in Hawkins' amended petition repeatedly refer to the union's "failure" to inform Hawkins of certain facts. Such allegations do not constitute a claim for negligent misrepresentation in Nebraska. In *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), the Nebraska Supreme Court officially adopted the definition of "negligent misrepresentation" found in Restatement (Second) of Torts § 552 (1977). Section 552(1) reads:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Section 552 appears to limit a negligent misrepresentation cause of action to cases where one party supplied the other with "false information." Hawkins' amended petition, read in a light most favorable to Hawkins, indicates that the union supplied DeBrie for Hawkins' purposes, but is devoid of factual allegations that the union supplied *any* information, let alone false information, regarding DeBrie's condition. In particular, Hawkins' petition contains nothing indicating that the union made any statement regarding DeBrie's health. The allegations in Hawkins' amended petition do not allege a cause of action for negligent misrepresentation.

[7] We have read the factual assertions Hawkins used as

support for its negligent misrepresentation claim in a light most favorable to Hawkins, and we can glean no other cause of action which might arise from those assertions. The trial court sustained the union's demurrer to Hawkins' negligent misrepresentation claim on the three grounds mentioned previously. We hold that Hawkins' "Second Cause of Action" fails on its face to state a claim for negligent misrepresentation. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993); *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993). Therefore, we affirm the trial court's decision to sustain the union's demurrer and to dismiss Hawkins' negligent misrepresentation claim.

3. Negligence

Our holding as to Hawkins' negligent misrepresentation claim leaves Hawkins with one cause of action: negligence. As noted above, the trial court sustained the union's general demurrer to Hawkins' negligence claim on three grounds. We begin by examining whether Hawkins' negligence claim was preempted by § 301 of the LMRA.

(a) Overview of § 301 Preemption

In sustaining the union's demurrer, the trial court held, inter alia, that Hawkins' negligence claim was preempted by § 301 of the LMRA. The relevant portion of § 301 reads:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185.

The U.S. Supreme Court has interpreted § 301 as

preempting state law causes of action where resolution of the state law claims depends substantially upon interpreting the terms of the CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). See, also, *Robinson v. Cushman, Inc.*, 242 Neb. 830, 496 N.W.2d 923 (1993). "If the state-law cause of action is 'inextricably intertwined with consideration of the terms of the labor contract,' it is preempted." *Id.* at 832, 496 N.W.2d at 925.

The Supreme Court's analysis of § 301 preemption has recognized that "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962). Preemption is necessary "to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 404, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Accord *Barske v. Rockwell Intern. Corp.*, 514 N.W.2d 917 (Iowa 1994). "Thus, federal labor law principles must be employed to resolve disputes involving alleged violations of the [CBA] or requiring interpretation of a provision or term of the [CBA]." *Id.* at 920-21.

Section 301 does not preempt every state law claim that is connected to a CBA provision or to parties who are privy to a CBA. "The clear gist of the decisions is that LMRA § 301 applies only in the interpretation of a [CBA], where the contract deals with employee representation, or where the dispute has some connection with industrial and economic peace between labor and management." *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 830-31, 448 N.W.2d 168, 171 (1989). A number of U.S. Supreme Court cases have defined the situations where § 301 preempts state law claims, and a review of those cases will be helpful in analyzing Hawkins' cause of action for negligence.

In *Allis-Chalmers Corp. v. Lueck, supra*, the employer and union were parties to a CBA which contained a self-funded disability plan administered by an insurance company. The disability plan covered employees for nonoccupational injuries, and the CBA contained provisions regarding a disability

grievance procedure. Lueck was an employee who was injured in a non-work-related accident. Lueck filed a claim with the company, but was unsatisfied with the way the company and its insurer handled his claim. Rather than submitting to the grievance procedure established in the CBA, Lueck sued the employer and its insurer in state court for bad faith handling of his insurance claim.

The Supreme Court held that Lueck's bad faith tort claim was preempted because the claim was rooted in contract and could have been pled as a contract claim under § 301. Whether the company and its insurer acted reasonably in handling Lueck's claim would have required the trier of fact to determine the respective parties' duties under the disability plan. The Court's primary concern, and the driving force behind § 301 preemption, was that analyzing Lueck's claim under state law would subject similar CBA provisions in other states to varying interpretations, undermining the Congressional goal of a unified and consistent federal body of CBA interpretation law.

In *Electrical Workers v. Hechler*, 481 U.S. 851, 107 S. Ct. 2161, 95 L. Ed. 2d 791 (1987), an employee sued her union on negligence grounds for allegedly failing to provide a safe workplace. The Supreme Court held that Hechler's claim was preempted by § 301 because a court would have to look to the CBA to determine whether the agreement in fact placed an implied duty on the union to provide Hechler with a safe workplace. Since questions of CBA interpretation were the basis for Hechler's tort claim, she could not avoid § 301 preemption by pleading her claim as a state law tort action.

The following year, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), the Court held that an employee's claim for retaliatory discharge was not preempted by § 301. Lingle was discharged after she was injured in a work-related accident and filed a workers' compensation claim. The union representing Lingle filed a grievance pursuant to the CBA, alleging that Lingle's termination was not for "just cause," as required by the agreement. While the grievance procedure was in progress, Lingle filed a claim in state court, alleging that she was discharged in retaliation for filing a workers' compensation

claim, in violation of Illinois public policy.

The employer contended that the state law claim was preempted by § 301 because it was "inextricably intertwined" with the CBA, even though disposition of the claim did not require an interpretation of the agreement. The employer argued, and the trial court agreed, that Lingle's claim was preempted by § 301 because the same facts would be analyzed in the grievance proceeding and the state law action. The U.S. Court of Appeals for the Seventh Circuit affirmed the trial court's decision. The Supreme Court granted certiorari and reversed the court of appeals, stating:

> We agree with the court's explanation that the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause. But we disagree with the court's conclusion that such parallelism renders the state-law analysis dependent upon the contractual analysis. . . . [Section] 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

486 U.S. at 408-10.

[8-10] *Lueck*, *Hechler*, and *Lingle* provide a clear analysis of § 301 preemption. State law tort claims which have their roots in contract, and which imply duties to one party or the other based on a contract, are preempted by § 301 when the contract at issue is a CBA. In other words, "[t]o be preempted by § 301, and thereby converted into federal actions, state claims must fall into one of two categories: claims substantially *dependent* on *interpretive analysis* of the CBA, or claims based on rights

created by the CBA." (Emphasis in original.) *Walton v. UTV of San Francisco, Inc.*, 776 F. Supp. 1399, 1402 (N.D. Cal. 1991). Conversely, state law actions which merely involve factual issues identical to those being tried in a grievance proceeding under a CBA, but which do not involve interpretation of the CBA, are not preempted under § 301. *Lingle v. Norge Division of Magic Chef, Inc., supra.*

(b) Preemption of Hawkins' Negligence Claims

Hawkins cited a plethora of authority and made numerous innovative arguments supporting its contention that its negligence cause of action is not preempted by § 301. However, when one examines the substance of Hawkins' negligence claim, it becomes clear that under the Supreme Court's reasoning in *Lueck* and *Hechler*, the negligence claim is preempted.

Hawkins argues that its negligence claim would not require the trier of fact to analyze and interpret the CBA. The inherent flaw in Hawkins' argument is that, without the CBA, Hawkins would have no basis for arguing that the union owed it any duty to supply a fit and healthy worker. In its brief, Hawkins admits that the union's duty to supply Hawkins with "skilled workers" arises directly from the language of the CBA. If Hawkins and the union were not subject to *some* contractual agreement, the union would have no duty to supply workers to Hawkins. In the instant case, the contractual agreement binding the two parties is a CBA. In order to determine whether the union breached any duty owed to Hawkins, the trial court would have to define "skilled worker" as it is found in the CBA. Under § 301, as defined by *Lueck* and *Hechler*, such analysis must be conducted using federal law.

In *Lueck*, as in the case at bar, the Court was faced with a state law tort claim which arose directly from the provisions of the CBA. In finding that such tort claims are preempted by § 301, the Court stated:

> Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. The parties'

> agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner. Similarly, the question whether Allis-Chalmers required Lueck to be examined by an inordinate number of physicians evidently depends in part upon the parties' understanding concerning the medical evidence required to support a benefit claim. *These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may choose to define the tort as "independent" of any contract question. Congress has mandated that federal law govern the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is pre-empted.*

(Emphasis supplied.) *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218-19, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985).

We find the quoted passage from *Lueck* applicable to the case at bar. The union's duty to provide a "skilled worker" to Hawkins was created by the CBA. Defining the term "skilled worker" as it is used in the agreement would be essential to delineating the union's duties towards Hawkins. As noted by the trial court, analyzing the union's duty to supply a "skilled worker" could raise a number of questions, including the union's duty to conduct background checks on each employee and the union's duty to make each employee submit to a medical exam. To answer any of these questions, the trial court would have to interpret the language of the CBA in order to determine what duty was owed by the union to Hawkins. Any such interpretation must be performed under federal law pursuant to § 301. Therefore, Hawkins' negligence cause of action is preempted. See *Robinson v. Cushman, Inc.*, 242 Neb. 830, 496 N.W.2d 923 (1993).

[11] The trial court's decision that Hawkins' negligence claim was preempted by LMRA § 301, standing alone, would have been sufficient to sustain the union's entire demurrer. An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993). Therefore, our finding that Hawkins' negligence claim was preempted by § 301 makes it

unnecessary to discuss any of the other grounds on which the district court sustained the demurrer.

(c) Effect of Preemption on Hawkins' Claim

[12] Our holding that Hawkins' negligence claim is preempted by § 301 does not mean that Hawkins would never be able to bring an action against the union in state court based on the facts presented in this case. Section 301 does not divest state courts of jurisdiction over actions involving CBA's. Rather, state courts have concurrent jurisdiction with federal district courts to hear federal LMRA actions. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962). Therefore, the district court would have been a proper forum for Hawkins' § 301 claim.

[13] However, the statute of limitations on a § 301 claim in Nebraska state courts is 3 years. See § 25-219. In the case at bar, the union provided DeBrie to Hawkins in May 1987. DeBrie received an award from the Workers' Compensation Court on May 17, 1988. The compensation court's order became final on November 15, 1988. The original petition filed by Hawkins does not appear in the record. Hawkins' amended petition, the earliest pleading in the record, was filed with the district court on August 25, 1992.

Under the facts presented to us in this record, Hawkins' petition was not filed within the 3-year period mandated by § 25-219. As such, Hawkins' petition cannot be further amended to state a cause of action, and the district court was correct in dismissing the petition with prejudice.

V. CONCLUSION

Hawkins' amended petition failed on its face to state a cause of action for negligent misrepresentation. Its negligence claim was preempted by § 301 of the LMRA, and the Nebraska statute of limitations for federal claims, § 25-219, has expired on Hawkins' § 301 claim. Therefore, the district court was correct in sustaining the union's demurrer and dismissing Hawkins' amended petition with prejudice.

AFFIRMED.

IN RE INTEREST OF KELLY D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. KAREN D., APPELLEE, AND PAUL D., APPELLEE AND CROSS-APPELLANT.

526 N.W.2d 439

Filed December 20, 1994. Nos. A-93-762, A-93-763.

1. **Juvenile Courts: Final Orders: Judgments: Appeal and Error.** An appeal from a final order or judgment entered by the juvenile review panel shall be reviewed by the Court of Appeals or the Supreme Court de novo on the record submitted to the panel. Neb. Rev. Stat. § 43-287.06 (Reissue 1993). An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record.
2. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction may be raised sua sponte by an appellate court.
3. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.
4. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
5. **Juvenile Courts: Jurisdiction.** The jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
6. **Parental Rights: Juvenile Courts: Jurisdiction.** In order for a child to lack proper parental care by reason of the fault or habits of its parent under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), a child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
7. **Parental Rights: Juvenile Courts: Jurisdiction: Proof.** If the pleadings and evidence at an adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.
8. **Jurisdiction.** Subject matter jurisdiction cannot be conferred upon a court by the acquiescence or consent of the parties, nor may it be created by waiver, estoppel, or conduct of the parties.
9. **Parental Rights: Pleadings.** The petition in an adjudication proceeding must allege facts which would show that the child lacks proper parental care by reason of the inadequacy of any parent whose custody or right to custody might be affected, so that both parents may understand that the litigation concerns their respective rights.

Appeal from the Juvenile Review Panel, THOMAS H. DORWART, KENT E. FLOROM, and J. PATRICK MCARDLE, Judges, and the Separate Juvenile Court of Lancaster County, TONI G. THORSON, Judge. Judgments of Review Panel and of Separate Juvenile Court reversed, and cause remanded with directions to dismiss.

Don Stenberg, Attorney General, Royce N. Harper, and James L. Hatheway, Special Assistant Attorney General, for appellant.

Roger C. Lott for appellee Paul D.

Roberta S. Stick, guardian ad litem for Kelly D.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

This appeal involves the disposition of a case in which a child has been adjudicated as a child lacking proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). The disposition order of the juvenile court was different than the disposition proposed by the Department of Social Services (DSS) in its predispositional report. DSS requested review by a review panel as provided under Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 1993), and that panel modified the juvenile court's disposition, but upon return of the case, the juvenile court found that the review panel lacked jurisdiction to order the action it ordered. DSS appeals both from the order of the review panel and from the order of the juvenile court which determined that the review panel's decision was unenforceable. The child's father cross-appeals from the order entered by the review panel. The appeals have been consolidated for the purposes of briefs and oral argument and will be considered together in this opinion.

While the orders appealed from and the briefs couch the issues in terms of jurisdiction, the basic issue in this appeal is what authority a juvenile court has in the case where a child's custodial parent is properly caring for the child, but the noncustodial parent of that child has propensities which would be a risk to that child if the child is not protected from the

noncustodial parent, and there is no allegation or evidence that the custodial parent is unwilling and unable to protect that child from the other parent. We conclude that in such a case, the statutes do not contemplate interference with the custodial parent's custody, and that the juvenile court was without jurisdiction to adjudicate the child as a child defined under § 43-247(3)(a). Consequently, we reverse the orders of both the juvenile court and the review panel and remand the cause with directions to dismiss the proceeding.

BACKGROUND

Kelly D., born on November 30, 1990, is the daughter of Karen and Paul D. In April 1992, Karen left the family home. Since that time, the couple have been separated, and Paul has had custody of Kelly. After leaving home, Karen apparently contacted Child Protective Services, informing them that she had sexual thoughts about Kelly, that she had digitally penetrated Kelly's vagina on at least two occasions, and that she was afraid she would hurt Kelly. On January 29, 1993, the Lancaster County Attorney filed a petition in which it was alleged that Kelly was a juvenile as defined by § 43-247(3)(a), because:

> **COUNT I.**
>
> Said child lacks proper parental care by reason of the fault or habits of her mother, Karen [D.] in that:
>
> A) On several occasions since April 2, 1992, Karen [D.] has had sexual thoughts toward Kelly [D.]; specifically wanting to put her finger in Kelly's vagina. Karen [D.'s] emotional and mental health and alcohol/drug usage has affected her parenting abilities in that she has not been able to parent Kelly on a day to day basis since April, 1992. Karen [D.] fears being alone with Kelly [D.] due to her sexual desires toward said child thereby placing said child at risk.
>
> . . . .
>
> C) All in Lancaster County, Nebraska.

The petition listed Karen and Paul as Kelly's parents and listed their separate addresses. It was served on both Karen and Paul.

The bill of exceptions does not contain a record of the proceedings of the March 19, 1993, adjudication hearing. The transcript contains a copy of the journal of that hearing. It shows the presence of the parties, their separate counsel, the State's attorney, and the guardians ad litem for both Karen and Kelly. It shows that "[r]ights and warnings were explained as required by provisions of Nebraska Revised Statute." The record shows that Karen admitted the allegations "in Paragraphs 1 (A) and (C)" and that Karen "was sworn and testified." The court also made factual findings, but those findings are essentially the facts alleged in the petition. The juvenile court found that it had jurisdiction over Kelly pursuant to § 43-247(3)(a) "by reason of the lack of proper parental care by reason of the fault and habits of her mother." The court ordered that a predisposition report be prepared by DSS.

The predisposition report, dated April 15, 1993, recommended that legal custody of Kelly be placed with DSS, that both Paul and Karen undergo psychological testing, that Paul and Karen be required to meet with the Child Protective Services case manager, and that Paul and Karen be required to sign releases of information for certain counselors and psychologists each consulted and to furnish such information to Child Protective Services. The report recommended that Karen be given a minimum of 9 hours supervised visitation with Kelly and recommended that Paul be required to "cooperate fully with said visitation plan arranged and directed by the Nebraska Department of Social Services and no [sic] interfere with Kelly's relationship with Karen [D.]"

At the April 21, 1993, dispositional hearing, the court disapproved DSS' dispositional plan. It is clear that it did so because the proceedings did not contain allegations or findings against Paul. In its journal entry, the court stated:

> [T]o the extent that the case plan presented by [DSS] exceeds the Court's jurisdictional basis, the plan is disapproved as it is not material to the Court's jurisdictional basis as there has been no filing of allegations or finding by the Court regarding the parental care provided by [Paul] . . . . The Court's jurisdictional basis relates solely to the adjudication pertaining to

> [Karen] and, as such, the Court's order must be tailored to be material to the jurisdictional basis pertaining to [Karen].

The court then placed Kelly under the "supervision of [DSS]," required Karen to undergo psychological testing, provided that DSS and the guardian ad litem "shall have access to Kelly [D.] at all reasonable times and places," provided minimum visitation for Karen, and required Paul to cooperate with the visitation plan as ordered. This order does not state that Paul shall have custody of Kelly, but its wording assumes that he has custody and that he will keep custody of her.

DSS then requested a review of the dispositional order by the juvenile review panel, pursuant to §§ 43-287.01 to 43-287.06. The review panel was likewise concerned with the lack of proceedings or allegations against Paul and stated it believed that under Neb. Rev. Stat. § 43-279.01 (Reissue 1993), an adjudication in regard to the father was mandatory. The panel ordered an adjudication be undertaken against Paul.

The journal entry from August 17, 1993, shows that the juvenile court received and reviewed the panel's order and found that the

> Order of the Juvenile Review Panel is outside the scope of the power of review as set forth in Neb. Rev. Stat. § 43-287.05 and does not present a dispositional plan that can be implemented by this Court and, therefore, the Juvenile Review Panel's Order of July 30, 1993, is not enforceable.

DSS has appealed from this "order" and that of the review panel.

ASSIGNMENTS OF ERROR

DSS alleges that the review panel erred when it (1) refused to require the juvenile court to consider evidence regarding Paul, (2) when it failed to find that requiring Paul to comply with certain provisions of the dispositional plan was in the best interests of Kelly, (3) when it failed to hold that legal custody of Kelly should have been given to DSS, and (4) when it failed to hold that the juvenile court had no jurisdiction over DSS and could not order it to comply with the plan. DSS also alleges that

the juvenile court erred when it declared the review panel's decision invalid and decided not to abide by the panel's order.

Paul cross-appealed from the order of the review panel, alleging that the review panel erred when it ordered the juvenile court to reopen the adjudication phase.

We dismiss this case because the juvenile court did not have jurisdiction of the matter, and therefore we do not consider the assigned errors.

STANDARD OF REVIEW

[1] An appeal from a final order or judgment entered by the juvenile review panel shall be reviewed by the Court of Appeals or the Supreme Court de novo on the record submitted to the panel. § 43-287.06. An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W 2d 635 (1994).

[2] Subject matter jurisdiction may be raised sua sponte by an appellate court. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

[3] Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

ANALYSIS

[4] A review of the basic principles that are applicable to this case will be helpful in our analysis. "The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child." *In re Interest of C.P.*, 235 Neb. 276, 284, 455 N.W.2d 138, 144 (1990).

The constitutional effect of the natural right was summarized in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 767, 408 N.W.2d 272, 277 (1987):

> In *State v. Metteer*, 203 Neb. 515, 521-22, 279 N.W.2d 374, 378 (1979), we stated that "[t]here is no doubt that

among the fundamental rights retained by the people under Article IX of the Bill of Rights of the Constitution of the United States is that of integrity of the family." In *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 577, 385 N.W.2d 448, 451 (1986), we noted that " 'the relationship between parent and child is constitutionally protected.' " Quoting *Quillion v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). Since the right involved is fundamental in nature, the statute interfering with that right is subject to strict scrutiny. *Shoecraft, supra.*

[5] On the other hand:

> [T]he jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants. See *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). In that case, we elaborated on the role of the juvenile court: "The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms."

In re Interest of M.B. and A.B., 239 Neb. 1028, 1030, 480 N.W.2d 160, 161 (1992).

The pertinent part of the applicable statute relied upon for the court's jurisdiction in this case, § 43-247, is as follows: "The juvenile court shall have exclusive original jurisdiction as to . . . . (3) Any juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent . . . ."

We have reviewed all of the cases we were able to locate in which the Supreme Court has considered either an adjudication of a child under § 43-247(3)(a) or the termination of parental rights of both parents when only one of the parents is the source of the abuse or possible abuse which might injure the child. We find in these cases that the parent who might injure the child

was either living with the child or had ready access to the child, as in *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511 (1992), and *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985), or in its opinion, the court stated that the custodial parent could not or would not protect the children from the dangerous spouse, as in *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992); *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992); *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992); and *In re Interest of D.P.Y. and J.L.Y.*, 239 Neb. 647, 477 N.W.2d 573 (1991).

The case *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), is an exception. In that case, the parents were separated, the children were in the custody of their mother, and the father had regular visitation with the children. The opinion shows that the father's visitations were discontinued in December 1985 and the action was filed on April 3, 1986. In that opinion, the court did not state whether the mother sought help from DSS, but the proposed plan provided for custody to remain with the mother. The case contained no discussion of the issues under consideration in this case.

[6] In *In re Interest of W.C.O., supra*, the Supreme Court stated that in order for a child to lack proper parental care by reason of the fault or habits of its parent under § 43-247(3)(a), " ' "[a] child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, *or it should be in danger of so becoming in the near future*." ' " 220 Neb. at 419, 370 N.W.2d at 153, quoting *Jones v. State*, 175 Neb. 711, 123 N.W.2d 633 (1963). The Supreme Court also stated:

> It is not the intent or purpose of the juvenile code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may acquire jurisdiction.

220 Neb. at 419, 370 N.W.2d at 153.

In *In re Interest of M.B. and A.B*, 239 Neb. at 1030, 480 N.W.2d at 161-62, the court said: "If evidence of the fault or

habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused."

In the case at hand, the question is whether it is reasonable to assume that Karen would harm her child in the situation the parties were in at the time the petition was filed. We will assume that Karen's admitted inclinations and her emotional and mental problems, as well as her abuse of alcohol and drugs, make her a risk to Kelly, if she has the opportunity. However, for Karen to pose a reasonable risk of harm to Kelly, she must have the opportunity to harm the child during either visitation or custody. There are no allegations in the petition that Karen had access to Kelly. The allegation in the petition that Karen had penetrated Kelly's vagina with her finger was denied by Karen, and this allegation was withdrawn by the State and stricken from the petition.

The record contains no allegation or evidence that would support a finding that Paul was unwilling or unable to protect Kelly from Karen. As the facts appear to us, we wonder why, upon Karen's report that she had sexual thoughts toward her daughter, DSS did not simply tell Paul of this fact and ascertain if he was willing and able to protect Kelly from Karen. If he was willing and able to do so, Kelly was not subject to a reasonable risk of harm, and no proceedings need have been commenced. If Paul indicated he was not willing and able to protect Kelly, the State could then institute proceedings against both parents, and there would be a sound basis for the court to acquire jurisdiction.

DSS' report to the court is in evidence. This report was prepared after the adjudication hearing, and even it does not show that Paul was not willing and able to protect Kelly from Karen. On separate grounds, this report maintains the Paul is not a perfect parent and that it would be in Kelly's best interests if custody were taken from Paul and given to DSS. The failure of the juvenile court to make such a finding is assigned as an error. It should be noted, however, that DSS does not report that Kelly lacks proper parental care by reason of Paul's fault. The procedure followed in this case avoids placing that question

before the court. Yet, DSS maintains Paul should be deprived of the custody of his daughter.

Even if DSS' investigation did uncover facts which led its officials to believe Paul was not capable of giving Kelly proper care, DSS cannot adjudicate his rights. Paul would be entitled to an adjudication hearing to dispute DSS' findings and an appeal from any determination which might be made against him. The significant point is that the proceeding espoused by DSS would deprive Paul of his constitutional right to the peaceable custody of his child, without notice of charges that Kelly lacks proper care due to his conduct and without a hearing on those charges.

DSS' plan recommended, among other things, that custody of Kelly be placed with DSS, that Paul and Karen undergo psychological testing, that DSS and the guardians ad litem have access to Kelly at all times, and that Paul sign a release form to release information from any treatment or counseling program in which he had participated. The lack of an adjudication on Paul's ability to care for Kelly was of concern to the juvenile court, but the court attempted to resolve the issue by finding that DSS' plan "exceeded the Court's jurisdictional basis." The juvenile court's solution to its jurisdictional problem was to refrain from ordering that Paul must comply with DSS' recommended requirements. However, refraining from exercising full control over Paul does not resolve the jurisdictional problem. If a child has been properly adjudicated under § 43-247(3)(a), then the court has jurisdiction over the custodial parent and may exercise control over the custodial parent. § 43-247(5). If a custodial parent is going to be subject to the court's jurisdiction because that parent's child is adjudged as a child under § 43-247(3)(a), then that custodial parent should receive notice that his or her parental rights may be curtailed and a hearing at which the parent could defend his or her rights.

[7] The adjudication of Kelly as a child defined in § 43-247(3)(a) was not appealed. An adjudication order in a juvenile court is an appealable order, and an appeal, if not made within 30 days after the order is entered, will be dismissed. *In re Interest of C.W. et al.*, 238 Neb. 215, 469 N.W.2d 535 (1991).

However,

> [i]f the pleadings and the evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power, to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.

In re Interest of D.M.B., 240 Neb. 349, 352, 481 N.W.2d 905, 909 (1992).

[8] While none of the parties appealed the adjudication order, lack of subject matter jurisdiction may be raised sua sponte by an appellate court. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *In re Interest of D.M.B., supra*. Subject matter jurisdiction cannot be conferred upon a court by the acquiescence or consent of the parties, nor may it be created by waiver, estoppel, or conduct of the parties. *Scherbak, supra*.

In *In re Interest of Constance G., ante* p. 1, 520 N.W.2d 784 (1994), an adjudication was made against the mother, but not the father. A panel of this court said:

> It was imperative that the juvenile court, under the circumstances of this case, make a finding regarding the alleged inadequacies of each parent. Both parents were named in the petition, and an adjudication that the juvenile court has jurisdiction over a minor child is the first step in a process which potentially has grave consequences to both parents.

Id. at 6, 520 N.W.2d at 788.

In *In re Interest of Constance G.*, as in this case, the rights of the father were simply ignored while the trial court dealt with the alleged unfitness of the mother.

In oral argument, the attorney for DSS argued that *In re Interest of Constance G.* is distinguishable from the case at hand because in *In re Interest of Constance G.* the minor was adjudicated to be homeless and destitute under § 43-247(3)(a), whereas in the case at hand, the child was adjudicated under the same statutory provision, but the adjudication was due to the

conduct of the mother which DSS termed "fault." Apparently, DSS views this case as a child abuse case, and of course child abuse usually arises by reason of the fault of the abuser, whereas a child is perhaps homeless and destitute without fault on the part of the parents. However, in this case, the adjudicated facts do not establish that Karen actually did anything to the child, and therefore, *In re Interest of Constance G.* cannot be distinguished by the attempt to label the mother's thoughts toward her child as "fault." Furthermore, we do not believe the fault or lack of fault of one parent has anything to do with the rights of the other parent who has not abused or neglected the child. Whether the child lacks proper care, not the guilt or fault of the parent, is the controlling factor.

The chief distinction between this case and *In re Interest of Constance G.* is that we do not have a bill of exceptions of the adjudication hearing in this case, whereas the court had such a record in *In re Interest of Constance G.* The only record we have of the adjudication hearing is the journal, portions of which were quoted near the beginning of this opinion. The petition is sketchy in the extreme. Neb. Rev. Stat. § 43-274 (Reissue 1993) provides in significant part: "The county attorney . . . may file with the clerk of the court having jurisdiction in the matter, a petition in writing specifying which subdivision of section 43-247 is alleged, setting forth the facts verified by affidavit . . . ." In *In re Interest of L.D. et al.*, 224 Neb. 249, 258, 398 N.W.2d 91, 98 (1986), a case where the sufficiency of an unverified petition was considered, the Supreme Court stated, "[W]e find that an adjudication based on subsection (3)(a) of § 43-247 is analogous to a civil proceeding, which guides us in answering some of the questions present in the case now under consideration." It also stated, "A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief." *Id.* The court went on to hold that if there were any deficiency in the formality of the petition, the father had waived it by participating in the proceedings and requesting affirmative relief. In that case, the formal deficiency was the failure to verify the petition.

[9] In the case at hand, the petition contains no allegations

claiming that the child lacked proper parental care by reason of the conduct of Paul, the person having custody of the child. The pleadings therefore show that Paul was given no notice of any claim against him or of the fact that the proceeding might interfere with his constitutionally protected rights to his child. In *In re Interest of Constance G.*, the panel concluded it was important that the court make a finding regarding the alleged inadequacies of each parent. In this case, we conclude that the petition must allege facts which would show that the child lacks proper parental care by reason of the inadequacy of any parent whose custody or right to custody might be affected, so that both parents may understand that the litigation concerns their respective rights. Under the circumstances of this case, the petition is so fundamentally inadequate that it could not be the basis of the juvenile court's jurisdiction. We therefore conclude that the juvenile court was without jurisdiction for the adjudication of March 22, 1993, and consequently of all the subsequent proceedings. We therefore reverse the orders of both the juvenile court and the review panel and remand the cause with directions to dismiss the proceeding.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY A. FRIEZE, APPELLANT.

525 N.W.2d 646

Filed December 20, 1994. No. A-94-180.

1. **Investigative Stops: Motor Vehicles.** An occupant has standing to challenge the stop of a vehicle.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
3. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as

the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.

4. **Police Officers and Sheriffs: Misdemeanors: Jurisdiction: Statutes.** A police officer lacks authority to pursue or arrest a suspected misdemeanant outside the officer's geographical jurisdiction, absent express statutory authorization.
5. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Probable Cause.** An officer observing a traffic violation or driving behaviors which reasonably indicate that the driver may be operating the vehicle while under the influence may make an investigatory stop of the vehicle.
6. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles.** An officer who has properly stopped a vehicle may thereafter naturally observe activity of the occupants or observe property in the vehicle within the officer's plain view which may indicate that the driver or occupants were involved in different or additional crimes.
7. **Convictions: Appeal and Error.** Upon review of a criminal conviction, an appellate court will not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
8. **Criminal Law: Appeal and Error.** In a criminal case where the trial court sits as the finder of fact, the trial court's findings have the effect of a verdict and will not be disturbed on appeal unless clearly erroneous.
9. **Criminal Law: Proof.** The State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's innocence.
10. **Controlled Substances: Motor Vehicles: Evidence: Circumstantial Evidence: Proof.** Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the controlled substance at the time of arrest or by the showing of ownership, dominion, and right of control of an automobile in which the contraband was found.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Timothy A. Frieze appeals his convictions for possession of burglar's tools and possession of a short shotgun. Because we find that Frieze's motion to suppress was properly denied and that the evidence is sufficient to sustain the convictions, we affirm.

FACTS

On July 19, 1993, at approximately 1 a.m., Officer Steven Rasgorshek of the Ralston Police Department was in his cruiser in the westbound lane of Harrison Street near the intersection of 78th Street in Douglas County, Nebraska. The centerline of Harrison Street is the boundary line between the city of Ralston in Douglas County and the city of La Vista in Sarpy County, Nebraska, with Sarpy County to the south and Douglas County to the north of the centerline.

Officer Rasgorshek observed a brown Ford pickup truck with an Iowa personalized plate reading "HOLTZY" proceeding southbound on 78th Street. The truck turned left from 78th Street onto eastbound Harrison Street, where, according to Officer Rasgorshek, the vehicle crossed back and forth over the double yellow centerlines. Officer Rasgorshek testified that, as the vehicle crossed the centerlines on Harrison Street, the vehicle violated traffic laws in Ralston to the north of the "double yellows" and Sarpy County to the south of the centerlines. According to the testimony, the truck had turned onto Harrison Street in front of the officer and was coming toward him for a time. Officer Rasgorshek turned around and followed the truck east on Harrison Street and then north on 72d Street in Omaha, Nebraska, for about a mile. As he followed the truck north on 72d Street, Officer Rasgorshek saw the truck weaving within its lane of travel and "crossing over the lane change, from lane one to lane two."

According to Officer Rasgorshek's testimony at the suppression hearing, he stopped the truck at 72d and Q Streets for "crossing over the line" and suspicion of drunk driving. Officer Rasgorshek testified specifically that his "initial reason for stopping was the fact that the vehicle was crossing the double yellow lines at Harrison Street and approximately 78th." Officer Rasgorshek stated he initially observed only the driver, Michael Holtz, in the truck. Officer Rasgorshek testified that the truck was raised high up with a "lift kit," and he could not see into the bed of the truck. For officer safety, Officer Rasgorshek called to Holtz to come back to the patrol car and bring his driver's license, registration, and proof of insurance. Holtz got out and told Officer Rasgorshek that he did not have

any of the requested documentation. About that time, Officer Robert Osterman, of the Ralston Police Department, arrived.

As Officer Osterman arrived, Officer Rasgorshek thought he saw a head peek up from the bed of the truck. He asked Holtz if anyone else was in the truck, and Holtz told him that his friend Tim was in the truck with him. To determine if this friend was in the cab of the truck or in its bed, Officer Rasgorshek directed Holtz to have his friend come back to the officers' location. Timothy Frieze, the defendant in this case, came back. Frieze had been a passenger in the cab of the pickup. Holtz was then asked if there was anyone else in the truck, and he said no. Officer Osterman walked up to the truck and observed two people in the bed of the truck. Officer Osterman directed these additional occupants to get out of the truck, and both Frieze and Holtz were placed face down on the ground while the others were brought over. They were also placed face down on the ground, and all of them were placed in restraints.

Officer Osterman then asked Holtz for permission to search the truck, and, according to Officer Osterman, Holtz granted permission. Holtz, the owner of the truck, testified at the suppression hearing that he did not give permission for the search of his truck and that he and the officers argued about it for 5 or 10 minutes. Officer Osterman searched the truck while Officer Rasgorshek stood guard over the four individuals on the ground.

In the cab of the truck, police found latex gloves, two pairs of work gloves, two black sweat shirts, several handtools (screwdrivers, wrenches, etc.), and a hacksaw. One 12 gauge shotgun shell was found in the glove compartment of the truck. A Mossberg 12 gauge short shotgun was found in the bed of the pickup truck. All four occupants were booked on possession of burglar's tools, possession of a short shotgun, and conspiracy. Additional charges were brought against certain of the other occupants of the pickup. Charges against the other occupants of the truck are not a subject of this appeal. Following his arrest, Frieze was taken to the Douglas County sheriff's office, where he was questioned and a statement was taken.

Prior to trial, Frieze moved to suppress all evidence arising

from the stop of the vehicle, including the tools and shotgun and a statement he apparently gave the officers at the scene to the effect that Holtz had come to pick Frieze up at the house of Frieze's girl friend. The trial court overruled Frieze's motion to suppress, and a bench trial was held thereafter. The parties stipulated to most of the facts, including the contents of the testimony of an expert who, if called by the State, would testify that the objects found during the search of the truck are associated with burglary. Prior to trial, the State advised the court that it would not use Frieze's statement in its case in chief. During the trial, Frieze objected to the admission of the evidence which had been the subject of his motion to suppress. His objections were overruled.

Frieze testified at trial and stated that he was in the truck to help protect his friend, Holtz. Frieze stated that Holtz had asked him to accompany him to Omaha to pick up the son of Holtz' girl friend because Holtz had been "jumped" in Omaha the previous day. Frieze testified that he did not know what street they had been on, but that they had pulled into an apartment complex, Holtz had honked the horn, and two "kids" had come out and jumped into the back of the truck. Frieze testified that he did not see either of the kids carry anything into the truck and did not notice any wrenches, hacksaws, or pliers in the truck. Frieze testified that he knew Holtz and that it would not have been unusual for Holtz to carry tools with him because of his occupation as a construction worker. On cross-examination, Frieze testified that he had previously told the officers at the scene that he was visiting his girl friend named "Becky" and that Holtz had come to pick him up and take him back to Council Bluffs, Iowa.

The trial court found both of Frieze's stories "preposterous" and convicted him of both counts in the information. Frieze was sentenced to concurrent terms of not less than 14 months' nor more than 3 years' imprisonment on both counts, with credit for time served. This appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Frieze claims that his motion to suppress was improperly denied and that the evidence at trial lacked the

probative force required to support the convictions.

ANALYSIS

Motion to Suppress.

[1] Prior to trial, Frieze filed a motion to suppress, seeking to exclude, inter alia, the items found in the search of the pickup and his statement made to the officers as to his whereabouts earlier on the evening of July 19, 1993. Under *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989), we conclude that Frieze, as an occupant in Holtz' pickup, has standing to challenge the stop of the vehicle.

[2,3] In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992); *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Masat*, 239 Neb. 849, 479 N.W.2d 131 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *State v. Pope, supra*; *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992).

[4] Frieze argues that Ralston police officer Rasgorshek's stop of the pickup in Omaha was improper because the stop was outside Officer Rasgorshek's jurisdiction. Frieze relies on *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991), which states that a police officer lacks authority to pursue or arrest a suspected misdemeanant outside the officer's geographical jurisdiction, absent express statutory authorization. Frieze argues that because the stop was improper, the fruits of the stop should be suppressed. See, U.S. Const. amend. IV; Neb. Const. art. I, § 7; *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). In response, the State argues that statutory authority exists for the stop, that the stop was proper, and that the evidence uncovered following the stop should not be excluded. We agree with the State.

Neb. Rev. Stat. § 18-1706 (Reissue 1991), headed "Fire, police, and emergency service; provision outside limits of municipality," provides: "Any city or village may by resolution authorize its fire or police departments or any portion thereof to provide fire, police, and emergency service outside of the limits of the municipality either within or without the state."

A review of the record shows that Ralston resolution No. 9202 (1992) (Resolution) was received in evidence. The Resolution provides in part:

> WHEREAS, State of Nebraska Revised Statutes 18-1706 provides that any city or village may by resolution authorize its police department to provide service outside of the limits of the municipality, and the Mayor and City Council have determined that it is in the best interests of the City and its inhabitants to invoke and use such statutory authority.
>
> NOW, THEREFORE, BE IT RESOLVED, that the Mayor and City Council do hereby authorize Ralston Police Personnel to extend and to provide police service outside of the corporate limits of the City of Ralston in the following situations: (1) Upon the request for assistance by another law enforcement agency designated by the Mayor and City Council as an approved mutual aid agency; and/or (2) police personnel having gone outside the corporate limits in pursuit of a person for purposes of apprehensions, arrest, ticketing or other official action in cases where such person was observed violating a law of the State or ordinance of the City within the City of Ralston's corporate limits.

Reading § 18-1706 and the Resolution together, we conclude that specific statutory authority permitted Ralston police officer Rasgorshek to pursue the Holtz pickup into Omaha. Compare *State v. Tingle, supra*. In so concluding, we observe that the path of the Holtz pickup when followed by Officer Rasgorshek was generally along the boundary between Ralston and La Vista and between Ralston and Omaha. We further observe that the "pursuit" in the instant case was consistent with the context and plain language of the Resolution.

Officer Rasgorshek testified that he observed Holtz' pickup

cross the double yellow centerlines while it proceeded eastbound on Harrison Street. Officer Rasgorshek's suppression hearing testimony, stipulated to at trial, was clear that the pickup crossed the centerlines on Harrison Street and approximately 78th. At this point, the vehicle was generally traveling in Sarpy County; however, when it improperly crossed the double yellow centerlines, in violation of Neb. Rev. Stat. § 60-6,131 (Reissue 1993), it ventured into Ralston in southern Douglas County. The driving violation was thus partly committed in Ralston. Consistent with the terms of the Resolution, Holtz' pickup was observed "violating a law . . . within the City of Ralston's corporate limits," and Officer Rasgorshek was permitted to pursue the vehicle "for purposes of apprehensions, arrest, ticketing or other official action." We do not read other statutory provisions granting the chiefs of police principal ministerial duties within their respective jurisdictions to be inconsistent with the foregoing. Compare Neb. Rev. Stat. § 14-601 et seq. (Reissue 1991).

[5,6] It is well settled in Nebraska that an officer observing a traffic violation or driving behaviors which reasonably indicate that the driver may be operating the vehicle while under the influence may make an investigatory stop of the vehicle. *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987). An officer who has properly stopped a vehicle may thereafter naturally observe activity of the occupants or observe property in the vehicle within the officer's plain view which may indicate that the driver or occupants were involved in different or additional crimes. See, *State v. Brown*, 232 Neb. 224, 439 N.W.2d 792 (1989) (holding that cylinder for a .22-caliber pistol discovered in vehicle was admissible because officer saw it in plain view within lawfully stopped vehicle); *State v. Thomte, supra* (holding that "seizure" of defendant for purposes of administering field sobriety tests was proper when officer, after lawful stop of vehicle, naturally observed defendant's physical appearance and behavior which indicated signs of intoxication). In the instant case, Officer Rasgorshek reasonably believed he was witnessing drunk driving and observed a driving violation partly committed in Ralston. The

stop was proper. On this record, we cannot say the trial court's implicit finding that the search was consented to is clearly erroneous. Frieze's argument that the stop and subsequent search were improper is not supported by the facts or applicable law.

Frieze argues that the statement he made at the scene, to the effect that Holtz had come to pick him up from his girl friend's house, should have been suppressed by the trial court because Frieze had not been advised of his *Miranda* rights before making the statement. Prior to trial, the State indicated that it would not use the statement in its case in chief. After Frieze testified on direct examination that he had accompanied Holtz to Omaha to guard against a possible attack, the State cross-examined Frieze, confronting him with his prior inconsistent statement. Under the facts, we find no error in the use of the statement.

In *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the U.S. Supreme Court held that a defendant's involuntary statement could not be used against him where the statement was obtained while the defendant was hospitalized and nearly in a coma. The *Mincey* Court, however, endorsed the longstanding rule that a statement made by a defendant in circumstances violating *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is admissible for impeachment if its trustworthiness satisfies legal standards. See, *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). Following our review of the record, we conclude that the statement bore indicia of trustworthiness, and the use of Frieze's statement for impeachment was proper. The trial court did not err in denying Frieze's motion to suppress.

Sufficiency of the Evidence.

Frieze argues generally on appeal that the evidence lacks probative force and is insufficient to support a finding of guilt beyond a reasonable doubt. See *State v. Frazier*, 234 Neb. 107, 449 N.W.2d 230 (1989). Frieze argues specifically that the tools are not burglar's tools and that the evidence does not satisfy the

requirement of possession of either the burglar's tools or the short shotgun. In response, the State argues that the evidence supports the convictions.

[7-9] Upon review of a criminal conviction, this court will not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Wilson*, 238 Neb. 217, 469 N.W.2d 749 (1991). These matters are entrusted to the finder of fact, whose findings will be sustained if the evidence, viewed in the light most favorable to the State, is sufficient to support them. In a criminal case where the trial court sits as the finder of fact, the trial court's findings have the effect of a verdict and will not be disturbed on appeal unless clearly erroneous. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Wilson, supra*; *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). It has been repeatedly held that the State is required to establish the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's innocence. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992); *State v. Blue Bird*, 232 Neb. 336, 440 N.W.2d 474 (1989).

Nebraska statutes provide as follows:

> (1) A person commits the offense of possession of burglar's tools if:
>
> (a) He knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and
>
> (b) He intends to use the explosive, tool, instrument, or article, or knows some person intends ultimately to use it, in the commission of an offense of the nature described in subdivision (1)(a) of this section.
>
> (2) Possession of burglar's tools is a Class IV felony.

Neb. Rev. Stat. § 28-508 (Reissue 1989).

Nebraska statutes further provide:

> (1) Any person or persons who shall transport or possess any machine gun, short rifle, or short shotgun commits a Class IV felony.

> (2) The provisions of this section shall not be held to prohibit any act by peace officers, members of the United States armed services, or members of the National Guard of this state, in the lawful discharge of their duties, or persons qualified under the provisions of federal law relating to the short rifle, short shotgun, or machine gun.

Neb. Rev. Stat. § 28-1203 (Reissue 1989).

A review of the evidence as set forth generally above in this opinion shows that the State produced evidence of each element of the crimes charged. Frieze's theories at trial were that the tools were not those of burglars and that he was not in actual possession of either the tools or the shotgun. With respect to the nature of the tools and other items, the stipulated expert testimony that the tools found in the pickup were burglar's tools was sufficient and apparently accepted by the finder of fact.

[10] With respect to possession, it has been held that constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the controlled substance at the time of arrest or by the showing of ownership, dominion, and right of control of an automobile in which the contraband was found. *State v. Woodruff*, 205 Neb. 638, 288 N.W.2d 754 (1980) (holding in context of illegal drugs and drug paraphernalia discovered in vehicle that constructive possession could be inferred from defendant's ownership of vehicle and position in vehicle closest in proximity to the contraband). In *State v. Loveless*, 209 Neb. 583, 593, 308 N.W.2d 842, 848 (1981), the Supreme Court stated that "[t]here is little question but that burglary tools would also fall within the definition of 'contraband' " for purposes of application of the constructive possession principle. We infer from *Loveless* that constructive possession applies to possession of a short shotgun under § 28-1203. See, also, Neb. Rev. Stat. § 28-1212 (Cum. Supp. 1994).

After receipt of all the evidence, the trial court found that it was

> obvious from the contents of the truck that the four of these people were all out to — on a joint act. There was four of everything to protect each other, and the shotgun was loaded and there was a shotgun shell in the glove

compartment of the truck right in front of [Frieze].

We cannot say, in the context of this trial, that these findings are clearly wrong. The evidence is sufficient to support the convictions.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err in denying Frieze's motion to suppress and that the evidence is sufficient to support the convictions.

AFFIRMED.

IN RE INTEREST OF ZACHARY W. AND ALYSSA W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JENNIFER W., APPELLANT.

526 N.W.2d 233

Filed December 27, 1994. No. A-94-284.

1. **Jurisdiction: Appeal and Error.** An appellate court has both the power and the duty to determine whether it has jurisdiction over the matter before it.
2. **Juvenile Courts: Final Orders: Appeal and Error.** An ex parte temporary detention order is nonfinal and thus not appealable, but a later detention order is a final, appealable order.
3. **Juvenile Courts: Parental Rights.** The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
4. **Juvenile Courts: Appeal and Error.** An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record.
5. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court.
6. **Visitation: Parental Rights: Proof.** Any right that grandparents might have to visitation while their grandchildren are in the custody of the Department of Social Services is subject to a showing that such visitation is in the best interests of the children.
7. **Constitutional Law: Parent and Child.** The relationship between parent and child is constitutionally protected.
8. **Constitutional Law: Due Process.** The proposition that a person's constitutionally protected right cannot be interfered with without an opportunity to be heard is well founded in the Due Process Clause in the U.S. Constitution.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded with directions.

Christina Thornton, of Legal Aid Society, Inc., for appellant.

No appearance for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

On January 3, 1994, a deputy county attorney for Douglas County filed a petition alleging that Zachary W. and Alyssa W., who were minor children aged 3 and 1 at the time, came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) because they lacked proper parental care by reason of the fault or habits of their mother, Jennifer W. On January 4, the State filed a motion for temporary custody, and the court found that the need for placement and detention existed and ordered the Nebraska Department of Social Services (DSS) to retain custody of the children. The court also set a detention hearing on that matter for January 14. This hearing date was later continued, and the detention hearing was held February 10.

On February 4, Florence G. filed a "Motion for Intervention" wherein she alleged that she is the grandmother of the children and that she is a proper and fit person to have the temporary custody and/or placement of said children. She requested, if the court did not place the children with her, that "she be granted visitation with said minor children in compliance with the laws of the State of Nebraska in reference to these matters." The February 11 journal of the detention hearing contains a paragraph which states, "Motion to Intervene was made by Vincent Sutera [the grandmother's attorney] on behalf of the children's grandmother. The motion was taken under advisement by the Court. Mr. Sutera was then excused from the proceedings."

The remainder of the same journal described the proceedings at the detention hearing and included the findings and the order of the court issued as a result of that hearing. The court found that reasonable efforts to prevent the need to remove the

children from the home had been made and that it would be contrary to the best interests of the children to return them to the parental home. The children were placed in the temporary custody of DSS. DSS was also authorized to consent to medical care and directed to furnish monthly reports to the court and attorneys. Jennifer was granted reasonable supervised visitation, ordered to contribute to the support of the children, and ordered under no circumstance to allow Pedro H., her former boyfriend, to be in the children's presence. The order was not appealed.

On February 17, 1994, the court entered and filed an order that contained no findings, but overruled the grandmother's motion to intervene, and ordered:

> [S]aid grandmother and stepgrandfather shall be granted visitation with said children as determined by the Nebraska Department of Social Services, AND IT IS SO ORDERED.
>
> IT IS FURTHER ORDERED that visitation by said grandmother and stepgrandfather shall in no way interfere with any case plan regarding the natural mother of said children.

The evidence adduced at the detention hearing shows that Jennifer was living with her boyfriend, Pedro, at the time DSS intervened on behalf of the children. The evidence shows that Pedro physically abused Jennifer, but does not show that he abused the children. The youth services unit of the Omaha police intervened after the mother took Alyssa to the hospital with burns on her feet and hands. The mother told the doctors at the hospital that the child was burned in the bathtub when her older sibling turned on the hot water while the mother's attention was distracted. Since the burns covered the entire area of the feet and hands to a certain height, but the child was not otherwise burned, the doctors were of the opinion that the burns were submersion burns and could not have happened in the way the mother claimed they happened. It appeared as though the child's feet and hands were forcibly immersed in extremely hot water. Other evidence of this event is unnecessary in view of the assignments of error contained in Jennifer's brief.

ASSIGNMENTS OF ERROR

Jennifer appeals from the order entered February 17, 1994, and alleges that the juvenile court erred because (1) the grandparents do not fall within the meaning of the Nebraska grandparent visitation statutes, Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 1993), and (2) the court did not make any finding as to whether visitation would be in the best interests of the children.

We note that the application was filed by the grandmother, but the court allowed visitation to the grandparents, which includes Jennifer's stepfather. Because of our resolution of this appeal, this inconsistency is not material and will therefore be ignored.

JURISDICTION

[1] An appellate court has both the power and the duty to determine whether it has jurisdiction over the matter before it. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The burden is particularly important where only the appellant has made an appearance in this court. Therefore, we will first consider whether this court has jurisdiction over this appeal.

[2] Neb. Rev. Stat. § 43-2,126 (Reissue 1993) provides in significant part: "Any final order or judgment entered by a separate juvenile court may be appealed to the Court of Appeals. The appellate court shall conduct its review within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . ." In the case *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), Justice Caporale analyzed the statutes regarding appeals from juvenile courts, and we shall not repeat his analysis in this opinion. In *In re Interest of R.G.*, the Supreme Court held that "the ex parte temporary detention order is nonfinal and thus not appealable, but that the later detention order is a final, appealable order." *Id.* at 415, 470 N.W.2d at 788. The order appealed from in the case at bar is neither the temporary detention order nor the "later" detention order. It was, however, entered immediately after a detention order that was appealable, and if the grandparents' visitation order is based upon any judicial process, that judicial process could only have

occurred at the time of the detention hearing which resulted in an appealable order.

[3] As pointed out in *In re Interest of R.G.*, the finality of a final order in a juvenile matter is in part determined by whether a substantial right has been affected by the order. The court stated that "the question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed." *Id.*

The order appealed from purports to be a denial of a motion to intervene, but it grants significant relief to the would-be intervenor. It also affects the detention of the children during the detention period that could last until the adjudication hearing. The statute directs that the adjudication hearing shall be held as soon as possible, but in all cases within 6 months after the petition is filed. Neb. Rev. Stat. § 43-277 (Reissue 1993). The order states that the grandparents' visitation "shall in no way interfere with any case plan regarding the natural mother." Therefore, it appears that the judge expected the grandparents' visitation to last past any adjudication hearing. The order places no limits on the visitation, but allows the visitation to be determined by DSS. It therefore appears that the visitation might extend over a long period without a known limit. We therefore conclude that the provision of the order is of sufficient importance and may reasonably be expected to last a sufficiently long period of time that the order affects a substantial right of Jennifer, and hence, it is appealable.

STANDARD OF REVIEW

[4,5] An appeal to the Court of Appeals or the Supreme Court from a juvenile court is reviewed de novo on the record. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of the conclusion of the trial court. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

ANALYSIS

Jennifer correctly argues that her mother and stepfather do

not have visitation rights to her children under §§ 43-1801 to 43-1803. With respect to grandparents' visitation rights, § 43-1803 specifically provides for venue in the district court of the county where the child resides or in the district court where the dissolution of the parents' marriage is pending or was dissolved. Thus, the juvenile court was not the proper venue and could not have granted visitation under the aforementioned statutes. Furthermore, no petition was filed, no evidence was introduced, and no findings were made alleging or proving the beneficial nature of the relationship of the grandparents to the children as required by § 43-1802(2).

In *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982), the Supreme Court rejected the notion that visitation rights could be preserved in the grandparents of children when the parental rights of the child's parents have been terminated. In making that decision, the court noted that the common law did not recognize visitation rights in grandparents and said:

> Even if one were to reject the common-law view . . . and accept the more modern view that under proper facts, where the best interests of the child demand it, grandparents may be entitled to seek rights of visitation, we would reach the same result in a case such as this.

Id. at 858-59, 326 N.W.2d at 677.

[6] The Supreme Court has not determined whether the juvenile court may grant visitation to the grandparents of children who are subject to proceedings before it. In the instant case, the issue of the grandparents' right to visit was not litigated in the juvenile court, but merely ordered. Therefore, this case lacks the factual record necessary to consider the question, even if *In re Interest of Ditter* were to be extended to allow the granting of visitation to grandparents in juvenile cases. And, as the above quote indicates, any right the grandparents might have to visitation while their grandchildren are in the custody of DSS is subject to a showing that such visitation is in the best interests of the children. The Legislature essentially imposed that standard when it recognized limited grandparents' visitation rights in § 43-1802. We can find no indication that either the Legislature or the Supreme Court will conclude that grandparents are entitled to visitation simply

because they are grandparents, without a showing that their visitation would be in the best interests of the children.

In the instant case, the grandmother filed a motion for intervention in which the alleged facts, if true, could support a finding that it was in the children's best interests to allow the grandparents visitation. However, this motion was dismissed without an evidentiary hearing, and the grandparents did not appeal or cross-appeal from that decision. Furthermore, the evidence contained in the bill of exceptions is totally devoid of any evidence bearing on whether visitation of the children by the grandparents was in the best interests of the children.

[7,8] More fundamentally, the children's mother was given no notice of any hearing at which she might litigate this issue. The procedure adopted by the court effectively granted part of the grandmother's motion without giving the children's mother an opportunity for a hearing on the issue. " ' "[T]he relationship between parent and child is constitutionally protected." ' " *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 767, 408 N.W.2d 272, 277 (1987) (quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978)). The proposition that a person's constitutionally protected right cannot be interfered with without an opportunity to be heard is well founded in the Due Process Clause in the Constitution. U.S. Const. amend. XIV, § 1.

The order of the juvenile court must be reversed and the cause remanded with directions to terminate the grandparents' visitation that was granted in the juvenile court's journal dated February 17, 1994. This order is without prejudice to a redetermination after an application, notice, and hearing.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ARLENE M. CHRONISTER, APPELLANT.

526 N.W.2d 98

Filed January 3, 1995. No. A-94-208.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless they are clearly erroneous.
2. _____: _____. In reviewing a trial court's findings on a suppression motion, the appellate court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses who testified concerning the motion.
3. **Motor Vehicles.** Nebraska law prohibits turning a vehicle or moving right or left upon a roadway without an appropriate signal.
4. **Police Officers and Sheriffs: Investigative Stops.** A pretextual stop is one in which the officer's stated purpose or motive for the stop conceals his real intention or the real state of affairs.
5. **Investigative Stops: Appeal and Error.** The determination of whether a stop is pretextual is a question of fact for the trial court and will not be reversed by the appellate court unless clearly erroneous.
6. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In order to protect an individual's right to personal security free from arbitrary interference by law officers, limited investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person is, was, or is about to be engaged in criminal activity.
7. **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.
8. **Search and Seizure.** Consent to search may be withdrawn before the completion of the search.
9. **Constitutional Law: Search and Seizure: Motor Vehicles.** A canine sniff of a legally detained automobile is not a search within the meaning of the Fourth Amendment.
10. **Probable Cause: Animals: Controlled Substances.** An alert by a drug detection dog supplies probable cause to believe that drugs are present.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

L. William Kelly, of Kelly & Schroeder, for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

This case involves the legality of a "canine sniff" of Arlene M. Chronister's vehicle after it was stopped by the Nebraska State Patrol for a minor traffic violation on Interstate 80. Following the canine sniff, a search warrant was issued authorizing a search of Chronister's vehicle, which search uncovered approximately 85 pounds of marijuana. Chronister's motion to suppress the evidence on the ground that it was unconstitutionally obtained was overruled by the district court. After a bench trial, Chronister was found guilty of possession of marijuana with intent to distribute, a Class III felony, and no drug tax stamp, a Class IV felony. We affirm the convictions because Chronister's vehicle was lawfully stopped upon probable cause, the canine sniff was a minimally intrusive investigative tactic lawfully employed during a *Terry* stop, and a drug detection dog's "alert" is sufficient to provide probable cause for a search.

FACTUAL BACKGROUND

On April 23, 1993, Trooper Gerald Schenck of the Nebraska State Patrol was patrolling Interstate 80 when he observed an eastbound vehicle without a license plate. When he turned his patrol car around and got behind the vehicle, it exited the Interstate at the Grand Island interchange without a turn signal. Schenck activated his car's overhead lights, which in turn activated a video and audio recording device which provided a videotape record of these events. Chronister was informed that she was stopped because she failed to signal her turn, but that she would be given a warning ticket. Chronister was unable to promptly find her operator's license, got out of the vehicle, and started going through her purse on the hood of the car. While she was looking through her purse, her traveling companion, Jeff Dorning, gave Schenck the vehicle's Pennsylvania registration papers, which indicated Chronister as the owner. After about 2 minutes of searching, Chronister produced a driver's license, and Schenck then wrote the ticket. Meanwhile, Dorning got out of the vehicle and went to sit in the driver's side while Chronister stood by the passenger's side.

Schenck inquired about Chronister's travels and was told that they were returning to Pennsylvania from Denver, where they had been visiting friends.

Schenck gave Chronister the ticket, immediately explained to her that illegal drugs and guns were going through Nebraska on the Interstate, and then inquired whether she had any such items, to which she responded negatively. Schenck then immediately asked if she had "any problem with me running my dog around your vehicle—checking the trunk." Chronister replied "No" and checked with her passenger, who also did not object. Within 2 minutes, Trooper A.H. Allen arrived on the scene as a backup officer, and Schenck informed him that the occupants were "very, very nervous" and that he had received their consent to search the vehicle.

Schenck looked inside the vehicle, and when he attempted to open the trunk with the key he had removed from the ignition, Chronister objected. Schenck did not open the trunk, but got his drug detection dog, Nero, from his patrol car and then performed a canine sniff of the vehicle, which involved Nero's circling the vehicle three times. Although there were some preliminary passive alerts, on the third pass of the vehicle, Nero crawled underneath the rear of the vehicle and attempted to scratch in the area of the trunk. According to Schenck's testimony, this was an "aggressive indication," which meant that the dog had definitely detected the odor of drugs. Nero had been trained to detect the odor of cocaine, marijuana, and heroin. Upon receiving the aggressive indication or alert, the two troopers attempted to convince Chronister to voluntarily open the trunk, explaining that if she did not do so, she would be delayed while they secured a warrant for a search, since the dog's alert had given them probable cause for a search. Chronister refused consent, and a warrant was issued for a search of the vehicle. The search uncovered approximately 85 pounds of packaged and processed marijuana in the trunk.

Schenck testified that his suspicions were aroused by Chronister and her companion's extremely nervous behavior, which started with her inability to secure her driver's license and increased when he mentioned drugs and guns. Schenck testified that Chronister would not make eye contact with him and was

chain-smoking. Additionally, Schenck observed a woman's makeup bag and a man's shaving kit in the backseat, along with a sleeping bag, but no other luggage. Schenck observed that Dorning had 4 or 5 days' beard growth, that Chronister's hair was uncombed, and that she had no makeup on. These observations and behaviors were recited as the basis for Schenck's suspicions about Chronister.

PROCEDURAL HISTORY

Chronister filed a motion to suppress the seized evidence on the grounds that this was an unlawful search and seizure under the Fourth Amendment. After an evidentiary hearing at which Schenck testified, as did an expert on drug detection dogs retained by Chronister, the district court overruled the motion to suppress. Chronister waived a jury trial, and the case was tried upon a factual stipulation that expressly preserved her objections to the seized evidence for purposes of appeal. The stipulated evidence included Chronister's signed *Miranda* advisory and waiver of her rights and her interview with the State Patrol. In that interview, Chronister admitted that she had been hired in Pennsylvania to travel to Denver to pick up marijuana and return it to Pennsylvania in exchange for $5,000. Upon the stipulated evidence, Chronister was found guilty.

ASSIGNMENTS OF ERROR

Chronister asserts that the trial court erred in (1) failing to find that the stop was pretextual, (2) failing to find whether there was an articulable basis to form a reasonable suspicion that criminal activity was occurring or was about to occur at the time of the stop, (3) considering Chronister's withdrawal of consent to search the vehicle as part of the probable cause in obtaining the search warrant, and (4) considering the alert of the dog as a basis for probable cause when "the search by the dog was completed after the withdrawal of consent by [Chronister]."

STANDARD OF REVIEW

[1,2] In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally

inadmissible, an appellate court will uphold the trial court's findings of fact unless they are clearly erroneous. In reviewing a trial court's findings on a suppression motion, the appellate court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses who testified concerning the motion. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

ANALYSIS

Pretextual Stop.

Chronister argues that being stopped for failing to use a turn signal was merely a pretext for conducting a search and seizure of the vehicle by Schenck.

[3] Nebraska law prohibits turning a vehicle or moving right or left upon a roadway without an appropriate signal. See Neb. Rev. Stat. §§ 60-6,161 to 60-6,163 (Reissue 1993). "When an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle." *U.S. v. Cummins*, 920 F.2d 498, 500 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991).

[4,5] A pretextual stop is one in which the officer's stated purpose or motive for the stop conceals his real intention or the real state of affairs. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 113, 126 L. Ed. 2d 78. Chronister does not point to any evidence in the record which disputes that she failed to signal her turn from the Interstate. That a law enforcement officer may be alert and looking for other law violations besides the minor traffic violation for which he or she stops an individual does not make the initial stop an illegal or pretextual stop. The determination of whether a stop is pretextual is a question of fact for the trial court and will not be reversed by the appellate court unless clearly erroneous. See *State v. Vann*, 230 Neb. 601, 432 N.W.2d 810 (1988). Although not explicitly stated in the trial court's journal entry, the denial of the suppression of evidence carries the implicit finding that the stop was not pretextual. There is no rule of law that when the trial court acts as the fact finder, as is the case when ruling on a suppression motion, specific findings of fact must be made. See *State v.*

Franklin, 241 Neb. 579, 489 N.W.2d 552 (1992). The initial stop of the vehicle driven by Chronister was made upon probable cause, was not pretextual, and was therefore lawful.

Was Chronister Illegally Detained?

Chronister next argues that once a driver has produced a valid operator's license and proof that she is entitled to operate a vehicle, she must be allowed to proceed on her way without being subjected to further delay by police for additional questioning. We cannot agree with this proposition under the facts present here. It is clear that there are three levels of police-citizen encounters: (1) a voluntary stop with noncoercive questioning; (2) an investigative stop based upon reasonable suspicion that criminal activity is afoot, where the officer uses the least intrusive methods reasonably available to rapidly dispel or verify his suspicions; and (3) a full-blown arrest in which the citizen is typically taken into the custody of the officer. See *State v. Van Ackeren, supra*. See, also, *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

In the instant case, before there was a detention as a result of a *Terry* stop, there was indisputable consent given by Chronister for Schenck to run his dog around the car and check the trunk. We have recited how consent was obtained, as well as watched and listened to the videotape. The consent was obtained in a nonthreatening and noncoercive manner. Schenck asked, after telling Chronister what he was interested in, and she consented, as did her companion. The voluntariness of this consent is not challenged. Since there was probable cause for the stop and consent was voluntarily granted, there was no preexisting illegality which tainted the consent. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). Accordingly, we view the matter as Chronister being detained initially upon a probable cause stop, which ended with the issuance of the warning ticket, but which was followed within a matter of seconds by a voluntary consent for Schenck to run his dog around the car and check the trunk. Thus, during the time that Chronister remained at the roadside after she was given a warning ticket, because she gave Schenck consent to search, the Fourth Amendment has not been offended.

Schenck was in the process of using the key to open the trunk when Chronister withdrew the consent to search. We need not decide any issues associated with the alleged withdrawal of consent because Schenck did not open the trunk, but instead at that time employed the drug detection dog, Nero, for a sniff of the vehicle. There was a seizure after Chronister revoked her consent and while the dog was performing the canine sniff. See, *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), and *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (both holding that there is a seizure when a reasonable person would have believed that he was not free to leave in view of the circumstances surrounding the incident). While Schenck was working the dog around the vehicle, reasonable persons would not have believed that they were free to leave, particularly when they were being watched over by another trooper.

[6] Therefore, the question becomes whether the seizure of Chronister which occurred after the consent to search was withdrawn may be upheld under the Fourth Amendment. The U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), authorized a category of seizure which has been vernacularized as a "*Terry* stop." *Terry* permits law enforcement officers to make a limited seizure of an individual suspected of criminal activity if the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. The *Terry* stop has been thoroughly discussed by the Nebraska Supreme Court in *State v. Ellington*, 242 Neb. 554, 558, 495 N.W.2d 915, 919 (1993):

> However, in order to protect an individual's right to personal security free from arbitrary interference by law officers, limited investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. In determining whether the officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the

officer's experience. *Terry v. Ohio, supra.*

In the context of investigative stops under *Terry*, the U.S. Supreme Court in *United States v. Sharp*, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985), teaches that "rigid time limitation[s]" or " 'bright line' " rules are not determinative of their legality, but, rather, "common sense and ordinary human experience" are to be used to distinguish a true investigative stop from a de facto arrest. Accord *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (declining to adopt an outside time limitation for a permissible *Terry* stop). In the present case, the district court did not make an explicit finding that there was articulable suspicion to justify a *Terry* stop after the issuance of the traffic citation. However, as earlier stated, the district court need not make specific factual findings, but the denial of the motion to suppress carries the implicit conclusion that reasonable suspicion existed for the seizure.

The facts giving rise to reasonable suspicion include Chronister's inability to find her driver's license when requested except after a 2-minute search and an immediate display of nervous behavior, including chain-smoking, upon Schenck's mention of drugs or guns; failing to make eye contact with Schenck; and pacing about the scene. We also bear in mind that Schenck, a 22-year veteran of the patrol, is accustomed to observing the behavior of people stopped for traffic offenses on the Interstate. It is the totality of the circumstances which determines whether reasonable suspicion exists, and acts, even if innocent when viewed separately, may warrant further investigation when viewed together. See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). Additionally, the trooper described the physical appearance of Chronister and her companion. She had uncombed hair and no makeup, and Dorning had not shaved for a number of days. There was no visible luggage except for a shaving kit, a woman's makeup bag, and a sleeping bag, adding to Schenck's suspicion that they had made an "out and back" trip as drug couriers.

However, Chronister correctly argues that the district court was wrong when it concluded that her withdrawal of consent could be used by the trooper to "add to his suspicion." The

authority the court cites for that proposition does not support the conclusion. Moreover, it is inconsistent with our system of constitutional guarantees that the exercise of a constitutional freedom be used as support for a finding of reasonable suspicion so as to justify a *Terry* stop. See *U.S. v. Alexander*, 835 F.2d 1406 (11th Cir. 1988) (stating in a footnote that defendant's refusal to consent to a search cannot establish probable cause to search). See, also, *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993) (holding that running away from police officer, absent more, does not establish grounds for an investigative stop).

[7] 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. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). In the case at hand, there was an articulable basis for Schenck to have reasonable suspicion that Chronister was involved in criminal activity without consideration of her withdrawal of consent. Schenck had reasonable suspicion that criminal activity was afoot which justified the taking of additional nonintrusive steps to quickly dispel or verify his suspicions.

Canine Sniff to Dispel Suspicion or Form Probable Cause.

[8,9] The method chosen in this case to dispel the suspicions was to use the drug detection dog and check the trunk. However, before the trunk could be opened, Chronister withdrew her consent. Consent to search may be withdrawn before the completion of the search. See *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979). At that point, Schenck used the dog to sniff the vehicle, and an "aggressive indication" by Nero led to the issuance of a search warrant. The Nebraska Supreme Court has previously held that a canine sniff of a package intercepted by the postal service is not a "search" of the package within the meaning of the Fourth Amendment. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). See, also, *U.S. v. Seals*, 987 F.2d 1102 (5th Cir. 1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 155, 126 L. Ed. 2d 116 (holding that

a canine sniff is not a search within the meaning of the Fourth Amendment). The airspace around a lawfully detained vehicle which carries the odor of illegal drugs is not something to which a citizen may assert a reasonable expectation of privacy. *U.S. v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990).

U.S. v. Hardy, 855 F.2d 753 (11th Cir. 1988), *cert. denied* 489 U.S. 1019, 109 S. Ct. 1137, 103 L. Ed. 2d 198 (1989), has been favorably cited by our Supreme Court in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 113, 126 L. Ed. 2d 113. *Hardy* holds:

> The canine sniff ordered in this case is the kind of brief, minimally intrusive investigation technique that may justify a *Terry* stop. As the Supreme Court noted in *Place*, a canine sniff does not require the opening of luggage and does not reveal intimate but noncontraband items to public view. "[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search." *Place*, 462 U.S. at 707, 103 S.Ct. at 2644; *see also Florida v. Royer*, 460 U.S. at 505-06, 103 S.Ct. at 1328-29 (suggesting that police questioning of suspect may not be justified under circumstances where canine sniff would confirm or dispel suspicions). Nor does a canine sniff involve the time-consuming disassembly of luggage or an automobile frequently required in a thorough search for contraband.

855 F.2d at 759.

[10] During the sniff of Chronister's vehicle, Nero gave an "aggressive indication," which signifies to the handler that the dog has detected the odor of the illegal drugs which the dog has been trained to detect. Chronister introduced the testimony of William Newman, who is an expert on the training and use of drug detection dogs. Newman had watched the tape of the canine sniff and was critical in some respects of Schenck's handling of Nero. However, Chronister does not make any argument in her brief concerning Newman's testimony. In fact, Newman testified that he observed the dog alert to the presence of drugs. The law is clear that an alert by a drug detection dog supplies probable cause to believe that drugs are present. See, *State v. Morrison, supra*; *State v. Staten*, 238 Neb. 13, 469

N.W.2d 112 (1991).

CONCLUSION

We have concluded that there was probable cause for the initial stop of Chronister and that the stop was not pretextual. The initial detention beyond that reasonably necessary to issue the traffic warning was as a result of voluntary consent for Schenck to use the dog and to check the trunk and thus cannot be said to offend the Fourth Amendment. The district court implicitly concluded that when consent was withdrawn, there was still reasonable suspicion that criminal activity was afoot which justified a *Terry* detention for a brief time to verify or dispel the trooper's suspicions that criminal activity was afoot. The canine sniff is a quick and nonintrusive method which enables the officer to verify or dispel his suspicions and which the law does not consider a search. Thus the sniff was not offensive to the Constitution, as Chronister and her vehicle were lawfully detained upon reasonable suspicion. An alert from a drug detection dog constitutes probable cause, and a valid search warrant was obtained. The total time elapsed from the stop of Chronister's vehicle to the alert of the drug detection dog was 12 minutes. Thus, the *Terry* stop and detention were of brief duration, as the law requires. See *United States v. Hardy, supra* (wait by roadside of over 50 minutes for arrival of drug detection dog was not unreasonable under Fourth Amendment).

We have examined all of Chronister's assignments of error and conclude that the district court was not clearly wrong with respect to its decision on the motion to suppress. Finding no illegality in the stop, sniff, or search, we affirm the convictions.

AFFIRMED.

MOTOR CLUB INSURANCE ASSOCIATION, APPELLEE, V. RANDY BARTUNEK, APPELLANT.

526 N.W.2d 238

Filed January 10, 1995. No. A-93-233.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or 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: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
3. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
4. **Insurance: Subrogation.** An insurer is not entitled to subrogation unless the insured has been fully compensated for his or her loss.
5. **Subrogation: Tort-feasors: Waiver.** Failure by a subrogee to intervene in a subrogor's suit against a third-party tort-feasor does not constitute a waiver by the subrogee of rights in any settlement or judgment secured by the subrogor from the tort-feasor.
6. **Insurance: Contracts: Subrogation.** Subrogation clauses are binding on persons other than the insured to whom the insurer has made payments for medical expenses pursuant to the insurance policy, and such persons, by accepting contractual benefits of the policy, become third-party beneficiaries of the policy. As third-party beneficiaries, such persons are bound by a subrogation clause contained in the policy.
7. **Insurance: Subrogation: Attorney Fees.** The general rule is that an insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, F.A. GOSSETT III, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded for further proceedings.

William G. Line, of Kerrigan & Line, for appellant.

J. Michael Coffey and Ronald H. Stave, of Stave & Coffey, P.C., for appellee.

IRWIN and MILLER-LERMAN, Judges, and HOWARD, District Judge, Retired.

IRWIN, Judge.

Motor Club Insurance Association (Motor Club) brought an action against Randy Bartunek in the county court for Dodge County, seeking to recover $5,000 it had paid to Bartunek pursuant to a subrogation agreement. Both parties filed a motion for summary judgment, and the county court granted summary judgment to Bartunek. Motor Club appealed to the district court for Dodge County, which reversed, and remanded for further proceedings to enter summary judgment in favor of Motor Club. Bartunek has timely appealed from the district court's order, and for the reasons set forth below, we affirm in part and in part reverse, and remand for further proceedings.

FACTUAL BACKGROUND

Motor Club issued a personal automobile insurance policy to Donald Imus which provided for the payment of medical expenses up to $5,000 incurred by anyone injured while a passenger in Imus' vehicle. The policy also contained a subrogation clause, which stated that Motor Club would be subrogated to the rights of any person to whom payment was made under the policy. Further, the policy stated that if a person who received payment under the policy recovered damages from another, the payee must hold the proceeds of such recovery in trust for Motor Club and reimburse Motor Club to the extent of its payment under the policy.

On January 12, 1991, Bartunek was a passenger in Imus' vehicle when it collided with a vehicle driven by Michael Gentrup. As a result of the collision, Bartunek sustained injuries and incurred medical expenses in excess of the $5,000 medical payment coverage in Motor Club's policy. Motor Club paid Bartunek $5,000, and Bartunek executed a "Medical Payments Receipt and Trust Agreement," which provided that Motor Club was subrogated to any right of recovery that

Bartunek had as a result of the accident and that Bartunek would hold $5,000 of any such recovery in trust for Motor Club.

Bartunek thereafter filed a negligence action against Gentrup in the district court for Cuming County and recovered a general verdict for $45,000. When Motor Club demanded $5,000 from Bartunek pursuant to its policy and the trust agreement, Bartunek refused to pay. Motor Club then filed this action.

Both parties moved for summary judgment. In Bartunek's memorandum in support of his motion for summary judgment, he claimed that Motor Club was not entitled to subrogation because Bartunek had not recovered his full loss in the action against Gentrup. Bartunek also argued in the alternative for a partial summary judgment in the amount of $4,545 for attorney fees and unreimbursed litigation expenses incurred in the negligence action. The county court granted summary judgment for Bartunek, stating that the jury verdict in Bartunek's action against Gentrup was a general verdict and that a decision regarding whether "any or all of the $5,000.00 in expenses for medical services were included" in the verdict would be pure speculation. On appeal, the district court found that Motor Club was entitled to judgment in the amount of $5,000 as a matter of law, reversed the county court's order, and remanded for further proceedings consistent with its order.

ASSIGNMENTS OF ERROR

Bartunek has assigned six errors on this appeal, which we have consolidated into five assigned errors. Bartunek claims that the district court erred in (1) failing to find that Bartunek did not recover the full amount of his loss in the negligence action, (2) reversing the county court's decision that it could not speculate on a general verdict, (3) failing to find that Motor Club had waived its subrogation interest, (4) failing to find the trust agreement invalid for lack of consideration and as constituting champerty, and (5) failing to set off against Motor Club's judgment a proportionate share of attorney fees and litigation expenses incurred in the negligence action.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *LaBenz Trucking v. Snyder*, 246 Neb. 468, 519 N.W.2d 259 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *Dalton Buick, supra.* See, *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993); *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991).

ANALYSIS

Full Recovery.

[3] Bartunek claims that he did not recover the full extent of his loss and that there was no identifiable portion of the jury's verdict to which Motor Club's subrogation interest could attach. This court has considered nearly identical arguments in *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994), *petition for further review overruled* 245 Neb. xxv, a case that is factually related to the one presently before us. In order to thoroughly address the issues raised in this appeal, we find it necessary to take judicial notice of the court records in *Geo. A. Hormel & Co.*

> When "cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action . . . ."

Association of Commonwealth Claimants v. Moylan, 246 Neb. 88, 91-92, 517 N.W.2d 94, 97 (1994). Accord, *Rhodes v. Yates*, 210 Neb. 14, 312 N.W.2d 680 (1981); *State v. Caton*, 2 Neb. App. 908, 518 N.W.2d 160 (1994).

Geo. A. Hormel & Co. involved a declaratory judgment action between Bartunek and his employer, Hormel. Hormel had paid Bartunek disability and medical benefits pursuant to a union contract and claimed a subrogation interest in Bartunek's $45,000 judgment against Gentrup. Bartunek sought a declaration that Hormel had no subrogation rights in the $45,000 judgment. Bartunek claimed, as he does in this case, that he did not recover his full loss in his action against Gentrup and that there was no identifiable portion of the jury verdict to which Hormel's subrogation interest could attach.

[4] In *Geo. A. Hormel & Co.*, this court cited *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), for the proposition that an insurer is not entitled to subrogation unless the insured has been fully compensated for his or her loss. We went on to apply the doctrine of collateral estoppel "against the backdrop of the sanctity of jury verdicts," 2 Neb. App. at 608, 513 N.W.2d at 553, and found that Bartunek had obtained full recovery from Gentrup for purposes of determining whether Hormel was entitled to subrogation. In reaching this result, we noted that Hormel had introduced into evidence the petition and a jury instruction from the negligence action and that this evidence, along with testimony from that action, clearly showed that the issue of Bartunek's medical expenses was actually litigated in the negligence action.

Having taken judicial notice of the record in *Geo. A. Hormel & Co.*, we conclude that for purposes of the present case, Bartunek is likewise collaterally estopped from asserting that he did not fully recover his medical expenses in the negligence action against Gentrup and that Motor Club's subrogation interest could not attach to the general verdict rendered in that action. We find that Bartunek's first two consolidated assigned errors are without merit.

Waiver.

[5] Bartunek next claims that Motor Club waived any

subrogation interest it might have had. In his brief, Bartunek essentially claims that Motor Club was required to intervene in Bartunek's action against Gentrup or waive its rights in the judgment Bartunek obtained from Gentrup. Neither party has directed us to applicable authority in Nebraska regarding this issue, and our own search has failed to reveal any. However, we are guided by authority from other jurisdictions holding that failure by a subrogee to intervene in a subrogor's suit against a third-party tort-feasor does not constitute a waiver by the subrogee of rights in any settlement or judgment secured by the subrogor from the tort-feasor. *Associated Hosp. Serv. of Phil. v. Pustilnik*, 262 Pa. Super. 600, 396 A.2d 1332 (1979), *vacated on other grounds* 497 Pa. 221, 439 A.2d 1149 (1981); *State Farm Mutual Automobile Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. Civ. App. 1970). We find those cases persuasive and consistent with jurisprudence in this state. Therefore, we find that this assigned error also lacks merit.

Validity of Trust Agreement.

In his fourth summarized assigned error, Bartunek claims that the trust agreement was invalid for lack of consideration and as constituting champerty. More precisely, Bartunek asserts that the trust agreement "required Bartunek to assign his entire claim to Motor Club including pain and suffering and loss of earnings" and that "Motor Club never paid a cent for pain and suffering or loss of earnings and could not be subrogated to claims it did not pay." Brief for appellant at 14.

We believe that Bartunek's argument fails for two reasons. First, the trust agreement did not require Bartunek to assign his entire claim to Motor Club. To the contrary, the agreement merely stated that in consideration for Motor Club's $5,000 payment to Bartunek, Bartunek would hold any money that he recovered from persons liable for his damages in trust for Motor Club and that Bartunek would retain any amount he recovered in excess of $5,000.

Second, Motor Club had a right to subrogation in this case even in the absence of the trust agreement, because the policy Motor Club issued to Imus provided that Motor Club would become subrogated to the rights of persons to whom it made

payment under the policy. The policy Motor Club issued to Bartunek provided:

> B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
>
> 1. Hold in trust for us the proceeds of the recovery; and
>
> 2. Reimburse us to the extent of our payment.

In *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989), the Nebraska Supreme Court held that a subrogation clause nearly identical to the one above was valid and binding on an insured who had recovered damages from a tort-feasor's insurance company. The court also rejected the notion that such a clause constitutes an assignment of a cause of action or champerty, stating:

> "Subrogation involves the substitution of an insurer by operation of law to the rights of the insured because of the insurer's pre-existing duty to pay the insured for the loss. In contrast, an assignment involves a transfer of a legal claim from an injured party to a volunteer who was under no pre-existing duty to compensate the injured party. Moreover, under subrogation an insurer's recovery is limited to the amount paid to the insured, whereas there is no such limitation on an assignee's recovery. Thus, subrogation simply does not create the same risk of maintenance or champerty as does assignment. . . ."

Id. at 420-21, 441 N.W.2d at 145 (quoting *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 245 N.W.2d 844 (1976)).

[6] Further, in *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993), the Nebraska Supreme Court held that such subrogation clauses are binding on persons other than the insured to whom the insurer has made payments for medical expenses pursuant to the insurance policy. The court reasoned that such persons, by accepting contractual benefits of the policy, become third-party beneficiaries of the policy. As third-party beneficiaries, such persons are bound by a subrogation clause contained in the policy.

In the present case, both the trust agreement and the subrogation clause in Imus' policy were valid and enforceable against Bartunek by Motor Club. Accordingly, Bartunek's

assigned error claiming that the trust agreement was invalid as an assignment and as constituting champerty is without merit.

Attorney Fees and Litigation Expenses.

[7] In his final assigned error, Bartunek claims that he was entitled to set off against Motor Club's judgment a proportional amount of Bartunek's attorney fees and litigation expenses incurred in the negligence action against Gentrup. Bartunek had alleged in his motion for summary judgment that he was entitled to a partial summary judgment for attorney fees and litigation expenses. "The general rule is that an insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees." *St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 157-58, 296 N.W.2d 479, 483 (1980). Accord, *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969); *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). Following this well-established rule, we find that Bartunek was entitled to set off against Motor Club's subrogated amount a proportionate share of litigation expenses and attorney fees which he incurred in his action against Gentrup.

The record establishes that Bartunek's attorney fees in the negligence action were "one-third of the amount recovered after reimbursement of the costs of litigation," or one-third of $45,000, which is $15,000. The ratio of Motor Club's subrogation amount to the entire judgment is 1 to 9, and thus, a proportionate share of the attorney fees that must be paid by Motor Club is one-ninth of $15,000, or $1,666.67.

Bartunek is also entitled to recover one-ninth of the litigation expenses that he incurred in the negligence action. However, the record is unclear on the amount of litigation expenses incurred by Bartunek in the negligence action. County court exhibit 6 is Bartunek's affidavit in support of his motion for summary judgment, in which he claims that he is entitled to $2,878.79 for "unreimbursed" litigation expenses from the negligence action

against Gentrup. However, attached to his affidavit is a "Motion to Tax Costs" filed in the negligence action, which lists various costs and expenses that Bartunek incurred in the negligence action and lists the total costs and expenses as $6,138. County court exhibit 4 is a "Journal Entry" from the negligence action, in which the district court for Cuming County ordered Gentrup to pay $921.67 in court costs. We are unable to reconcile the various figures that Bartunek used in calculating his litigation expenses. We must therefore remand the cause for a determination of the amount of litigation expenses that Bartunek incurred in the negligence action.

CONCLUSION

We conclude that Motor Club was entitled to subrogation for the $5,000 it had paid Bartunek, but that Bartunek is entitled to set off against that amount a proportionate amount of attorney fees and litigation costs that he incurred in the negligence action. Accordingly, we affirm in part and in part reverse the order of the district court, and we remand the cause to the district court with directions to remand to the county court for a determination of the amount of litigation expenses that Bartunek is entitled to set off against Motor Club's subrogation interest.

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

LARRY L. LEGRAND, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

527 N.W.2d 203

Filed January 10, 1995. Nos. A-93-1086, A-93-1087.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Courts: Prior Convictions.** The Nebraska Supreme Court has clearly stated that it will follow U.S. Supreme Court precedent recognizing the right to challenge the use of prior convictions for enhancement purposes.

3. **Prior Convictions: Pleas: Records: Right to Counsel: Waiver: Proof.** It is impermissible to attack the validity of a prior conviction in an enhancement proceeding on any grounds, with one exception: Challenges to prior plea-based convictions offered for enhancement purposes are allowed when based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered and when the defendant was sentenced to imprisonment for any period of time as a result of the pleas.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, F.A. GOSSETT III, Judge. Judgment of District Court affirmed.

Robert Wm. Chapin, Jr., for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

CONNOLLY, IRWIN, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

Larry L. LeGrand appeals the judgment of the district court for Dodge County, which affirmed the decision of the Dodge County Court, which denied LeGrand's petitions in a "separate proceeding" to have two prior Dodge County convictions for driving while intoxicated (DWI) declared invalid. The convictions were to be used for the purpose of enhancing LeGrand's most recent DWI arrest, which took place in Lancaster County, to a third offense. We affirm the decision of the district court because under the holdings in *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), the "separate proceeding" is not constitutionally mandated.

I. BACKGROUND

On July 4, 1987, LeGrand was arrested in Dodge County and charged with a first-offense DWI. On August 11 the same year, LeGrand appeared with counsel for arraignment in Dodge County Court. A checklist form indicates that at that time, LeGrand was advised of the penalties for the offense and was informed of his privilege against self-incrimination; right to confront witnesses; right to a jury trial; right to counsel; and

right to due process, including proper notice and a fair and impartial hearing. LeGrand was also informed that upon a guilty plea he would effectively waive or forfeit the presumption of his innocence and all defenses available to him, thus relieving the State of the burden of proving his guilt beyond a reasonable doubt. LeGrand pled not guilty and requested a jury trial.

On September 18, 1987, LeGrand again appeared in Dodge County Court with his attorney and changed his plea on the DWI charge to guilty. The record indicates that the judge went through the same checklist used in the previous arraignment. This time, however, an additional paragraph containing the following language was checked:

> Defendant advised the Court that he/she understood the nature of the charge(s), the possible penalties that might be imposed, and all rights available to him by law, and that this plea to the charge(s) was entered fully voluntar[il]y, knowingly, and intel[l]igently, with full understanding of the consequences. Upon inquiry by the Court, it was determined that there was a factual basis for the plea, that the necessary elements for the crime were met, and that the defendant had specifically committed the crime in question. The Court accepts the Defendant's plea and finds the Defendant guilty of the charge(s).

On October 13, 1987, LeGrand was sentenced for the DWI offense. Nothing in the record indicates that LeGrand appealed this conviction.

LeGrand was arrested and charged with his second DWI offense on October 12, 1990, in Dodge County. LeGrand appeared and was represented by counsel at his arraignment hearing on November 6. The county judge went through a checklist virtually identical to that used in the arraignment for the first DWI charge. LeGrand pled not guilty and requested a jury trial.

On February 19, 1991, LeGrand made another appearance in Dodge County Court, where, after being rearraigned, he pled guilty to the second DWI charge. Again, the county judge went through the checklist and checked the additional paragraph set out above. LeGrand was sentenced on March 26. Nothing in the

record indicates that LeGrand appealed this conviction.

LeGrand's petitions allege that he was recently arrested on a third DWI charge in Lancaster County. The record is not entirely clear, but apparently the prosecutor in the Lancaster County case wishes to use the two previous Dodge County convictions to enhance the offense in Lancaster County to a third-offense DWI under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). In order to combat the Lancaster County prosecutor's attempt to enhance the charge, LeGrand filed two "Petition[s] in Separate Proceeding to Invalidate Convictions for Purposes of Enhancement" in Dodge County Court, alleging that the guilty pleas in the two prior Dodge County convictions were not based on a full advisement of LeGrand's constitutional rights as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

LeGrand's petitions were denied by the county court. LeGrand appealed the county court decision to the district court for Dodge County, which affirmed the county court decision. These appeals followed. While these appeals were pending, the State filed a petition to bypass the Nebraska Court of Appeals. The Nebraska Supreme Court denied that petition.

II. ASSIGNMENT OF ERROR

LeGrand argues that it was error for the district court to affirm the county court's decision overruling LeGrand's petitions in a "separate proceeding" to invalidate the two prior DWI convictions for the purposes of enhancement.

III. STANDARD OF REVIEW

[1] LeGrand's assignment of error presents a question of law. Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

IV. ANALYSIS

The concept of attacking prior convictions in enhancement proceedings has a complex history in Nebraska. These cases

require us to bring this convoluted saga to a swift and practical end. In light of the recent U.S. Supreme Court holdings in *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), previous Nebraska Supreme Court decisions, holding that "separate proceedings" had to be available for defendants to challenge their prior convictions on *Boykin* grounds when those convictions were being used to enhance more recent crimes, are no longer compelling. Therefore, we hold that LeGrand's petitions to have his prior convictions declared invalid for the purposes of his impending enhancement proceedings should be dismissed.

1. HISTORY OF ATTACKS ON PRIOR CONVICTIONS IN NEBRASKA

(a) Groundwork: *Burgett v. Texas* and *Boykin v. Alabama*

For a long time it was questionable whether criminal defendants were allowed to make any kind of attack on their prior convictions outside of direct appeals. In *State v. Ninneman*, 179 Neb. 729, 140 N.W.2d 5 (1966), *cert. denied* 385 U.S. 838, 87 S. Ct. 85, 17 L. Ed. 2d 72, Justice Carter made the following observation:

> Defendant contends . . . that he was denied the right to obtain counsel in his first conviction in 1961, and that it was therefore void and not useable to prove that he was subject to the increased penalty for a second violation. The finality of the previous conviction is established. Defendant did not appeal nor seek redress by habeas corpus. In fact, he entered a plea of guilty and satisfied the penalty for the 1961 offense. I submit that under the existing law of this state he may not collaterally attack irregularities in his first conviction to avoid the increased penalties for the second.

Id. at 735, 140 N.W.2d at 8-9 (Carter, J., concurring in the result).

Justice Carter's analysis was brought into question when the U.S. Supreme Court rendered its decision in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). In *Burgett*, the Court held that challenges to the validity of prior convictions in enhancement proceedings were permissible when

the prior conviction was allegedly invalid because the defendant was denied his Sixth Amendment right to counsel. A line of U.S. Supreme Court cases, beginning with *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), had established a rule making it "unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett v. Texas*, 389 U.S. at 114. The *Burgett* decision opened the door for attacks on prior convictions obtained in violation of *Gideon* when those convictions were being used to enhance the punishment for a more current conviction.

Two years later, the U.S. Supreme Court decided *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Boykin had been arrested and charged with five counts of common-law robbery. The trial court appointed counsel to represent him, and 3 days later, at his arraignment, Boykin pled guilty to all five charges. The record did not reflect that the judge had asked any questions of Boykin regarding his plea, and Boykin never addressed the court. Boykin was sentenced to death on all five counts.

On direct appeal, the Alabama Supreme Court affirmed Boykin's convictions and sentences. The U.S. Supreme Court granted certiorari and reversed Boykin's convictions, holding that it was plain error for the trial judge "to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242. The Court further stated:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

(Citations omitted.) 395 U.S. at 243-44.

Burgett and *Boykin* form the basis of LeGrand's attack on his prior convictions in the cases at bar. *Burgett* mandated that

where the defendant was neither represented by nor waived counsel in a prior prosecution, the defendant could successfully attack the use of that prior conviction to enhance the punishment in a subsequent conviction. *Boykin* made clear that in order for a guilty plea to satisfy minimal constitutional requirements, the record had to show that the plea was intelligent and voluntary. Thus, it appeared that a defendant could challenge the use of prior convictions in enhancement proceedings when the prior convictions were obtained in violation of *Boykin*.

(b) Evolution of *Boykin* Rule in Nebraska

Before turning to the issue of attacks on prior convictions in enhancement proceedings, we must first examine the status of the *Boykin* rule in Nebraska courts. In *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), the defendant challenged the validity of his guilty plea on *Boykin* grounds. Turner alleged on direct appeal that the record from the trial court failed to affirmatively show that he had entered his guilty plea voluntarily, understandingly, and intelligently and with full knowledge of the rights he was waiving by his plea. The Nebraska Supreme Court refused to read *Boykin* as requiring the trial court to affirmatively show that it had advised Turner of certain constitutional rights. Instead, the court held that *Boykin* "requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." 186 Neb. at 425, 183 N.W.2d at 765.

The Nebraska Supreme Court set out a more detailed and somewhat expanded version of its reading of the *Boykin* rule in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). After reviewing decisions from several other jurisdictions, the court stated:

> [N]o defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of his rights as provided for by the *Boykin-Turner* rule. That means that such defendants are entitled to be informed of the nature

> of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. A voluntary and intelligent waiver of these rights must affirmatively appear from the record.

209 Neb. at 654-55, 309 N.W.2d at 98.

However, questions remained even after *Tweedy*. In particular, it was still unclear what constituted an affirmative showing of a voluntary and intelligent waiver. The court addressed those concerns in the definitive decision *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). There, the court held:

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

Id. at 820, 394 N.W.2d at 883.

Part 1a of the rule stated in *Irish* simply restated the *Tweedy* rule. Parts 1b and 2a and b added language which explained what constituted the requisite affirmative showing of compliance with *Boykin*. The rule as stated in *Irish* represents the definitive interpretation of the *Boykin* rule as adopted by the Nebraska Supreme Court. In the cases at bar, LeGrand alleges that the requirements of *Irish* were not met in his prior convictions.

(c) *Boykin* Challenges to Prior Convictions

Before turning to our analysis in the cases at bar, it would be helpful to examine the historical development of *Boykin* challenges in *Burgett*-styled attacks on prior convictions.

(i) Statutory Authority

The statutory provision governing enhancement proceedings in DWI cases is Neb. Rev. Stat. § 60-6,196 (Reissue 1993) (formerly § 39-669.07). Of particular relevance is § 60-6,196(3), which reads:

> For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions under this section and under a city or village ordinance enacted pursuant to this section in the eight years prior to the date of the current conviction. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, *and make objections on the record regarding the validity of such prior convictions.*

(Emphasis supplied.)

This statutory provision is the basis for attacks on the validity of prior DWI convictions in enhancement proceedings in Nebraska, including the attack by "separate proceeding" implemented in the cases at bar.

(ii) Chronological Development of Attacks on Prior Convictions in Enhancement Proceedings

(a) No Attacks Allowed

In *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), the Nebraska Supreme Court was faced with a *Burgett* attack on a prior conviction in an enhancement proceeding on *Boykin* grounds under § 39-669.07 (Reissue 1978). Voight had been convicted of DWI. He was sentenced as a third-time offender after two prior convictions were received into evidence. On appeal, Voight argued that the prior convictions were improperly used to enhance his sentence because they were obtained in violation of *Boykin* and *State v. Turner*, 186 Neb.

424, 183 N.W.2d 763 (1971). The Nebraska Supreme Court refused to reach the merits of Voight's claim, holding that in an enhancement proceeding under § 39-669.07, the defendant could not collaterally attack his prior misdemeanor convictions. See, also, *State v. Kelly*, 212 Neb. 45, 321 N.W.2d 80 (1982) (expressly restating the *Voight* rule).

The *Voight* rule was tenuous because the U.S. Supreme Court had handed down its per curiam decision in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). In November 1975, Baldasar was arrested and charged with theft. The prosecutor sought to introduce a prior misdemeanor conviction in order to have Baldasar tried as a felon under the Illinois enhancement statute. Baldasar argued that the prior misdemeanor conviction should not have been admissible in the enhancement proceeding because he was not represented by counsel in the prior adjudication. The U.S. Supreme Court, without a clear majority, held that Baldasar's earlier conviction should not have been received into evidence in the enhancement proceeding, stating that Baldasar "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." (Emphasis in original.) 446 U.S. at 224 (Stewart, J., concurring).

(b) General Objection Allowed When Sixth Amendment Right to Counsel Is at Issue

Based on the *Baldasar* decision, the Nebraska Supreme Court overruled *Voight* in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). In *Smith*, the court reasserted the rule that a defendant could not relitigate, and therefore could not collaterally attack, prior convictions in an enhancement proceeding. However, the court stated that when a defendant was not shown to have waived or been represented by counsel at the prior prosecutions, the State could not meet its burden of proving the prior convictions. Thus, an objection to a prior conviction in enhancement proceedings did not constitute a collateral attack—instead, such an objection was treated as an evidentiary challenge which was valid to defeat the State's attempt to prove the prior conviction. Thus, the court in *Smith*

held that when a defendant objected to the introduction of a prior conviction which failed to show on its face that counsel was afforded or waived, the objection should be sustained.

Following the *Smith* decision, attempts to exclude prior convictions from use in enhancement proceedings on grounds other than not being afforded the Sixth Amendment right to counsel were unsuccessful. The Nebraska Supreme Court refused to consider such attacks and appeared to be strictly interpreting the *Smith* holding as being limited to instances where the record on its face failed to show that the defendant had been represented by or waived counsel. See, *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), *denial of habeas corpus rev'd on other grounds* 958 F.2d 831 (8th Cir. 1992); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985).

(c) Genesis of "Separate Proceeding"

A closer reading of *Davis* and *Fraser* unveils a slow erosion of the *Smith* rule. Each of those cases cites *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984), for the highlighted portion of the following proposition:

> The defendant argues that the *Smith* case stands for the proposition that a constitutionally invalid prior conviction cannot be used to enhance the penalty for a subsequent offense. The *Smith* case held that a transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes. Other objections to the validity of the judgment must be raised by direct appeal *or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.*

(Emphasis supplied.) 218 Neb. at 416, 355 N.W.2d at 515-16.

The highlighted portion of the excerpt from *Baxter* referring to a "separate proceeding" had not appeared in previous decisions. The *Baxter* court cited no authority for the statement. The "separate proceeding" contemplated in *Baxter*, which the court endorsed in *Davis*, *Hamblin*, and *Fraser*, appears to be a direct affront to the narrow rule announced in

Smith. Yet none of the cases cited called *Smith* into question. Thus, the dicta in the *Baxter* decision appears to have been the legal origin for the "separate proceeding" we are faced with in the cases at bar.

(d) "Separate Proceeding" Entrenched

The Supreme Court articulated the *Baxter* language as the definitive rule in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). *Oliver* was another DWI enhancement case where the defendant was attempting to have his prior convictions excluded on *Boykin* grounds. The *Oliver* court's initial concern was dealing with certain language used in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), which indicated that it was proper for a defendant to raise a *Boykin* challenge to prior convictions in an enhancement proceeding by introducing verbatim transcripts of the prior prosecutions. In *Oliver*, the court expressly disapproved of the holding in *Gonzales* that a defendant could raise the constitutional invalidity of a prior conviction in an enhancement proceeding. Then, the *Oliver* court announced this rule: "[The constitutional invalidity of a prior conviction] may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." 230 Neb. at 870, 434 N.W.2d at 298. Thus, the *Oliver* court definitively announced as law the "separate proceeding" phrase that apparently originated in *Baxter*.

The *Oliver* decision was called into question in a subsequent habeas corpus proceeding, *Oliver v. Spire*, No. CV89-L-149, 1989 WL 230917 (D. Neb. Sept. 10, 1990), where the federal district court found the rule announced by the Nebraska Supreme Court in *Oliver* ambiguous. The Nebraska Supreme Court attempted to further define the *Oliver* rule in *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992). In *Crane*, the court stated that the federal court had misread the *Oliver* holding. The federal court had concluded that the *Oliver* rule was not clearly a procedural bar to relief. Instead, the federal court suggested that *Oliver* stood for the proposition that proof of the presence or waiver of counsel in a prior prosecution was enough to establish its constitutionality for use in an enhancement

proceeding. The court in *Crane* offered the following reply:

> We have repeatedly held that, as a procedural matter, a defendant cannot collaterally attack a prior conviction in an enhancement proceeding and that challenging a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack. . . . We do, however, allow challenges to prior plea-based convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered. . . . We do so because we do not regard such a challenge as a collateral attack on the former judgment. . . . One could also challenge the constitutional validity of a prior conviction through a separate proceeding, such as an action for declaratory judgment.

(Citations omitted.) 240 Neb. at 35, 480 N.W.2d at 403.

The *Crane* court further stated that the rule announced in *Oliver* was a *procedural* rule which barred collateral attacks in enhancement proceedings. The court still did not define "separate proceeding," other than suggesting that it could be an action for declaratory judgment.

(e) First Use of "Separate Proceeding"

The first successful utilization of a "separate proceeding" to challenge the use of prior convictions in an enhancement proceeding on *Boykin* grounds occurred in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). In 1990, Wiltshire was convicted of DWI in Lancaster County. The State sought to enhance the conviction to a third offense by offering two prior DWI convictions. Wiltshire challenged the validity of his 1982 Lancaster County conviction by objection and by filing a " 'Petition for Relief in a Separate Proceeding.' " *Id.* at 824, 491 N.W.2d at 328. The trial court denied both requests for relief.

The Nebraska Supreme Court approved the trial court's decision overruling Wiltshire's objection on *Boykin* grounds, but reversed the trial court's decision overruling Wiltshire's " 'Petition for Relief in a Separate Proceeding.' " The court in *Wiltshire* held that the *Oliver* rule contemplated two tiers of

challenges to prior convictions in enhancement proceedings. The first tier comprised only challenges alleging that the defendant was neither represented by nor waived counsel at the prior prosecutions. A first-tier challenge could be made by a general objection, because, as stated in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), such an objection was technically an argument that the State had failed to meet its burden of proving the prior conviction. Such an objection did not constitute a collateral attack.

The second tier of *Oliver* comprised challenges based on *Boykin* grounds. A second-tier challenge could not be made by general objection, because such an objection constituted a collateral attack on the prior conviction. To make a second-tier challenge, one had to raise the issue on " 'direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.' " *State v. Wiltshire*, 241 Neb. at 827, 491 N.W.2d at 330. Thus, Wiltshire's general objection on *Boykin* grounds was properly overruled. However, Wiltshire's petition for a "separate proceeding" was a proper vehicle for challenging a prior conviction on *Boykin* grounds and should have been considered by the trial court. On the merits, the court found that the 1982 conviction did not pass muster under *Boykin* and ordered the trial court not to consider the prior conviction in the enhancement proceeding.

(iii) Current Rule Under Wiltshire

The *Wiltshire* decision was the latest major installment in the development of constitutional attacks on prior convictions in enhancement proceedings. Under *Wiltshire*, the well-established rule that collateral attacks on prior convictions are forbidden in enhancement proceedings remains technically intact. However, *Wiltshire* provides two avenues around the anti-collateral-attack rule. First, as mandated by *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), a general objection on the grounds that the defendant was neither represented by nor waived counsel is valid. Second, a "separate proceeding," first recognized in

State v. Baxter, 218 Neb. 414, 355 N.W.2d 514 (1984), and then definitively adopted in *Oliver*, is a viable means of attacking prior convictions on *Boykin* grounds. The legal roots of the "separate proceeding" are unclear. The language appeared in *Baxter* with no citation to prior authority and was not necessary to decide the issues presented in *Baxter*. Regardless, the Nebraska Supreme Court continued to cite the *Baxter* language and eventually adopted it as the rule.

The cases at bar invite us to further define *Oliver* and *Wiltshire*. LeGrand was arrested and charged with DWI in Lancaster County. The prosecutor in that case now wants to enhance the charge to a third-offense DWI by introducing LeGrand's two prior DWI convictions from Dodge County. LeGrand challenged both prior convictions on *Boykin* grounds by filing petitions in a "separate proceeding" as instructed by *Wiltshire*. Thus, LeGrand has correctly challenged his prior convictions as far as *Wiltshire* takes him. However, these cases differ from *Wiltshire* and its predecessors in that LeGrand's adjudications involve two counties. LeGrand's prior convictions occurred in Dodge County. The current charge and enhancement proceeding are being tried in Lancaster County. LeGrand filed his petitions in a "separate proceeding" in Dodge County. Thus, the question LeGrand puts before us is, Which court is the proper venue for the "separate proceeding": the court where the allegedly invalid convictions were handed down, or the court where the enhancement proceeding is taking place? Our decision makes it unnecessary to reach that issue.

2. Recent Case Law Regarding Attacks on Prior Convictions on *Boykin* Grounds

Recent federal case law has raised serious questions regarding whether states must provide a procedure through which *Boykin* rights are protected in enhancement proceedings, see *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and whether states must allow defendants to challenge prior misdemeanor convictions where the defendant spent no time in prison as a result of the prior conviction, see *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Our reading of these cases indicates that the

Nebraska "separate proceeding" is not constitutionally required. Therefore, we hold that a "separate proceeding" commenced expressly for the purpose of invalidating a prior conviction for use in an enhancement proceeding is no longer a valid means of raising a constitutional *Boykin* challenge to the prior conviction.

(a) *Custis v. U.S.*

The primary case leading to the conclusion that the Nebraska "separate proceeding" is not constitutionally mandated is *Custis v. U.S., supra*. Custis was arrested in Maryland, where he was charged with three federal drug and firearm offenses. In federal district court, Custis was convicted by a jury on one of the charges, acquitted of two of the charges, and convicted of a lesser-included offense of one of the charges of which he was acquitted. The federal prosecutor then sought to enhance Custis' sentence under 18 U.S.C. § 924(e)(1) (1988) by using three prior state felony convictions: one from Pennsylvania and two from Maryland. Custis challenged the use of the Maryland convictions in the enhancement proceedings on *Boykin* grounds.

The U.S. Supreme Court affirmed the rulings of the district court and the U.S. Court of Appeals for the Fourth Circuit which denied Custis his requested relief, holding that the statute on which Custis based his challenge did not authorize collateral attacks on prior convictions. Custis argued that even if the statute did not authorize collateral attacks, the constitution required that a defendant have some procedural route through which prior convictions could be challenged in enhancement proceedings. The Supreme Court disagreed and held that such procedures were only required when an indigent defendant was denied his Sixth Amendment right to counsel.

The U.S. Supreme Court clearly stated that a violation of a defendant's *Boykin* rights did not reach the unique level of defect caused by a failure to provide counsel. Since the two types of constitutional rights were distinct, the Court refused to extend *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), beyond the scope of the Sixth Amendment right to counsel. In reaching its decision, the Court made the

following policy statement, which we find highly persuasive:

> Ease of administration also supports the distinction. As revealed in a number of the cases cited in this opinion, failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of . . . failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court transcripts or records that may date from another era, and may come from any one of the 50 States.
>
> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. . . . [P]rinciples of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]." . . . These principles bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality served by the limitation on collateral attack has special force."

(Citations omitted.) *Custis v. United States*, 114 S. Ct. at 1738-39.

(b) *Nichols v. U.S.*

Another U.S. Supreme Court case supporting our decision that the Nebraska "separate proceeding" is no longer constitutionally mandated is *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Nichols pled guilty to federal felony drug charges. At sentencing, the prosecutor

sought to enhance Nichols' punishment under the federal sentencing guidelines by introducing a prior misdemeanor conviction for driving under the influence. Nichols objected to the use of the prior misdemeanor conviction on the grounds that he had not been afforded his Sixth Amendment right to counsel, in violation of *Burgett* and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980).

The Court in *Nichols* expressly overruled *Baldasar* and held that a sentencing court may use a defendant's previous uncounseled misdemeanor conviction to enhance the sentence for a subsequent offense so long as the previous uncounseled misdemeanor conviction did not itself result in a sentence of imprisonment. Therein, the Court effectively limited the holding in *Burgett*. The modern reading of *Burgett*, as modified by *Nichols*, limits the opportunity to challenge prior convictions on Sixth Amendment right-to-counsel grounds to those cases where the prior offense resulted in a felony or misdemeanor conviction for which the defendant was imprisoned.

Nichols is important to our analysis in the cases at bar because, prior to recognizing the *Baldasar* decision, Nebraska courts did not allow attacks on prior convictions in enhancement proceedings. See *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980). The holding in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), which required that a defendant have the opportunity to attack a prior conviction on Sixth Amendment right-to-counsel grounds, was based on the Nebraska Supreme Court's reading of *Baldasar*. It appears that the Nebraska Supreme Court concluded that the *Smith* holding was necessary in order for Nebraska sentencing enhancement procedure to comply with federal constitutional law as stated in *Baldasar*. *Nichols* instructs that *Baldasar* need not be read that broadly.

3. EFFECT OF *CUSTIS* AND *NICHOLS* ON NEBRASKA "SEPARATE PROCEEDING"

The *Custis* and *Nichols* decisions are clear indications that the Nebraska "separate proceeding" is no longer constitutionally mandated. Furthermore, the reasoning of the

majority in *Custis* is most compelling. Collateral attacks on prior convictions in enhancement proceedings, like the Nebraska "separate proceeding," force the courts to address issues that should have been determined with finality long ago. In addition, the vague nature of the "separate proceeding" leaves many troubling procedural questions unanswered. The cases at bar are an example. Must the Lancaster County Court sit patiently and wait while LeGrand challenges convictions that are 4 and 7 years old before it can sentence him? In which court must the "separate proceeding" be brought? If the Lancaster County Court does sentence LeGrand now, what is the effect if the Dodge County Court decides that LeGrand's prior convictions were unconstitutionally obtained? Can a "separate proceeding" ever be brought on grounds other than *Boykin* violations? The "separate proceeding" concept requires answers to all of these questions.

[2] The Nebraska Supreme Court has clearly stated that it will follow U.S. Supreme Court precedent recognizing the right to challenge the use of prior convictions for enhancement purposes. *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). In *Wiltshire*, the court allowed "separate proceeding" attacks in enhancement proceedings based on a broad reading of the U.S. Supreme Court decisions in *Burgett*, *Baldasar*, and *Boykin*. Likewise, the *Smith* decision was based on a broad reading of *Baldasar*. In *Custis* and *Nichols*, the U.S. Supreme Court cast a bright light on this area of the law and clearly indicated that the states are free to allow *Boykin* challenges in enhancement proceedings, but we need not provide the "separate proceeding" in order to comport with federal constitutional law. Accordingly, we are required to take this opportunity to clarify the Nebraska procedure for enhancing sentences.

[3] Consistent with the foregoing analysis, we hold that it is impermissible to attack the validity of a prior conviction in an enhancement proceeding on any grounds, with one exception: We do allow challenges to prior plea-based convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered, when the defendant was sentenced

to imprisonment for any period of time as a result of the pleas. We also note that, under *Custis* and *Nichols*, our holding expands beyond the scope of DWI enhancement proceedings and covers enhancement proceedings under other recidivist statutes.

V. CONCLUSION

We affirm the district court's decision to affirm the decision of the county court, which overruled LeGrand's "Petition[s] in Separate Proceeding to Invalidate Convictions for the Purposes of Enhancement." Under *Custis* and *Nichols*, the "separate proceeding" is not constitutionally mandated and therefore is no longer a viable method of challenging prior convictions in enhancement proceedings.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KELLY M. CASH, APPELLANT.

526 N.W.2d 447

Filed January 10, 1995. No. A-94-203.

1. **Motions to Suppress: Appeal and Error.** Findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witness testifying regarding the motion.
3. **Blood, Breath, and Urine Tests: Police Officers and Sheriffs: Time.** When an officer is required to observe a person before administering a test, the officer need not stare fixedly at the person being tested for the specified period of time in order to satisfy the observation requirement, but must remain in the person's presence and be aware of the person's conduct.
4. **Drunk Driving: Blood, Breath, and Urine Tests.** A valid preliminary test is not a prerequisite to chemical testing under Neb. Rev. Stat. § 39-669.08(2) (Cum. Supp. 1992).
5. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs: Probable Cause: Arrests.** If an officer has probable cause to arrest a suspect for violating a statute or ordinance while the suspect is under the influence of alcoholic liquor or drugs and has reasonable grounds to believe that the suspect was driving while under the influence of alcohol or drugs, that officer may arrest

the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered or was improperly administered.

6. **Blood, Breath, and Urine Tests: Words and Phrases.** A chemical test can be a test of a substance to determine its chemical composition, as well as a test using chemicals.
7. **Trial: Witnesses.** It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his or her opinion about an issue in question.
8. **Trial: Expert Witnesses.** In dealing with questions calling for expert opinion, particularly hypothetical questions, much must be left to the discretion of the trial judge.
9. **Trial: Appeal and Error.** In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.

Appeal from the District Court for Nemaha County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Nemaha County, CURTIS L. MASCHMAN, Judge. Judgment of District Court affirmed.

Louie M. Ligouri for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

Kelly M. Cash appeals her conviction for driving while intoxicated in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). Cash claims that the result of a test of her blood alcohol level should have been suppressed both because it was given after an improperly administered breath test and because the test was not a "chemical test" as required by statute. She further argues that the court improperly limited her counsel's cross-examination of the arresting officer. For the reasons recited below, we affirm.

STATEMENT OF FACTS

Brian Beckman, a deputy sheriff for Nemaha County, testified that on March 25, 1993, at approximately 11:05 p.m., he was traveling north out of Auburn, Nebraska, on U.S. Highway 75 when he noticed a car being driven by Cash cross over the centerline. Beckman followed Cash's vehicle to the

Peru junction of Highways 67 and 75, where he dropped off a male transient who had been in the patrol car with Beckman. While dropping off the transient, Beckman observed Cash's car turn east onto Highway 67. Beckman then proceeded east onto Highway 67 and caught up with Cash's car. While following Cash's car, Beckman again observed the vehicle cross over the centerline and then swerve back and cross over the shoulder line on the highway. Beckman then activated his patrol car's overhead red emergency lights and attempted to stop Cash's vehicle. After the lights came on, Cash reduced her vehicle's speed to 45 miles per hour and continued driving for approximately another quarter of a mile and then pulled off onto the shoulder of the highway. After both vehicles were stopped, Beckman approached the driver's side of the vehicle and requested Cash's operator's license and vehicle registration. While checking Cash's license, he noticed the odor of alcohol emanating from within the vehicle. A second female occupant was sitting in the front passenger seat of the vehicle. After smelling the odor of alcohol, Beckman requested Cash to step from the vehicle and go back to his patrol car. When Cash was walking back to the patrol car, Beckman noticed her steadying herself by using the side of her vehicle. In the space between Cash's vehicle and the patrol car, about 5 feet, Cash staggered. Beckman again noticed that, after reaching the patrol car, Cash was using the side of the car to maintain her balance. Beckman testified that while Cash was in the patrol car, he detected an odor of alcohol coming from Cash. Beckman then requested Cash to perform a preliminary breath test. Beckman did not have Cash perform any physical field sobriety tests because she was crying and hysterical and because he did not feel that these tests would have been fair to her at that point in time. At 11:13 p.m., Cash signed a preliminary breath test advisement prearrest form. Beckman then asked permission to search Cash's vehicle, and he had her sign a form for that purpose at 11:17 p.m. After Cash signed the search form, Beckman left Cash in his patrol car and proceeded to search the vehicle Cash had been driving. After finding no alcohol or other contraband in the vehicle, Beckman proceeded back to his patrol car and had Cash submit to a preliminary breath test at around

11:29 p.m., 16 minutes after Cash signed the preliminary breath test form. After Cash failed the breath test, Beckman placed her under arrest for driving while intoxicated. Beckman then transported Cash to Nemaha County Hospital in Auburn, Nebraska, so that a blood test could be performed on Cash as prescribed under Neb. Rev. Stat. § 39-669.08(4) (Cum. Supp. 1992). Blood was drawn from Cash at 12:30 a.m. on March 26, 1993, and the test results showed Cash to have a body fluid alcohol content of .141. Finally, Beckman testified that in his opinion, Cash "was under the influence enough to impair her ability to operate a motor vehicle."

ASSIGNMENTS OF ERROR

Cash alleges that the trial court erred in the following ways: (1) in overruling her motion to suppress and in admitting evidence of the results of any purported chemical test of Cash's blood; (2) in admitting into evidence the results of a purported chemical test or tests of Cash's blood without proof of compliance with all statutory requirements; (3) in permitting the arresting officer to express his opinion, without a sound and proper basis, as to whether Cash was intoxicated; and (4) in violating Cash's constitutional rights by unduly limiting the cross-examination of Beckman.

STANDARD OF REVIEW

[1,2] Findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witness testifying regarding the motion. *Thompson, supra*; *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992).

The trial court is given wide discretion in determining whether or not a lay witness' qualification to state an opinion has been established, and such discretion will not be disturbed on appeal unless there is an abuse of that discretion. *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985);

Northern Nat. Gas Co. v. Beech Aircraft Corp., 202 Neb. 300, 275 N.W.2d 77 (1979).

ADMISSIBILITY OF BLOOD TEST

Cash argues that the chemical blood test results should have been suppressed for the following two reasons: (1) The statutory requirements were not properly followed in that the breath test given before the blood test was not properly administered, and (2) the blood test that was performed was not a chemical test and thus not a test allowed under Neb. Rev. Stat. § 39-669.11 (Cum. Supp. 1992).

Validity of Breath Test.

Cash argues that the preliminary breath test was not performed in accordance with the methods prescribed by the state Department of Health and that therefore the blood test that was administered after the breath test was not admissible in evidence. We will first consider whether the breath test was properly administered.

A checklist used by Beckman contained the method for administering a preliminary breath test as prescribed by 177 Neb. Admin. Code, ch. 1 (1993), adopted by the Department of Health. One of the steps on this checklist reads as follows: "Observe subject for 15 minutes prior to testing." Cash alleges that Beckman failed to observe her for the required 15-minute period before administering the test. Cash states that during the 15-minute observation period, Beckman was searching her car and not "directly" observing her. Thus, Cash argues that since the preliminary test was not performed in accordance with the Department of Health test guidelines, the results should be vitiated, which would make the subsequent blood test inadmissible.

To start, we determine what the word "observe" means in relation to the relevant statutes and guidelines involved in this case. Observe is not defined in Neb. Rev. Stat. § 39-669 et seq. (Reissue 1988 & Cum. Supp. 1992) or in the Department of Health test guidelines. It also has not been interpreted by Nebraska case law that we could find. Other jurisdictions have interpreted the word "observe" as used in similar drunk driving statutes to determine its meaning and scope.

[3] In *State v. Smith*, 16 Conn. App. 156, 164, 547 A.2d 69, 73 (1988), the court held that a regulation requiring " 'continuous observation' must be interpreted with reference to the purpose of the regulation." The Connecticut court concluded it was sufficient for the officer to be present for at least 15 minutes and be able to determine if the person ingested food or beverages, regurgitated, or smoked. Other jurisdictions have come to the same conclusion that when an officer is required to observe a person before administering a test, the officer need not stare fixedly at the person being tested for the specified period of time in order to satisfy the observation requirement, but must remain in the person's presence and be aware of the person's conduct. See, *State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (Idaho App. 1994); *Goode v. State*, 303 Ark. 609, 798 S.W.2d 430 (1990); *State v. St. Jean*, 554 A.2d 206 (R.I. 1989); *Gilbreath v. Municipality of Anchorage*, 773 P.2d 218 (Alaska App. 1989); *Tipton v. Com.*, 770 S.W.2d 239 (Ky. App. 1989); *State v. Taylor*, 781 S.W.2d 551 (Mo. App. 1989); *Simpson v. State*, 707 P.2d 43 (Okla. Crim. App. 1985).

The evidence in this case shows that Beckman left Cash alone in the patrol car and went to her car to conduct a search. The State admits Beckman did not observe Cash as required. The breath test given to Cash was clearly not properly administered in accordance with methods approved by the Department of Health as required under § 39-669.11(2) and therefore is not competent evidence under § 39-669.11(1). Since the breath test was not offered or received into evidence, we do not discuss or consider whether that breath test would be otherwise admissible.

Result of Improperly Administered Preliminary Breath Test.

Cash does not maintain the blood test per se was incorrectly administered. Rather, in summary, she argues that under §§ 39-669.08(3) and 39-669.14, a properly conducted preliminary breath test is a condition precedent to a chemical test of the breath, blood, or urine.

The pertinent part of § 39-669.08 reads as follows:

> (2) Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of

this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine when the officer *has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcoholic liquor* or drugs in violation of section 39-669.07.

(3) Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village *may* require any person who operates or has in his or her actual physical control a motor vehicle in this state to submit to a preliminary test of his or her breath for alcohol concentration if the officer *has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident.*

(Emphasis supplied.)

Cash bases her argument on the above statute and § 39-669.14, which reads in part as follows:

Any person arrested for any offense involving the operation or actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs shall be required to submit to a chemical test or tests of his or her blood, breath, or urine as provided in section 39-669.08 *without the preliminary breath test* if the arresting officer does not have available the necessary equipment for administering a breath test or if the person is unconscious or is otherwise in a condition rendering him or her incapable of testing by a preliminary breath test.

(Emphasis supplied.)

In evaluating the statutory interpretation of §§ 39-669.08 and 39-669.14, we follow the reasoning laid out by the Supreme

Court in *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977). In *Orosco*, the court analyzed whether a preliminary breath test was a prerequisite to an arrest under "section 39-669.08, R. R. S. 1943" and "section 39-669.14, R. S. Supp., 1976." 199 Neb. at 539, 260 N.W.2d at 308.

The emphasis in §§ 39-669.08 and 39-669.14 above implies that a preliminary breath test is a prerequisite to a blood test, otherwise it would not be necessary to have this exception. The Supreme Court's analysis of these statutes stated the following:

> It is clear enough that section 39-669.08, R. R. S. 1943, makes no requirement that a preliminary breath test be offered as a condition precedent to *arrest*. Taken by itself, section 39-669.08, R. R. S. 1943, is perfectly clear. An ambiguity or conflict arises only because of the implication from the recital contained in section 39-669.14, R. S. Supp., 1976. . . .
>
> There is no way the conflict in the statutes can be reconciled. If effect is to be given to the recital in section 39-669.14, R. S. Supp., 1976, then we must rewrite section 39-669.08, R. R. S. 1943, to make the giving of the preliminary breath test a condition precedent to *arrest* for any offense committed while driving an automobile while under the influence of intoxicating liquor. If we are not to rewrite that section then we must disregard the recital. The legislative history of section 39-669.08 (3), R. R. S. 1943, is helpful. In discussions on the floor of the Legislature, the test was always referred to in permissive terms such as "could" or "can." It also seems equally clear that the purpose of subsection (3) authorizing the preliminary test is to give the officer an optional tool to use in determining whether to make an arrest for the violations referred to in subsection (2).

(Emphasis supplied.) 199 Neb. at 539-40, 260 N.W.2d at 308.

[4,5] If Cash's position were accepted, a valid preliminary test would be necessary for an arrest under § 39-669.08(2). In the above quote, the Supreme Court called this test "an optional tool to use in determining whether to make an arrest." An optional tool is by definition not a necessary tool. We therefore hold that a valid preliminary test is not a prerequisite

to chemical testing under § 39-669.08(2). If the officer has probable cause to arrest a suspect for violating a statute or ordinance while the suspect is under the influence of alcoholic liquor or drugs and has reasonable grounds to believe that the suspect was driving while under the influence of alcohol or drugs, that officer may arrest the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered or was improperly administered. By administering a preliminary breath test, the officer did not make that test a prerequisite to an arrest.

Probable Cause to Arrest.

The preliminary breath test was administered before Cash was arrested. We have already concluded that this test was improperly administered and thus could not be admitted into evidence. Whether the result of an improperly administered breath test may be used as one of the pieces of information necessary to establish probable cause to arrest is an interesting question. However, under the facts in this case we do not get to that question. Later in this opinion we determine that Beckman had sufficient information to testify that in his opinion, Cash was under the influence of alcohol sufficient to impair her ability to operate a motor vehicle. The information that Beckman had as a basis for his opinion as a witness was the same information that he had at the time he arrested Cash, except for the preliminary breath test results. Since the record shows he had such information without the breath test, we need not consider whether he could have properly considered the breath test. The evidence in the record supports a finding by the trial court that Beckman had probable cause to arrest Cash without the results of the preliminary breath test. The findings of fact by the trial court on a motion to suppress will not be overturned unless clearly wrong. *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993).

Gas Chromatography—A Chemical Test?

[6] Cash argues that the gas chromatography test performed on Cash's blood to determine her body fluid alcohol level is not a "chemical" test, but, rather, an electronic test. Cash further argues that electronic tests are not prescribed under § 39-669.08

and therefore are not valid. The recognition of such an argument would be a judicial determination that the science of chemistry is required to limit its techniques to 19th century test tubes and litmus paper. This argument has been advanced in many courts in other jurisdictions, and it has been universally rejected. See, *Fisher v. State*, 177 Ga. App. 465, 339 S.E.2d 744 (1986); *State v. Nichols*, 110 Idaho 823, 718 P.2d 1261 (Idaho App. 1986); *Dollar v. State*, 287 Ark. 153, 697 S.W.2d 93 (1985); *Gandara v. State*, 661 S.W.2d 749 (Tex. Crim. App. 1983); *City v. Schenck*, 63 Ohio Misc. 14, 409 N.E.2d 284 (1980). The discussion in these cases centers around the notion that a "chemical test" can be a test of a substance to determine its chemical composition, as well as a test using chemicals. The record shows that gas chromatography is a test used to determine the body fluid levels of a certain chemical—alcohol—and therefore is a chemical test.

DEPUTY'S OPINION

The Supreme Court has held that after sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion the defendant was driving while intoxicated. See *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988). In *Dail*, the court stated the following with respect to an officer's opinion testimony that the defendant was under the influence of alcohol:

> The officer stated [his] conclusion after testifying that he had observed the defendant's car to be weaving, the defendant's eyes were bloodshot and watery, the defendant's speech was slurred, he smelled an odor of alcohol, and the defendant failed most of the standardized field sobriety tests. Further, it had been shown that the officer had been employed by the Bellevue Police Department for over 6 years, that he had received training on the apprehension and detection of intoxicated drivers, that he had made approximately 100 to 150 DWI stops, and that he has had occasion to observe the effects of alcohol on friends, relatives, and neighbors. Based on these facts, there was sufficient foundation for the officer to testify that he believed the appellant to be intoxicated.

Id. at 662, 424 N.W.2d at 105.

Similarly, in the case at hand, Beckman testified that he observed Cash's vehicle cross over the centerline on two occasions and the shoulder line on one occasion, he observed Cash use both vehicles to steady her balance as she walked back to the patrol car, he observed Cash stagger as she walked in between the vehicles on her approach to the patrol car, and he detected the smell of alcohol emanating from Cash. He further testified that he had been employed by the Nemaha County sheriff's office for 2 years, he had received training with regard to investigating alcohol-related offenses, he had observed others drink to the point of intoxication, and he had performed 100 to 150 alcohol-related investigations.

[7] In *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985), the trial court allowed opinion testimony into evidence under Neb. Evid. R. 701. In that case, there was a great deal of disagreement over whether shattercane had infested fertile female corn in the field, making the corn unusable as seed corn because detasseling was unfeasible. The trial court allowed opinion testimony of two witnesses who stated that the corn could have been detasseled. The foundation for the testimony was based on the witnesses' personal farming experience in raising seed corn, their dealing with shattercane, and their observations of the field in question. The court held that it was within the trial court's discretion to determine if there was sufficient foundation for a witness to give his or her opinion about an issue in question.

Thus, we hold that based on the facts contained in the record, there was sufficient foundation for Beckman to testify that in his opinion, Cash was under the influence of alcohol sufficient to impair her ability to operate a motor vehicle.

COURT'S LIMIT ON CROSS-EXAMINATION

During cross-examination, Beckman was asked whether he would still hold the opinion that Cash was under the influence of alcohol if she had passed the field sobriety test involving the raising of one leg perfectly. The objection to this testimony was sustained. The defendant made an offer of proof by the question-and-answer method that if Beckman were allowed to

testify, he would still have the same opinion even if Cash had passed a variety of field sobriety tests. Cash maintains that this evidence relates to Beckman's credibility in testifying that Cash was under the influence and that said evidence should have been admitted and considered by the court. Thus, Cash argues that this impermissibility limited her right to cross-examine Beckman to show his lack of credibility.

The offer of proof has Beckman testifying on the basis of facts not in evidence, that is, Cash passing field sobriety tests that were not administered to her. Obviously, there was no hope that such assumed evidence could be established. The question is whether a hypothetical question that assumes facts not in evidence may be asked of an expert witness on cross-examination. Generally, the authorities disagree about whether, on cross-examination, an expert may be asked questions that assume facts which are not in evidence. See Annot., Propriety of Hypothetical Question to Expert Witness on Cross-Examination, 71 A.L.R.2d 6 et seq. (1960). This annotation cites and discusses cases from some states which hold that such questions may not assume facts not in evidence, some which hold that the questions may assume facts not in evidence, some which hold that the question may assume facts not in evidence only if the purpose of the question is to test the qualification of the expert or the accuracy of the expert's opinion, and still other jurisdictions which hold that the trial court has the discretion to allow or not allow such questions. The cases cited in this annotation were generally decided before uniform rules of evidence were widely adopted.

[8] The closest and most recent case discussing this issue in Nebraska is *Bengtson v. Bengtson*, 204 Neb. 602, 284 N.W.2d 406 (1979). In *Bengtson*, the appellant asked the appellee's expert what effect a second parental breakup might have upon the parties' child. There was no evidence that the appellee and his new companion would break up, and therefore the question was completely hypothetical. In that case, the Supreme Court said:

> The line was drawn by the court at the place determined by it to prohibit Mr. Nanos from relating matters only involving speculation, possibility, or conjecture. In

> dealing with questions calling for expert opinion, particularly hypothetical questions, much must be left to the discretion of the trial judge.

Id. at 606, 284 N.W.2d at 409. The court held that the ruling was appropriate and not an abuse of discretion.

The facts in *Bengtson* can be distinguished from those in the case at hand in that the purpose of the hypothetical question in *Bengtson* was to develop evidence as to the effect of the father's future conduct relating to the child if the father were awarded custody. The court's discretion in *Bengtson* is based on the court's discretion to control the examination of expert witnesses under Neb. Rev. Stat. § 27-701 et seq. (Reissue 1989).

[9] In the case at hand, the only purpose for the offered line of inquiry would be to test the believability of the witness. That type of inquiry is controlled by Neb. Rev. Stat. § 27-611 (Reissue 1989), which provides "[t]he judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . ." In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988). We conclude that the trial court has the discretion to prevent the cross-examination of an expert witness that incorporates questions that assume facts not in evidence even when the purpose of that examination is to test the qualification or accuracy of the witness. The record shows that Cash's attorney was allowed adequate freedom to develop weaknesses in Beckman's testimony. We hold that the trial court did not abuse its discretion by not permitting the defendant's counsel to ask hypothetical questions assuming facts not in evidence.

Therefore, we hold that the judgment of the district court in affirming the county court's conviction under § 39-669.07 was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIXIE A. LINN, APPELLANT.
526 N.W.2d 683

Filed January 10, 1995. No. A-94-290.

1. **Courts: Appeal and Error.** In reviewing decisions of the district court which affirm, reverse, or modify decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court.
2. **Prior Convictions: Proof.** In a proceeding to enhance the sentence because of prior convictions, the State has the burden to prove such prior convictions.
3. _____: _____. When using a prior conviction to enhance a sentence, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel, and an attack on such convictions on any other ground is impermissible.
4. **Records: Proof.** A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.
5. **Prior Convictions: Judgments: Records.** The failure of a judge to sign a judgment does not render the judgment invalid when an authenticated copy thereof is offered into evidence for the sole purpose of enhancing the penalty on a later conviction.
6. **Trial: Prior Convictions: Appeal and Error.** If a defendant fails to object to the admission in evidence of his or her prior convictions, error claimed with respect to the admission of that evidence is not preserved for appellate review.

Appeal from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, GRATEN D. BEAVERS, Judge. Judgment of District Court affirmed.

Thomas J. Gaul, Deputy Hall County Public Defender, for appellant.

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

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

Dixie A. Linn appeals from a district court order which affirmed her conviction for driving under the influence of alcohol, third offense. On appeal, Linn alleges that the State failed to prove a valid judgment for purposes of enhancement because one of the convictions used by the State was not signed

by the county court judge. We affirm for three separate reasons detailed hereinafter.

FACTUAL SUMMARY

On December 12, 1993, Dixie A. Linn, who was represented by counsel, entered a guilty plea to the charge of driving under the influence of alcohol. The county court accepted Linn's plea, and an enhancement hearing was held that same day. At the outset of the enhancement hearing, the county court made the following statement to Linn:

> Now, you have certain rights in an enhancement hearing and that includes the rights to review the record of that prior, of those prior convictions. You have the right to object to the validity of those prior convictions, then you have the right to present mitigating circumstances to the court regarding those prior convictions, prior to sentencing occurring in this case, and among other things, I'll have to be convinced that you were represented by counsel or that you had knowingly, voluntarily, and intelligently waived your right to counsel at the time of those prior convictions.

At the enhancement hearing, the State introduced evidence of two prior convictions for driving under the influence of alcohol. Exhibit 1 is a certified copy of the record of a conviction of October 2, 1992, for driving under the influence of alcohol, second offense.

Exhibit 2 is a certified copy of the record of a conviction for driving under the influence of alcohol, second offense, for which Linn was sentenced on July 9, 1992. Exhibit 2 contains a complaint and a two-page journal entry. The journal entry was not signed by a county court judge. Exhibit 2 bears the seal of the county court for Hall County, is certified as a true copy of the original on file with the court, and is signed by the court clerk.

Both exhibits 1 and 2 reflect that Linn was represented by counsel. The exhibits were received in evidence without objection from Linn's counsel. Immediately thereafter, the trial judge observed, "Exhibit two does not reflect the signature of a county judge on the journal entry. All right, with no argument

and objection by either side the court will find that this is a third offense, driving under the influence of alcohol."

The county court then found Linn guilty of driving under the influence of alcohol, third offense. Linn returned to court on January 6, 1994, and was sentenced to pay a $500 fine, court costs, and the breath testing fee. She was also sentenced to 3 months' incarceration, and her driver's license was revoked for 15 years. Linn appealed to the district court for Hall County, which affirmed the decision of the county court. This appeal timely followed.

ASSIGNMENT OF ERROR

On appeal to this court, Linn alleges that the State failed to prove a valid judgment because the journal entry in exhibit 2 was not signed by a county court judge.

STANDARD OF REVIEW

[1] In reviewing decisions of the district court which affirm, reverse, or modify decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court. See, *State v. Gerstner*, 244 Neb. 508, 507 N.W.2d 490 (1993); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). The record shows that Linn filed a statement of errors in the county court which raised the issue of sufficiency of the evidence used for enhancement. Thus, the assigned error is properly before us.

ANALYSIS

Linn argues that the State failed to prove that she was guilty of driving under the influence of alcohol, third offense. If a person has been convicted in the previous 8 years of operating or being in actual physical control of any motor vehicle while under the influence of alcoholic liquor or drugs, the convictions may be used to enhance the penalty for a current conviction. See Neb. Rev. Stat. § 60-6,196 (Reissue 1993).

[2,3] In a proceeding to enhance the sentence because of prior convictions, the State has the burden to prove such prior convictions. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). When using a prior conviction to enhance a sentence,

the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. *Id.* In *LeGrand v. State, ante* p. 300, 527 N.W.2d 203 (1995), this court applied two recent U.S. Supreme Court cases, *Custis v. U.S.*, ____ U.S. ____, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. U.S.*, ____ U.S. ____, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), which provide further support for this holding. In fact, *LeGrand* holds that the *only* permissible ground of attack on a prior conviction being used for enhancement purposes is that the transcript fails to disclose whether the defendant had or waived counsel at the time the plea was entered. There is no claim that either of Linn's prior two convictions were uncounseled, and in fact the exhibits involved herein show that she had counsel for both convictions.

> [4] A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.

Neb. Rev. Stat. § 25-1285 (Reissue 1989). See *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). The statute says nothing about the signature of the judge being part of the proof of the judicial record.

In compliance with § 25-1285, the State proved with certified copies Linn's prior convictions for driving under the influence of alcohol. Linn argues that although exhibit 2 is a certified copy of her July 9, 1992, conviction, the State failed to prove that a valid judgment existed because exhibit 2 was not signed by the county court judge rendering the judgment of conviction. Linn's argument appears to be that a valid final judgment is not rendered until and unless a judge's signature appears thereupon. Although we believe the attack which Linn attempts here on her prior conviction goes beyond that allowable in an enhancement proceeding, we also disagree with her that the lack of a judge's signature means that the State did not carry its burden of proof with respect to prior convictions.

Rendition of judgment occurs when the court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket. Neb. Rev. Stat. § 25-1301 (Reissue

1989). Failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994). In a criminal case, it is the sentence which is the judgment. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988).

The issue of the validity of an unsigned judgment has been previously addressed by the Nebraska Supreme Court. In *Stacks v. Crawford*, 63 Neb. 662, 88 N.W. 852 (1902), the court found that a transcript of the district court of the United States was competent evidence, even though the presiding judge failed to sign the journal of the record.

[5] In *In re Application of Niklaus, Niklaus v. Holloway*, 144 Neb. 503, 13 N.W.2d 655 (1944), the appellant attacked the validity of a judgment because the judge failed to sign the journal entry. The Nebraska Supreme Court stated, "The failure of a judge to sign the judgment does not have the effect of rendering the judgment invalid." *Id.* at 511, 13 N.W.2d at 659. While signing judgments is a prudent practice for trial courts, the failure of the judge to sign the judgment does not render the judgment invalid when an authenticated copy thereof is offered into evidence for the sole purpose of enhancing the penalty on a later conviction.

[6] Additionally, notwithstanding that the judgment in exhibit 2 was not signed, Linn failed to object to its admission. If a defendant fails to object to the admission in evidence of his or her prior convictions, error claimed with respect to the admission of that evidence is not preserved for appellate review. *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984); *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978). Failure to assert a timely objection at the time of trial constitutes a waiver of the objection. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991).

The county court advised Linn of her rights in the enhancement hearing prior to the admission of the exhibits, including the right to object to the validity of her prior convictions. Linn was given the opportunity to challenge her prior convictions, and she failed to do so. After the exhibits had been received in evidence, the court pointed out that exhibit 2

had not been signed by the county court judge, yet Linn offered no objection. Linn waived the right to object to the validity of her prior convictions. Linn's assignment of error is without merit.

CONCLUSION

We find that the failure of the presiding judge to sign the judgment in exhibit 2 did not render it invalid. Moreover, Linn waived any objection to the validity of her prior convictions. Finally, Linn's attack on exhibit 2 exceeds the permissible boundaries for attacks on prior convictions being used solely for enhancement purposes. For these reasons, we affirm the judgment of the district court which affirmed the judgment of the county court.

AFFIRMED.

HANNON, Judge, dissenting.

I must respectfully dissent from my colleagues' opinion for two reasons: first, because of what I regard as the proper interpretation of the statute which I think controls the time of the rendition of a judgment in county court, and second, because of a firm conviction that under modern practice, the use of an unsigned "journal entry" to prove a court acted in conformity with the facts stated in the journal ignores how such records are compiled and certified.

Neb. Rev. Stat. § 25-2729(3) (Reissue 1989) provides as follows:

> The time of rendition of a judgment or making of a final order is the time at which the action of the judge in announcing the judgment or final order is noted on the trial docket or, if the action is not noted on the trial docket, the time at which the journal entry of the action is filed.

The evidence offered by the State does not establish that the judgment was noted on the trial docket. Therefore, the county court did not render a judgment until the journal entry of the action was filed. When is a journal entry filed?

The term "journal entry" is not defined by Nebraska cases or statutes, but the Ohio Court of Appeals defined the related term "to journalize" to mean what I have observed the legal profession in Nebraska has always used the term to mean. That

court stated, "To journalize a decision means that certain formal requirements have been met, *i.e.*, the decision is reduced to writing, signed by a judge, and filed with the clerk so that it may become a part of the permanent record of the court." *San Filipo v. San Filipo*, 81 Ohio App. 3d 111, 112, 610 N.E.2d 493 (1991). See, also, *State v. Ellington*, 36 Ohio App. 3d 76, 521 N.E.2d 504 (1987).

In this case, the State offered a certified copy of an unsigned and unfiled piece of paper that contains a title "Journal Entry." If this document had been signed and filed, I would agree that it would evidence the defendant's conviction. Since no such showing was made, the State failed to prove the conviction in that case.

On a more practical level, I am convinced that generally the clerks of county courts will accept and place in the designated file any piece of paper containing a caption that is handed to them. I am also convinced that judges generally sign journals that they think properly record their decision and that they do not sign papers they think do not do so. Clerks usually do not file stamp unsigned documents that are prepared for the judge's signature. I am also convinced that clerks of the courts certify as records of their courts any requested paper that they find in the file. I further believe that the clerks and judges should act in this fashion. Therefore, a certified paper that shows an unsigned and unfiled "journal entry" should not evidence any more than it shows, i.e., that for whatever reason the judge has not acted.

For these reasons, I would reverse that finding of the county court which relied upon the second conviction for the enhancement of the defendant's penalty in this case.

STATE OF NEBRASKA, APPELLANT, V. JIM L. CLASON, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. LEE A. CLASON, APPELLEE.

Filed November 22, 1994. Nos. A-93-1040, A-93-1041.
This opinion has been ordered permanently published by order of the Court of Appeals dated January 12, 1995.
526 N.W.2d 673

1. **Appeal and Error.** Regarding a question of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
3. **Criminal Law: Motions to Dismiss.** In a criminal case, a court may grant a defendant's motion to dismiss only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
4. **Criminal Law: Conspiracy: Intent.** An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be criminal.
5. **Conspiracy: Circumstantial Evidence: Proof.** A conspiracy need not be established by direct evidence of acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished.
6. **Criminal Law: Conspiracy.** An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.
7. _____: _____. A conspiracy charge may be filed if the substantive crime can be committed by a single person.
8. _____: _____. A conspiracy charge may be filed if more or different people participate in the conspiracy than are necessary to commit the substantive offense.
9. _____: _____. A conspiracy charge may be filed where the substantive offense has not yet been committed by any of the conspirators.

Appeal from the District Court for Furnas County: JOHN J. BATTERSHELL, Judge. Exception sustained.

Don Stenberg, Attorney General, Kimberly A. Klein, and David Arterburn for appellant.

No appearance for appellees.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

The defendants, Jim L. and Lee A. Clason, were separately charged in Furnas County, Nebraska, with conspiracy to distribute methamphetamine. The defendants were tried together, and at the close of the State's evidence, the trial court granted the defendants' motion to dismiss. The State appeals under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994). The defendants in this proceeding have already been placed in jeopardy, and their acquittal in the prior proceeding cannot be reversed. The issues raised in this appeal are the sufficiency of the evidence and whether the Wharton Rule precludes a conspiracy charge against one of the defendants. We conclude that the evidence was sufficient to submit the cases against both defendants to the jury and that the Wharton Rule does not limit prosecution in these cases.

CONSPIRACY CHARGES

In summary, the informations allege that between August 15, 1991, and February 12, 1992, the defendants or other unnamed coconspirators agreed that "they or one of them [would] engage in or solicit the unlawful, knowing or intentional distribution, delivery, dispensation, or possession with intent to deliver or dispense a controlled substance, to wit: Methamphetamine." For a shorthand expression in this opinion, we will call this drug by one of its street names, "crank." The informations allege 11 overt acts were committed pursuant to the conspiracy: (1) Between October 1 and 29, 1991, Jim Clason told Randall Johnson he would obtain crank for him for $150 in advance. (2) On October 29, Jim Clason described to Johnson the methods by which Jim Clason could obtain crank. (3) On October 31, Johnson delivered $150 to Jim Clason to purchase one-eighth ounce of crank. (4) Between October 31 and November 11, Jim Clason transferred the $150 to an employee of Clason Trucking Company, who gave it to Lee Clason. Lee Clason purchased crank with the money in California and attempted to deliver it to Johnson in California. At Johnson's request, Lee Clason transported the crank to Nebraska. (5) Between October 31 and December 18, Lee Clason delivered the crank intended for

Johnson to Jim Clason. (6) On December 18, Jim Clason discussed obtaining additional crank for Johnson. (7) On December 18, a truck driven by Lee Clason was stopped and searched in Harlan County, Nebraska, and a quantity of crank was found in the sleeper. (8) On December 27, Lee Clason and Johnson discussed the possibility of Lee Clason's obtaining crank for Johnson. (9) Between November 1 and 30, Allen Shepherd, a Clason Trucking driver, paid Jim Clason between $150 and $175 to be used to purchase crank. Jim Clason transferred this money to Lee Clason, who purchased crank and delivered it to Jim Clason in Furnas County, who then delivered it to Shepherd. (10) Between December 1 and 25, Shepherd purchased crank from Lee Clason in Beaver City, Nebraska. (11) On October 3, an associate of Jim Clason's wired money to Shepherd in California, who gave it to Lee Clason to purchase crank.

STATEMENT OF FACTS

The trial before a jury commenced on October 19, 1993, and ended on October 25, when the trial judge granted the defendants' motion to dismiss after the prosecution rested.

The issues before the court are whether the evidence is sufficient to have submitted the cases against the defendants to the jury and whether the Wharton Rule precludes a conspiracy charge against Jim Clason. The following is a summary of the evidence in a light most favorable to the State:

In 1992, Clason Trucking was a partnership owned by Eugene and Ruth Clason, the defendants' parents. The firm owned and operated several large semi-trailer trucks equipped to carry livestock. Ruth Clason acted as a dispatcher for the firm. Jim Clason acted as the shop foreman in the firm's truck barn in Beaver City, where the trucks were maintained. Lee Clason drove a truck for the firm. Clason Trucking typically transported hogs from Phillipsburg, Kansas, to Farmer John's packing plant in Los Angeles, California.

In order to protect the hogs from the desert heat and stress on the trip to California, the drivers would leave Phillipsburg at approximately 1 a.m. and make the 1,460-mile trip in approximately 30 hours. The drivers regularly exceeded the

speed limit, and they made only four or five short stops on the trip. This schedule violated the applicable Interstate Commerce Commission regulations regarding the amount of rest a driver must have. The drivers used crank to remain alert while maintaining their rigorous work schedule.

After unloading at Farmer John's, the trucker would go to a certain motel to rest to the extent possible and await instructions from the dispatcher on a possible return load. Usually a load was arranged for at least part of the return trip, but frequently a truck would return to Nebraska empty.

Johnson had worked for Clason Trucking for about 6 weeks when, on October 28 or 29, 1991, Jim Clason told Johnson that he had truckdrivers take money with them, buy crank in California, and then bring it back to Nebraska. He told Johnson he had some people who were going to California at that time, and he asked him if he wanted to buy some crank. Johnson told him he did not have the required $150 with him. Through intermediaries, Johnson got in touch with an Officer Bodeman of the McCook, Nebraska, Police Department. On October 29, Johnson told Bodeman that Clason's truckers were trafficking in crank. Bodeman had Johnson call Jim Clason at his residence in Beaver City. A tape recording of that conversation was introduced into evidence.

In the course of that conversation, Johnson made tentative arrangements with Jim Clason to purchase some crank the next time he saw him. Jim Clason stated an "eight ball" of crank would cost Johnson $150.

On October 30, Jim Clason called Johnson to take a truckload of hogs to Los Angeles. He was to leave for California on November 1. Arrangements were made to wire Johnson for sound before he went to Beaver City on the afternoon of November 1. The police gave Johnson $250 for purchase money, and during the visit, Johnson gave Clason $150 of the money for the purchase of crank. In that conversation, Clason did not mention where he was going to get the crank.

A few days later, while on a trip for Clason Trucking, Johnson met with Lee Clason at the motel in California. Johnson testified: "We discussed he didn't have the money with

him. Somehow or the other it didn't get sent with him, but it was on the way out with one of the other drivers that was going to be there real shortly." The other driver, Shepherd, arrived later with the money. Later, Johnson saw Lee Clason at a truck wash in Barstow, California. Lee Clason said he had gotten the crank he was supposed to pick up for Johnson, and he asked Johnson if he wanted it. Johnson said no because he did not want to carry it back in his truck. Lee Clason told Johnson he, Lee Clason, was supposed to take it back and give it to Jim Clason. At that time, Johnson saw what Lee Clason represented as crank, and it looked like crank to Johnson. They then drove their respective trucks back toward Nebraska.

Johnson's next conversation on the subject of the drug he had purchased was with Jim Clason when Clason asked if Johnson wanted to sell back part of the eight-ball he had purchased. Johnson told him no.

A recorded telephone conversation between Jim Clason and Johnson on November 13 shows that Jim Clason knew Johnson was to receive some crank and that he owed it to Johnson. In the recording, Jim Clason tries to come up with some excuses as to why he does not have Johnson's crank. However, Jim Clason never really said why he did not give the crank to Johnson.

On December 18, after Johnson returned from a vacation, he met with Officer Bodeman and attempted to telephone Jim Clason from the McCook police station. In the attempt to reach Jim Clason, Johnson talked with Lee Clason. The telephone conversation was not recorded, but Johnson testified that Lee Clason told him that they had Johnson's crank. Nothing was said about how Johnson was going to get the crank that he had already paid for.

On December 18, Johnson and Officer Bodeman again went to Beaver City to the Clason truck barn in an attempt to get Johnson's crank from Jim Clason. Johnson was again wired for sound, and the recording was received into evidence. In that recording, Jim Clason stated that he did not have Johnson's crank. Also in the conversation, Johnson said that he had a new job that started at the beginning of the year. Jim Clason stated that the crank was only for Clason Trucking's drivers and that it

was not for everybody in the county. Jim Clason said he was not sure if the other drivers would be willing to bring back any crank for Johnson, but that it would be up to them. At various points in the conversation, Jim Clason said that he would return Johnson's $150.

In a final attempt by Johnson to obtain the crank that he purchased from Jim Clason, Johnson telephoned Lee Clason on December 27 from the McCook police station. This conversation was recorded and received into evidence. During the course of this conversation, Lee Clason said he was unhappy with Johnson. He stated he suspected Johnson had set him up for the search of his truck that occurred in Harlan County. After Lee Clason was apparently convinced that Johnson was not the one who turned him in, he told Johnson his truck was searched twice, and only a trace of crank was found. Lee Clason stated that the officers who performed the search missed a bag of crank that was lodged between the wall and the mattress of the truck cabin.

Johnson never did receive the crank that he had purchased from Jim Clason, nor did he get back the $150.

Shepherd testified that he drove trucks for Clason Trucking for the period from September 9, 1991, to February 12, 1992, before he was arrested in Texas when crank was found in his truck. He stated that he saw Jim Clason use crank "more times than he could count," and on at least 10 occasions, Jim Clason shared some with him. On 20 to 40 occasions, he saw Lee Clason with what appeared to be crank, and Lee Clason shared crank with Shepherd on perhaps 20 occasions.

Shepherd testified that on approximately October 1, 1991, Jim Clason had someone in Kearney, Nebraska, wire $558 to Shepherd in California. Previously, Jim Clason had told Shepherd that when he received this money, he was to give it to Lee Clason for the purchase of crank. Upon receipt of the money, Shepherd gave that money plus $150 of his money to Lee Clason to purchase crank.

On one occasion in Beaver City, Shepherd gave Jim Clason $150 that he and several other drivers had pooled to purchase crank. Jim Clason said he would have either Lee Clason or Jim Schoenthal, another Clason driver, pick it up. A few days later,

Shepherd picked up the crank at Jim Clason's house. In December, Shepherd give Jim Clason $150 for crank. Jim Clason said Lee Clason was to pick up the drugs, but upon Lee Clason's return, Jim Clason told Shepherd that Lee Clason was too nervous to pick up the crank.

Ed Todd testified that he drove a truck for Clason Trucking from May to December 1991. He saw Jim Clason use crank once in Beaver City. He also saw Lee Clason in possession of an illegal substance in California while J.D. Hallsted, a Clason Trucking driver, was present. Todd and Hallsted pooled $75 each and gave it to Lee Clason. Lee Clason left in his truck and came back in about 2 hours with what appeared to be crank.

Hallsted testified that he drove a truck for Clason Trucking from September to December 1991. He stated that he saw Jim Clason use crank on about 10 occasions and that they used it together on one occasion in the shop in Beaver City. He saw Lee Clason with crank in California on more than one occasion. He confirmed Todd's testimony about their purchase of crank from Lee Clason. He testified that both Jim Clason and Lee Clason told him that Johnson had given them $150 to buy crank. Hallsted stated that Jim Clason said the crank was picked up and brought back but never delivered to Johnson because Jim Clason had used it himself.

DISMISSAL OF THE CASE

In granting the defendants' motion to dismiss, the judge reviewed the evidence. In doing so, the judge stated the evidence established that the defendants and most of the witnesses used large amounts of crank, that the only attempted delivery of a drug to Johnson was in California; and that Johnson delivered $150 to Jim Clason to purchase crank, but after that the evidence "gets a lot more murky." The judge stated there is no agreement he could find with Lee Clason. The judge then referred to a couple of statements Jim Clason made which, if believed, could tend to establish he had not talked to Lee Clason about his getting crank and to a statement Lee Clason made in December 1991 to the effect that Johnson would have to talk to Jim Clason to get his money back. The judge stated that distribution of crank required at least two people.

"Therefore, the Wharton Rule in order to have a conspiracy we have to have three people." The judge also said that he believed the "cooperating individual cannot provide the overt acts that are necessary to complete the transaction." At least, the judge stated, that was his reading of *State v. John* (apparently 213 Neb. 76, 328 N.W.2d 181 (1982)). The judge stated that if "this was the type of conspiracy that only required two people, I would have no trouble finding Mr. Jim Clason guilty of conspiracy." The judge then considered whether there was evidence to support a finding of the 11 alleged overt acts. He found there was sufficient evidence to establish Nos. 1, 3, 6, 7, and 8 of the alleged acts, but he found insufficient evidence to support a finding of the other overt acts. In conclusion, he stated that "the state has failed to present sufficient evidence to allow the jury to find the defendants guilty beyond a reasonable doubt" and dismissed the cases.

ASSIGNMENTS OF ERROR

The State alleges the trial court erred in the following respects: (1) applying the incorrect standard of proof, i.e., "beyond a reasonable doubt" in determining whether the case should be dismissed; (2) determining the Wharton Rule required dismissal of the case; and (3) unduly restricting the State's evidence by not allowing portions of testimony to be admitted regarding the stop and search of Lee Clason's truck in Harlan County.

SCOPE OF REVIEW

[1] Whether a trial court should have granted a motion for directed verdict at the close of the State's case is a question of law. Regarding a question of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994).

DISCUSSION

Evidentiary Standard.

[2] On a criminal defendant's motion to dismiss for insufficient evidence of the crime charged, the State is entitled to have all its relevant evidence accepted as true, the benefit of

every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992); *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990); *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). If, when viewed in this light, the State's evidence is sufficient to establish all the elements of the crime charged, a denial of the defendant's motion to dismiss is without error. *State v. Stahl, supra*; *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

[3] In a criminal case, a court may grant a defendant's motion to dismiss only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Pierce, supra*; *State v. Diesing*, 231 Neb. 132, 435 N.W.2d 190 (1989).

The Nebraska Supreme Court has held that a prima facie case of conspiracy is a preliminary question for a trial court's determination concerning the admissibility of a coconspirator's acts. *In re Interest of M.L.S.*, 234 Neb. 570, 452 N.W.2d 39 (1990); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). In *Copple*, the court stated that there is a distinction between proving conspiracy as a crime beyond a reasonable doubt and establishing conspiracy as a prerequisite and a means to achieve admission of an alleged coconspirator's acts and declarations as evidence, where only a prima facie showing of conspiracy is sufficient.

Once a conspiracy is established, wide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which remotely tends to establish the conspiracy charged. *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975). The trial judge stated in his decision that he takes the view most favorable to the State when evaluating the evidence. However, in granting the motion to dismiss, the trial judge said, "the state has failed to present sufficient evidence to allow the jury to find the defendants guilty beyond a reasonable doubt."

While the trial judge is correct in taking the view most

favorable to the State, he erred by using the standard "beyond a reasonable doubt" on a motion to dismiss. As stated in Nebraska case law cited above, a trial judge may properly grant the defendant's motion to dismiss if the judge finds there was a complete failure of evidence to establish an essential element of the crime charged or if the judge finds the evidence to be so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.

There is no rule that instructs a court to direct a verdict and dismiss the State's case when in the opinion of the judge the jury could not find the defendant guilty beyond a reasonable doubt. The correct standard is stated above, and the court erred in applying that other standard. However, as stated above, the trial court also stated a summary of the correct rule. Whether a case should be dismissed at the close of the State's case is a question of law. Since we cannot tell which standard the trial judge did in fact apply, we feel constrained to determine if the trial judge should have dismissed the case under the correct rule.

Crime Charged.

Conspiracy is defined in Neb. Rev. Stat. § 28-202 (Reissue 1989), which states in relevant part:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.
>
> (2) If a person knows that one with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit such crime with such other person or persons whether or not he knows their identity.
>
> (3) If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple

crimes are the object of the same agreement or continuous conspiratorial relationship.

[4] " ' "[A]n overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. . . . An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be . . . criminal . . . ." ' " *State v. Anderson*, 229 Neb. 427, 435, 427 N.W.2d 764, 770 (1988), quoting *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987).

The trial court found that 5 of the 11 overt acts were established. While we believe there was sufficient evidence to support a finding that additional overt acts were established, we will not go into detail in that regard, because one overt act is sufficient. On the issue of the sufficiency of the evidence, we are concerned only with whether the alleged conspiracy has been proved.

In granting the motion to dismiss, the trial judge did not clearly state what he understood the conspiratorial agreement to be. Some statements by the judge support the conclusion that he considered the conspiracy to be between the defendants and Johnson to have crank brought to Nebraska for Johnson. The agreement alleged in the informations was that "they or one of them [would] engage in or solicit the unlawful, knowing or intentional distribution, delivery, dispensation, or possession with intent to deliver or dispense" crank into Furnas County. The information was essentially in the words of the statute, and absent a motion to quash, an allegation in the words of the statute is generally sufficient. *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982). Under § 28-202(3), a conspiracy may be an agreement to commit multiple crimes if the multiple crimes are the object of the same agreement or the same conspiratorial relationship.

[5] In the case at hand, the alleged conspiratorial agreement is broad, and it is not limited to a specific agreement or agreements to bring crank from California on one or more specific occasion, but, rather, multiple crimes that are part of a conspiratorial relationship. "A conspiracy need not be established by direct evidence of acts charged, but may, and

generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished." *State v. Cortis*, 237 Neb. 97, 112, 465 N.W.2d 132, 143 (1991). In this case, Jim Clason's conversations with Johnson, Shepherd, Todd, and Hallsted, in which he agreed to obtain crank for them at various times, plus the evidence that Lee Clason did overt acts and made statements in California and Nebraska, if believed, establish that Lee Clason was filling orders taken by Jim Clason. Lee Clason's actions as testified to by the other truckers, if believed, establish him as a member of that conspiracy, not simply that he purchased crank in California. The evidence would support a finding that some of the truckers were ordering and agreeing to purchase crank which was to be delivered to them in Furnas County and used by them there. They made this agreement with Jim Clason by ordering crank from him to be distributed in Nebraska. There is ample circumstantial evidence that Lee Clason frequently purchased crank in California for distribution and use in Nebraska through Jim Clason and that Lee Clason knew of this established procedure. Some, if not all, of the truckers showed they were part of the conspiracy by delivering money to California or by ordering, accepting, and using crank in Nebraska. The evidence would support a finding that Lee and Jim Clason, and others, knew of the entire arrangement and while knowing of that arrangement either ordered, took delivery of, paid for, or used crank which they knew was imported by an established but irregular procedure. The evidence establishes a continuous conspiratorial relationship to distribute crank in Nebraska. While the conspiracy charge was not limited to obtaining crank for the use of drivers for Clason Trucking, the evidence would support a finding that Jim and Lee Clason, and others, conspired to import California crank for that purpose.

We can find nothing in *State v. John, supra*, that would support a finding that Johnson's actions cannot be used to prove the conspiracy. However, even if one does not consider Johnson's actions as those establishing overt acts, there is ample other evidence of overt acts, as found by the trial court, which would be sufficient to establish them for purposes of

submitting the cases to the jury.

Wharton Rule.

To the extent the trial judge's ruling is interpreted as holding the Wharton Rule made it impossible to prosecute Jim Clason for conspiracy to deliver drugs, we do not agree.

The Nebraska Supreme Court recognizes the Wharton Rule, as adopted by the U.S. Supreme Court, as an exception to the rules of conspirator liability. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Essentially, this rule precludes the prosecution of conspiracy when the number and identity of persons involved in the conspiracy are the same as the number and identity of persons required to commit the underlying substantive offense.

[6] The classic formulation of the rule is as follows: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 Ronald A. Anderson, Wharton's Criminal Law and Procedure § 89 at 191 (1957).

In *Utterback*, the question of the application of the Wharton Rule came before the court in the process of testing the reliability of an informant who supplied information used in a search warrant application. The informant's reliability was considered on the ground that the information he supplied the police was against the penal interests of the informant and therefore reliable. In *Utterback*, the statement the informant gave to the police would be against that informant's penal interests only if the admission that he had purchased marijuana from a certain party was an admission of a crime. The court noted that the purchase of marijuana was not statutorily proscribed. The statement might be against his penal interests if he could be guilty of conspiracy with the seller of the marijuana to deliver or distribute the marijuana to him. This is the classic case of a crime that is necessarily a two-party crime, and it was held he could not be guilty of conspiracy under the Wharton Rule.

The rationale for the rule is to avoid cumulative punishment for conspiracy and the completed substantive offense. While conspiracy and a substantive crime are generally separate

offenses, conspiracy is usually a lesser-included offense of a crime involving concerted criminal activity. *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). Examples of such concerted criminal activity are incest, bigamy, adultery, and dueling. *Id.*

[7] In *Utterback*, the Supreme Court noted in passing that the Wharton Rule does not apply to offenses that can be committed by one person, and in particular to the possession of a controlled substance with intent to deliver.

[8] Another exception to the Wharton Rule is that a conspiracy charge may be filed if more or different people participate in the conspiracy than are necessary to commit the substantive offense. *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968); *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973). Thus, the Wharton Rule shields a conspiracy from prosecution only if the agreement is necessary to perfect the elements of the substantive crime. *People v. Incerto, supra.*

[9] Another exception is that the Wharton Rule is inapplicable where the substantive offense has not yet been committed by any of the conspirators. See, *Iannelli v. United States, supra*; *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943); *People v. Incerto, supra.* See, also, Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.5 (2d ed. 1986). The rationale for this exception is that the Wharton Rule should *not* be allowed to operate in such circumstances because it would improperly immunize all of the defendants from being charged with conspiracy when the substantive crime involving concerted activity has not yet been committed. LaFave & Scott, *supra.*

This exception is not strictly applicable to the case at hand because the alleged conspiracy is not to commit only one crime. However, the exception would prevent the application of the Wharton Rule even if the alleged conspiracy was the delivery of crank to Johnson, because the crank was never in fact delivered to him. If the conspiracy charge against Jim Clason was to sell Johnson a drug, and the drug was actually delivered as the drugs were in *Utterback*, the Wharton Rule would prevent prosecution for conspiracy. However, that is not the conspiracy charged in the information, and the drug was not delivered to Johnson.

Allowing the rule to operate in the present case would

completely overlook the function of conspiracy as an inchoate crime. The fact that an offense requires concerted action for its commission is not a reason to completely immunize criminal preparation to commit it by barring prosecution for conspiracy. Model Penal Code § 5.04, comment (1985); Model Penal Code § 5.04, comments (Tent. Draft No. 10, 1960). The inchoate crime of conspiracy allows law enforcement agencies to intervene and protect the public from persons who reveal that they are disposed to criminal activity and have committed overt acts toward that end. LaFave & Scott, *supra*.

Thus, it is the holding of this court that the Wharton Rule does not apply in cases where the substantive offense requiring concerted activity has not been completed.

Exclusion of Certain Evidence.

The State argues that the trial court unduly restricted the evidence admitted in the State's cases by refusing to allow testimony regarding the stop and search of Lee Clason's truck in Harlan County and that two small bags with crank residue were found in the process of that search. The initial question is whether the State preserved this possible error during the trial. Neb. Rev. Stat. § 27-103 (Reissue 1989) provides in significant part:

> (1) Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

There is a great deal of discussion about the admissibility of certain evidence in connection with the arrest of Lee Clason in Harlan County, but no questions were asked and no offer was made. We can study the record and perhaps surmise what the evidence would have been, but that is all.

Furthermore, the issue of the admissibility of this evidence turns upon whether the evidence is relevant under Neb. Rev. Stat. § 27-402 (Reissue 1989) or whether its probative value is

outweighed by undue prejudice, confusion of the issues, or misleading the jury, etc. The determination of the admissibility of such evidence is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991); *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

The State bases its argument on the general proposition that the trial court must allow great latitude in the receipt of evidence in conspiracy cases. With no offer of proof, and in the context of these appeals, we conclude that consideration of this evidentiary question would not be helpful, and we do not consider it.

CONCLUSION

We conclude that the district court should not have granted the defendants' motion to dismiss.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL T. GEORGE, APPELLANT.

527 N.W.2d 638

Filed January 17, 1995. No. A-94-030.

1. **Appeal and Error.** With respect to questions of law, an appellate court has an obligation to reach a conclusion independent of the trial court's determination.
2. **Criminal Law: Intent.** A person cannot perform the same act intentionally and unintentionally at the same time.
3. **Criminal Law: Homicide: Intent.** A person cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime. Attempted manslaughter does not and cannot exist under current Nebraska law.
4. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

5. **Criminal Law: Weapons.** A defendant acquitted on the underlying felony charge cannot be convicted of an offense under Neb. Rev. Stat. § 28-1205 (Reissue 1989).
6. **Double Jeopardy.** Double jeopardy protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense.
7. **Double Jeopardy: Convictions: New Trial: Lesser-Included Offenses.** When a retrial is granted for a defendant who has been tried for one crime but convicted of a lesser-included offense, the principles of double jeopardy restrict the new trial to the lesser charge on which he or she was originally convicted and prohibit a retrial on the original charge submitted to the jury on which the defendant was not found guilty.
8. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion. That is, a sentence within the statutory limits will not be modified as excessive unless the trial court's reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part, and in part reversed and vacated.

Harry A. Moore, Madison County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

Michael T. George was charged with (count I) robbery, (count II) attempted second degree murder, (count III) use of a weapon in the commission of the felony offense of robbery, and (count IV) use of a weapon in the commission of the felony offense of attempted second degree murder. He was tried before a jury and was found guilty as charged under counts I and III and of attempted involuntary manslaughter under count II and the use of a weapon in the commission of the felony offense under count IV. This appeal concerns the validity of the convictions for attempted manslaughter under count II and for the use of a weapon in the commission of a felony under count IV. Since we conclude the convictions must be set aside, we also

consider whether George may be retried under counts II and IV. We conclude he may not be retried under those counts. We also reject George's claim that the sentences for the convictions under counts I and III were excessive.

FACTS

The evidence summarized in a light most favorable to the State establishes the following: At around 9 p.m. on March 28, 1993, George entered Coffin's Corner, a convenience store located in Grand Island, stabbed a store patron who was standing at the counter visiting with the clerk, and then pushed the patron out of the way. George then proceeded to rob the store by threatening the clerk with the same knife that he used to injure the patron. George took approximately $200 to $250 in cash from the store.

The injured patron was taken to the hospital and underwent surgery to repair the knife wound. The patron has since recovered from the knife injury.

ASSIGNMENTS OF ERROR

George alleges 10 errors by the trial court. These errors may be summarized as the following three errors: (1) The trial court erred in instructing the jury on attempted manslaughter as a lesser-included offense of attempted second degree murder, (2) the trial court erred in accepting a guilty verdict from the jury and sentencing George for the use of a weapon in the commission of the felony of attempted second degree murder when he was acquitted by the jury of attempted second degree murder, and (3) the trial court abused its discretion by imposing sentences that are excessive.

STANDARD OF REVIEW

[1] The questions raised by assignments Nos. 1 and 2 are questions of law. With respect to questions of law, an appellate court has an obligation to reach a conclusion independent of the trial court's determination. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

The standard of review for the allegedly excessive sentences will be stated when that issue is considered.

DISCUSSION

ATTEMPTED MANSLAUGHTER

The information charges George in count II as follows:

> [O]n or about March 28, 1993 [George] intentionally engaged in conduct which, under the circumstances as he . . . believed them to be, constituted a substantial step in a course of conduct intended to culminate in his . . . commission of the crime of 2nd degree Murder, to-wit: did then and there attempted [sic] to intentionally, but without premeditation, kill William Ostrander.

The jury found George innocent of attempted second degree murder, but guilty of attempted manslaughter.

Neb. Rev. Stat. § 28-201 (Reissue 1989) in pertinent part defines criminal attempt as follows:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> (a) *Intentionally* engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) *Intentionally* engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(Emphasis supplied.)

Neb. Rev. Stat. § 28-305 (Reissue 1989) defines manslaughter as follows: "(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another *unintentionally* while in the commission of an unlawful act. (2) Manslaughter is a Class III felony." (Emphasis supplied.)

As can be seen by its statutory definition, manslaughter has two branches: (1) causing the death of another upon a sudden

quarrel and (2) unintentionally causing the death of another while in the commission of an unlawful act. *State v. Anderson*, 1 Neb. App. 914, 511 N.W.2d 174 (1993). Since there is no evidence in the record of a sudden quarrel, the manslaughter offense involved in this case is unintentionally attempting to cause the death of another while in the commission of an unlawful act—in this case, robbery.

[2,3] The combination of the elements of the crime of criminal attempt with the elements of involuntary manslaughter creates a peculiar animal. The trial court instructed the jury that "[t]he elements of Attempted Manslaughter are: 1. That the defendant . . . engaged in conduct which constituted a substantial step to culminate in his commission of the crime of attempted manslaughter. 2. That he attempted to kill another without malice . . . unintentionally while in the commission of an unlawful act." A person cannot perform the same act intentionally and unintentionally at the same time. This instruction is a contradiction because a person cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime. Thus, attempted manslaughter does not and cannot exist under current Nebraska law.

[4] At trial, George did not object to the jury instruction on attempted manslaughter. The failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal unless there is plain error indicative of a probable miscarriage of justice. *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). However,

> an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Id. at 499, 513 N.W.2d at 530 (citing *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994)). Since "attempted involuntary manslaughter" does not exist as a crime in Nebraska, which we held above, convicting someone of such a nonexistent crime is clearly a miscarriage of justice and is plain error. Thus, George's

conviction under count II must be vacated.

USE OF A DEADLY WEAPON

George was charged in the information in count IV as follows: "[O]n or about March 28, 1993 [George] used a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit a felony offense, to-wit: used a knife to commit the felony offense of attempted 2nd degree murder." The jury found George guilty of count IV, but the verdict does not specify the underlying felony to which this offense attached.

[5] The jury found George innocent of attempted second degree murder. And "[a] defendant acquitted on the underlying felony charge cannot be convicted of an offense under [Neb. Rev. Stat. § 28-1011.21 (Cum. Supp. 1974)] involving that felony; but a defendant convicted of the underlying felony might still be acquitted on a charge under [§ 28-1011.21]." *State v. Saxon*, 193 Neb. 278, 280-81, 226 N.W.2d 765, 767 (1975). Section 28-1011.21 has been renumbered as Neb. Rev. Stat. § 28-1205 (Reissue 1989) and has been amended; however, the substantive portion of this statute as it relates to the holding in *Saxon* has not changed. Therefore, George cannot be found guilty of using a weapon to commit the felony offense of attempted second degree murder if he is found innocent of attempted second degree murder.

DOUBLE JEOPARDY

The State concedes the conviction under count IV must be reversed and requests that this court remand the cause for a retrial on both count II and count IV. Frequently, principles of double jeopardy do not prevent a retrial when a conviction has been set aside or a mistrial granted. See *State v. Levison*, 1 Neb. App. 1051, 510 N.W.2d 495 (1993). However, in the case at hand, we conclude the principles of double jeopardy prevent a retrial on the charge of attempted second degree murder and its dependent charge of use of a weapon to commit that felony.

[6] Both the U.S. Constitution and the Nebraska Constitution provide that no person shall be twice put in jeopardy for the same offense. U.S. Const. amend. V; Neb. Const. art. I, § 12; *State v. Hoffman*, 227 Neb. 131, 416

N.W.2d 231 (1987). The U.S. Supreme Court stated the following with respect to double jeopardy: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

[7] In the cases *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970), and *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), the U.S. Supreme Court held that when a retrial is granted for a defendant who has been tried for one crime but convicted of a lesser-included offense, the principles of double jeopardy restrict the new trial to the lesser charge on which he or she was originally convicted and prohibit a retrial on the original charge submitted to the jury on which the defendant was not found guilty.

In *Price*, the defendant was charged in state court with murder, but was convicted of voluntary manslaughter. The jury verdict made no reference to the charge of murder. The defendant obtained a new trial and was tried again for the original charge of murder. The defendant objected at the retrial to being subjected again to the original charge of murder, in violation of the double jeopardy provision in the Constitution, but the objection was overruled by the trial court. The second jury found the defendant guilty of voluntary manslaughter. The defendant appealed the second conviction based on the trial court's overruling his objection to being tried again on the charge of murder, in violation of the Double Jeopardy Clause of the U.S. Constitution. The Georgia Court of Appeals affirmed the second jury verdict based on the holding of the Georgia Supreme Court in *Brantley v. State*, 132 Ga. 573, 64 S.E. 676 (1909), *aff'd* 217 U.S. 284, 30 S. Ct. 514, 54 L. Ed. 768 (1910). The Georgia Supreme Court denied certiorari, and the defendant sought review by the U.S. Supreme Court, which granted the writ and reversed. In reversing, the U.S. Supreme Court stated the following:

Petitioner sought and obtained the reversal of his initial

> conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for that crime. However, the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense. Such a result flows inescapably from the Constitution's emphasis on a risk of conviction and the Constitution's explication in prior decisions of this Court.

Price, 398 U.S. at 326-27. The Court further stated:

> [T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge. There is no relevant factual distinction between this case and *Green* v. *United States*.

398 U.S. at 329.

In *Green*, the defendant was indicted in the District of Columbia for arson and first degree murder and was convicted of arson and second degree murder. The verdict was silent on the charge of first degree murder. The defendant obtained a retrial on the conviction of second degree murder and upon retrial was again tried on the original charge of first degree murder. At the retrial, he was convicted of first degree murder. This conviction was reversed by the U.S. Supreme Court based on a violation of the Double Jeopardy Clause in the Fifth Amendment to the U.S. Constitution. The basic premise of *Price* and *Green* is that a defendant cannot be retried for an offense a jury has found the defendant not guilty of, even if the defendant was convicted of a lesser crime.

Price and *Green* differ from the case at hand in that the defendants in *Price* and *Green* requested a retrial on the lesser-included offense, whereas, in this case, there is no lesser-included offense upon which George may be tried. However, we think it is even more evident that the Double Jeopardy Clause protects an accused from being placed on trial again for the same offense that the accused was found not guilty of in the previous trial when the defendant was wrongly convicted of a nonexisting crime. Thus, this court cannot

remand this cause for a retrial on the charge of attempted second degree murder or the use of a weapon to commit the underlying felony when the jury has already found George not guilty of attempted second degree murder. Furthermore, we cannot remand this cause for a retrial on the charge of attempted manslaughter because it does not statutorily exist. Therefore, we hereby reverse George's convictions under counts II and IV and vacate the sentences imposed for those convictions.

EXCESSIVE SENTENCES

[8] The court sentenced George to 16 2/3 to 50 years' imprisonment for the conviction under count I and 6 2/3 to 20 years' imprisonment for the conviction under count III. The sentences are to run consecutively, as provided by § 28-1205(3). George argues these sentences are excessive. A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion. That is, a sentence within the statutory limits will not be modified as excessive unless the trial court's reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993); *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992).

The manner in which George committed robbery was serious. His record is long. The court did not abuse its discretion. The convictions and sentences on counts I and III are affirmed, but the convictions and sentences on counts II and IV are reversed and vacated.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. CURTIS CRABTREE, APPELLANT. STATE OF NEBRASKA, APPELLEE, V. LORI L. HARWICK, APPELLANT. STATE OF NEBRASKA, APPELLEE, V. DEANNA L. HINKLEY, APPELLANT.

526 N.W.2d 688

Filed January 17, 1995. Nos. A-94-366, A-94-367, A-94-368.

1. **Motions to Suppress: Appeal and Error.** Findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Blood, Breath, and Urine Tests: Words and Phrases.** Under Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1992), "chemical test or tests" may refer to a test conducted with chemicals. However, the term also encompasses a test that determines the chemical composition of a person's blood, breath, or urine.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

David E. Veath for appellants.

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

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

In these separate but consolidated appeals, Curtis Crabtree, Lori L. Harwick, and Deanna L. Hinkley each appeal from their convictions for operating a motor vehicle while under the influence, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992). The issue on appeal is the same in each case. The defendants argue that the results of their breath tests should have been suppressed because the tests were administered with the Intoxilyzer Model 4011AS, which does not perform a "chemical test" as required by statute. For the reasons cited below, we affirm.

PROCEDURAL BACKGROUND

Each defendant in this case was arrested and failed a breath test administered using an Intoxilyzer Model 4011AS. Thereafter, each defendant was separately charged with driving

under the influence of alcoholic liquor, or when such person had a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of his or her breath, in violation of § 39-669.07. Each of the defendants filed a motion to suppress the breath test results on the grounds that the test results were obtained from breath tests not conducted pursuant to the statutory laws of Nebraska. A consolidated hearing on the motions to suppress was held on January 20, 1994. The only issue argued by the defendants on the motions to suppress was whether the breath tests using the Intoxilyzer Model 4011AS met the definition of a "chemical test" under Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1992). The district court overruled the motions to suppress, holding that "[c]learly, the law allows tests which are not 'chemical' in nature as set out in Section 39-669.08 R.R.S. 1943."

A bench trial for each defendant was held on April 13, 1994. At trial, the defendants stipulated to the following facts: Each defendant was lawfully arrested for driving under the influence of alcoholic liquor. As a result of each arrest, each defendant was directed to take a breath test pursuant to § 39-669.08. Each test was conducted by a properly certified agent of the Alliance Police Department in compliance with checklist procedures promulgated by the Department of Health. The testing machine used was the Intoxilyzer Model 4011AS. Defendant Crabtree's test result was .161 of a gram of alcohol per 210 liters of breath, defendant Hinkley's test result was .174, and defendant Harwick's test result was .149, all over the legal limit. Counsel for each defendant specifically objected to the breath test results on the grounds that use of the Intoxilyzer Model 4011AS was not in compliance with Nebraska statutory and case law and that the test results should have been suppressed. The defendants also reoffered all evidence introduced at the prior hearing on the motions to suppress. The district court overruled each defendant's renewal of his or her motion to suppress the test results and thereafter found each defendant guilty of driving while under the influence, in violation of § 39-669.07.

ASSIGNMENT OF ERROR

The defendants appeal, and their assignments of error can be consolidated to the following: The trial court erred in failing to suppress and exclude from evidence the breath test results of the Intoxilyzer Model 4011AS, since the test results of the Intoxilyzer were not from chemical tests.

STANDARD OF REVIEW

[1,2] Findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992). Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Roche, Inc.*, 246 Neb. 568, 520 N.W.2d 539 (1994).

ANALYSIS

The defendants' argument in this appeal centers on the assertion that the breath tests administered using the Intoxilyzer Model 4011AS were not chemical tests and thus were not tests allowed under Neb. Rev. Stat. § 39-669.11 (Cum. Supp. 1992). That statute provides that "[a]ny test made under section 39-669.08, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution . . . ." Section 39-669.08 provides in pertinent part:

> (1) Any person who operates . . . a motor vehicle in this state shall be deemed to have given his or her consent to submit to a *chemical test or tests* of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol . . . in such blood, *breath*, or urine.
>
> (2) Any law enforcement officer . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving . . . a motor vehicle while under the influence of alcoholic liquor . . . to submit to a *chemical test or tests* of his or her blood, *breath*, or urine for the purpose of determining the concentration of alcohol . . . in such blood, breath, or urine . . . .

(Emphasis supplied.)

The defendants argue that § 39-669.08 mandates that a chemical breath test for the purpose of determining alcohol concentration is the sole and exclusive breath test acceptable. The defendants also argue that any type of test of the breath other than a chemical test is not in compliance with the strict statutory mandate of chemical analysis. The defendants would have us hold that a chemical test is one in which transformation occurs, i.e., when by use of chemicals " 'one substance' " is changed " 'into a different substance.' " Brief for appellants at 18. A breath test obtained by the Intoxilyzer Model 4011AS is an optical physics test of infrared absorption where a light wave passes through the breath sample via mirror arrangements and the resulting light wave is collected on a detector. A signal from the detector is electronically processed, and the device displays a numerical result. The defendants argue that the Intoxilyzer Model 4011AS does not perform a chemical test and is not in compliance with Nebraska law.

This court has recently rejected a similar argument in *State v. Cash, ante* p. 319, 526 N.W.2d 447 (1995). In *Cash*, the defendant argued that the result of a gas chromatography test on her blood was not valid, as it was not a "chemical test" but, rather, was an electronic test. This court held that a "chemical test" under the statutes can be a test of a substance to determine its chemical composition, as well as a test using chemicals. This court concluded that gas chromatography is a test used to determine the body fluid levels of a certain chemical—alcohol—and therefore is a chemical test. See, also, *State v. Nichols*, 110 Idaho 823, 718 P.2d 1261 (Idaho App. 1986); *Gandara v. State*, 661 S.W.2d 749 (Tex. Crim. App. 1983).

[3] The purpose of the Intoxilyzer test is to measure an individual's blood alcohol content by measuring the extent to which an individual's breath is composed of alcohol vapor. The fact that the Intoxilyzer makes this measurement through the use of infrared light rather than chemical transformation is of no legal consequence. "Chemical test or tests" may refer to a test conducted with chemicals. However, the term also encompasses a test that determines chemical composition, specifically, the extent of alcohol vapor in a sample of the suspect's breath, by subjecting the molecules of the sample to

infrared light, which produces a predictable result that is then digitized and displayed. Thus, for purposes of § 39-669.08, the Intoxilyzer Model 4011AS performs a chemical test, and the motion to suppress was properly overruled.

CONCLUSION

There being no merit in the defendants' assignment of error, the judgments of conviction by the trial court are affirmed.

AFFIRMED.

JENNIFER LARSON, BY AND THROUGH HER FATHER AND NEXT FRIEND, DAVID LARSON, APPELLANT, V. HOMETOWN COMMUNICATIONS, INC., AND HOMETOWN OPERATIONS, INC., DOING BUSINESS AS THE FREMONT TRIBUNE, AND MARYLAND CASUALTY INSURANCE COMPANY, APPELLEES.

526 N.W.2d 691

Filed January 24, 1995. No. A-94-183.

1. **Workers' Compensation: Appeal and Error.** 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 do not support the award.
2. _____: _____. The Workers' Compensation Court review panel is bound to employ the same standard of review of the trial court's decisions as applied by the Supreme Court and the Court of Appeals.
3. **Employer and Employee: Independent Contractor.** In some situations, a newspaper carrier can be an independent contractor as a matter of law; in others, an employee as a matter of law; and in still others, the status of the newspaper carrier to the newspaper is a factual issue.
4. **Workers' Compensation: Independent Contractor.** Where a written contract between the claimant and alleged employer exists which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workers' compensation statutes.

5. **Employer and Employee: Independent Contractor: Appeal and Error.** The determination of status as an employee, on the one hand, or as an independent contractor, on the other, is a fact question for the trier of fact. The review is to see if sufficient competent evidence warrants the factfinder's conclusion. Such a conclusion will not be set aside unless clearly wrong.
6. **Workers' Compensation: Employer and Employee.** A person working as a substitute for another may be an employee under the Workers' Compensation Act, at least where the employer knows of, and acquiesces in, the substitution, and if an employer expressly or impliedly assents to an employee's hiring an assistant or substitute, the assistant occupies the position of an employee of the employer.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

Robert T. Cannella, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., and Stephen L. Gerdes for appellant.

Joseph W. Grant, of Gaines, Mullen, Pansing & Hogan, and Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

Kenneth C. Stephan, of Knudsen, Berkheimer, Richardson & Endacott, and L. Michael Zinser, of Zinser and Domina, for amici curiae Nebraska Press Association and Nebraska Daily Press Association.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

Jennifer Larson, a 12-year-old girl, was struck by an automobile while she was delivering daily newspapers for Hometown Communications, Inc., the publisher of the Fremont Tribune. As a result of the accident, Jennifer is in a persistent vegetative state. Through her father and next friend, David Larson, Jennifer filed an action to recover workers' compensation benefits. At the initial hearing before a single judge of the Workers' Compensation Court, the only issue tried was whether Jennifer was an employee or an independent contractor of the Fremont Tribune when she delivered the papers. The trial judge analyzed the evidence in a lengthy opinion and concluded that the control exercised by the Fremont Tribune over its newspaper carriers was sufficient to make Jennifer an employee. The review panel reversed the

order of the trial judge, and Jennifer appeals to this court. We conclude that there is sufficient evidence to support the trial judge's finding. Accordingly, we reverse the judgment of the review panel and order the trial judge's award to be reinstated.

STATEMENT OF FACTS

The Fremont Tribune newspaper is published 6 days a week, Monday through Saturday. In February 1991, its circulation was 11,810 newspapers with 9,688 home subscribers. Sixty-four percent of the home subscribers had their paper delivered by a carrier on foot or bicycle. The evidence shows that between 25 and 52 percent of subscribers paid in advance to the Fremont Tribune, rather than paying the carrier, who collected from house to house once a month.

The newspaper route Jennifer was working on February 22, 1991, was nominally Valerie Brauner's route. However, as will be explained, the girls had divided the route with the blessing of the Fremont Tribune.

On July 20, 1989, Valerie executed an agreement with the Fremont Tribune to deliver papers along the route in Cedar Bluffs, Nebraska. The agreement was entitled "Independent Carrier Agreement" and stated:

> The Company agrees to sell, and the Carrier agrees to purchase sufficient quantities of newspapers to cover the delivery schedule, together with such additional quantities of newspapers as the Carrier may require in conducting his independent business of selling and delivering the Company's newspapers.
>
> . . . .
>
> . . . It is understood that the carrier is free to engage in other business activities, but he agrees that the Company's newspapers will be delivered in a timely manner in accordance with said delivery schedule.

The Fremont Tribune furnished Valerie with a "Carrier Hand Book," a subscription receipt card to keep track of collections from customers, a collection calendar which set forth the days when collections must be made by carriers and the date upon which a carrier's balance for newspapers must be paid to the Fremont Tribune, and a "Vacation Handbook for Your

Substitute."

The Carrier Hand Book states that "you are not an employee of the Tribune but an Independent Contract Merchant." The handbook states duties and requirements the carrier must follow. For example, the handbook states that "[t]he Fremont Tribune guarantees its customers home delivery of their paper before 5 p.m. . . . Papers should be delivered before 5 p.m. daily and before 7 a.m. on Saturdays and Holidays." In addition, the handbook states that the carriers are required to deliver "Shoppers" to all nonsubscribers along their route on Tuesdays, for which the carriers are paid on a per-piece basis. In addition, the carriers were told that it was possible that on certain days the carriers would receive inserts and that "[t]hese need to be put inside your papers before you deliver them." The handbook states that a carrier must "[n]ever let papers pile up!!! If you notice papers piling up for more than 3 days, call in a stop." Finally, the handbook states:

> Going on vacation and can't do your route? Find a substitute to do it for you.
>
> The paper route is your business, if you can't be there to take care of it find a friend to take care of it while you are gone.
>
> Call the office with the substitute's name, address and phone number so we know who is in charge while you are gone.

The Vacation Handbook for Your Substitute states:

> Any time while you're on vacation it is very important that a well trained substitute properly manages your route. This booklet is designed to provide your substitute with basic information about managing a Tribune Newspaper Route while you're vacationing. Review the entire booklet with your substitute step by step[.]

Valerie testified at trial that because she had difficulty completing the route on Tuesdays and Wednesdays because of personal obligations, and because she was tired of managing the entire route by herself, she asked Jennifer to split the route with her. Valerie and Jennifer, along with their mothers, agreed that Jennifer and Valerie each would deliver half the route on Tuesdays and Wednesdays, and then each would deliver the

entire route every other week on Mondays, Thursdays, Fridays, and Saturdays. Valerie agreed to handle collecting the cost of subscriptions from all the customers, in exchange for which she would be entitled to the $10 per month the Fremont Tribune automatically billed her and placed in a bank account. The $10 per month was retained by the Fremont Tribune as a deposit to cover any indebtedness carriers may incur, and the balance in the bank account was returned to the carriers when they surrendered their route to the Fremont Tribune. Valerie's mother wrote to the Fremont Tribune in August 1990, notifying the paper that Jennifer and Valerie would be sharing the route. In addition, a flier was given to each subscriber on Valerie's route, informing them that Jennifer and Valerie would be responsible for splitting the route.

Kathy Brown, the district sales manager for the Fremont Tribune's out-of-town routes, testified that as part of her duties she was required to supervise over 70 carriers. Brown had the power to reconfigure the routes and add and subtract subscribers. If there was a route for which the Fremont Tribune did not have a carrier, it was Brown's duty to deliver the papers on that route herself. In addition, if a customer received a paper which was wet, the customer was provided with a replacement paper, for which the responsible carrier was not charged.

Brown testified that carriers were told what to charge the subscribers and what the Fremont Tribune would charge the carriers for the newspapers. When the carriers collected the subscription price, they were told by the paper to tell the subscriber "you are from the Fremont Tribune." If a customer refused to pay the carrier, Brown would call the customer to find out if there was a problem. If Brown determined that the customer had refused to pay without cause, she instructed the carrier to stop delivering the paper. Brown did not allow the carriers to bring in their payments, after collecting the subscription price from the customers, at any other time than that determined by the Fremont Tribune.

Carriers received a monthly statement, which had columns for charges, credits, and the balance. In the charges column were charges for such items as the newspapers delivered, rubberbands, and the deposit of $10. In the credit column were

credits for customers who paid the Fremont Tribune directly for their subscriptions, credits for papers delivered to Fremont Tribune employees, and payment for delivery of the "Shoppers." Every month after collection time, carriers were required to remit to the Fremont Tribune the balance which appeared on the monthly statement, which was the charge for the newspapers and other items less the credits each carrier received.

Through her father and next friend, Jennifer filed a petition for workers' compensation benefits from the Fremont Tribune. The trial court found that Jennifer was an employee, and not an independent contractor, of the Fremont Tribune and awarded Jennifer workers' compensation benefits and medical costs. The Fremont Tribune appealed to the review panel of the Workers' Compensation Court, which reversed the trial court's order, finding that as a matter of law, Jennifer was an independent contractor of the Fremont Tribune. Jennifer appeals the review panel's order.

ASSIGNMENTS OF ERROR

Jennifer alleges that the review panel erred by (1) exceeding its powers when it reversed the trial court's factual finding that she was an employee of the Fremont Tribune, (2) rendering a decision not supported by competent evidence when it found she was bound by the Independent Carrier Agreement executed between Valerie and the Fremont Tribune, (3) exceeding its powers in making a factual finding that Valerie and Jennifer were engaged in a joint venture and that there was no contract of employment between them, and (4) dismissing Jennifer's claim that the Fremont Tribune was her statutory employer.

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 do not support the award. *Pearson v. Lincoln Telephone Co.*, 2 Neb.

App. 703, 513 N.W.2d 361 (1994).

[2] The Workers' Compensation Court review panel is bound to employ the same standard of review of the trial court's decisions as applied by the Supreme Court and the Court of Appeals. *Id.* The review panel should not substitute its view of the facts for that of the trial court, and thus, if there is competent evidence in the record before the trial court to support its decision, then the review panel should affirm the decision, award, or order of the court. *Id.*

> Consequently, the review panel cannot go beyond its statutory mandate for review, which is limited to reversing or modifying "only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law." § 48-179. If the review panel goes beyond this standard, then it has "acted without or in excess of its powers," one of the four grounds for reversal by this court found in § 48-185 (Cum. Supp. 1992).

Pearson, 2 Neb. App. at 712, 513 N.W.2d at 367.

ANALYSIS

Our review is to determine whether the trial court's decision is clearly wrong or contrary to law. The review panel reversed the trial court's decision, finding, as a matter of law, that Valerie was an independent contractor, and therefore, by implication, so was Jennifer. Our review of the pertinent law suggests that we must use a two-step analysis to determine whether the trial court's decision was clearly wrong or contrary to law. First, we must determine whether Valerie was an independent contractor as a matter of law, and second, if she was not an independent contractor as a matter of law, whether there is evidence in the record to support the trial court's decision that Valerie was an employee of the Fremont Tribune, and therefore, by implication, so was Jennifer. A third question is Jennifer's status as a substitute carrier, and not a regular carrier. Regardless of Valerie's status, Jennifer may be an employee of Valerie, but not of the Fremont Tribune. Because we conclude Valerie was an employee of the Fremont Tribune, Jennifer's status as a substitute presents an additional question in determining Jennifer's relationship with the Fremont Tribune.

Was Valerie an Independent Contractor as a Matter of Law?

In its brief, the Fremont Tribune relies heavily on *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979), and *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991), wherein the Supreme Court held as a matter of law that truckers driving their own leased-out trucks were not employees. These cases are workers' compensation cases involving over-the-road truckers who had leased their trucks to a trucking company under a formal written lease. As will be discussed later, although we conclude these cases provide the approach this court should follow in considering the issues in this case, they are so factually dissimilar to the case at hand that they are not an aid in analyzing the evidence.

The Fremont Tribune also relies on *LaFleur v. LaFleur*, 452 N.W.2d 406 (Iowa 1990), and *Taylor v. Industrial Acc. Com.*, 216 Cal. App. 2d 466, 30 Cal. Rptr. 877 (1963), cases in which the courts have held that a newspaper carrier was an independent contractor as a matter of law. See, also, *Hartford A. & I. Co. v. Indus. Acc. Com.*, 123 Cal. App. 151, 10 P.2d 1035 (1932); *Cable v. Perkins*, 121 Ill. App. 3d 127, 459 N.E.2d 275 (1984); *Lewiston Daily Sun v. Hanover Ins. Co.*, 407 A.2d 288 (Maine 1979).

In *Ross v. Post Publishing Co.*, 129 Conn. 564, 29 A.2d 768 (1943), a Connecticut court held a newspaper carrier was an independent contractor, but in *Scorpion v. American-Republican, Inc.*, 131 Conn. 42, 37 A.2d 802 (1944), the question of whether a newspaper carrier was an employee or an independent contractor was held to be a question of fact for the jury, notwithstanding a written agreement maintained by the publishing company establishing the relationship as a matter of law. In *Taylor, supra*, and *Fleming v. Foothill-Montrose Ledger*, 71 Cal. App. 3d 681, 139 Cal. Rptr. 579 (1977), the California courts held a newspaper carrier was an independent contractor as a matter of law. However, in *Cal. Emp. Com. v. L. A. etc. News Corp.*, 24 Cal. 2d 421, 150 P.2d 186 (1944), the California Supreme Court held there was substantial evidence to support the trial court's finding that certain newspaper carriers were employees. The court in *California Employment Com. v. Bates*, 24 Cal. 2d 432, 150 P.2d 192 (1944), held that

certain newspaper carriers were employees as a matter of law. From an examination of these cases, we conclude they each turn on their own facts.

[3] The results of these cases vary, but the common thread in all of them is that the appellate court used the same basic "control test" to determine the status of a newspaper carrier which the Nebraska Supreme Court has applied to every case it has considered in determining the true status of an alleged employee. The different results come from the different facts in the cases. From our review of the case law from other jurisdictions, we conclude that in some situations, a newspaper carrier can be an independent contractor as a matter of law; in others, an employee as a matter of law; and in still others, the status of the newspaper carrier to the newspaper is a factual issue. The result in each case is dictated by the amount of control the newspaper maintains over the carrier.

[4] In this case, the Fremont Tribune and Valerie entered into a written contract. The Supreme Court has held:

> " '[W]here a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes.' "

Anthony v. Pre-Fab Transit Co., 239 Neb. 404, 408, 476 N.W.2d 559, 562 (1991) (quoting *Knowlton v. Airport Transportation Co.*, 235 Neb. 96, 454 N.W.2d 278 (1990)). Accord *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979).

In *Anthony*, *Knowlton*, and *Stephens*, the Supreme Court found the relationship was that of an independent contractor as a matter of law, because in each case it found that there was a written contract which denominated the claimant's relationship to the alleged employer as one of an independent contractor and because in each case the court found that nothing in the manner of performance was inconsistent with the written terms

of the agreement.

In the case at hand, Valerie had executed an agreement on July 20, 1989, with the Fremont Tribune to deliver papers along the route in Cedar Bluffs. The agreement was entitled "Independent Carrier Agreement" and stated:

> The Company agrees to sell, and the Carrier agrees to purchase sufficient quantities of newspapers to cover the delivery schedule, together with such additional quantities of newspapers as the Carrier may require in conducting his independent business of selling and delivering the Company's newspapers.
>
> . . . .
>
> . . . It is understood that the carrier is free to engage in other business activities, but he agrees that the Company's newspapers will be delivered in a timely manner in accordance with said delivery schedule.

The Fremont Tribune furnished Valerie with a Carrier Hand Book, a subscription receipt card to keep track of collections from customers, and a collection calendar which set forth the days when collections must be made by carriers and the date upon which a carrier's balance for newspapers must be paid to the Fremont Tribune.

The Carrier Hand Book states that "you are not an employee of the Tribune but an Independent Contract Merchant." Notwithstanding that phrase, the tone of the handbook is directory. The handbook states duties and requirements the carrier must follow. For example, the handbook states, "The Fremont Tribune guarantees its customers home delivery of their paper before 5 p.m. . . . Papers should be delivered before 5 p.m. daily and before 7 a.m. on Saturdays and Holidays." It states, "Don't rush through your route and take the chance of missing someone, . . . and deliver your route alone." In addition, the handbook states that the carrier is required to deliver "Shoppers" to all nonsubscribers along their route on Tuesdays, for which the carriers are paid on a per-piece basis. In addition, the carriers were told that it was possible that on certain days, the carriers would receive inserts, and that "[t]hese need to be put inside your papers before you deliver them." The handbook states that a carrier must "[n]ever let

papers pile up!!! If you notice papers piling up for more than 3 days, call in a stop."

The handbook also gives some "Suggestions for Collecting," but on the next page it states, "You may start collecting at the beginning of each pay period. In your collection book you will find a collection calendar, showing when you should collect and pay your bills. Always collect at the proper time." This handbook also states: "Every carrier must add to a savings account when they begin their route. Once the total balance of savings has been reached, you may discontinue this savings."

Finally, the handbook states, "Going on vacation and can't do your route? Find a substitute to do it for you. . . . Call the office with the substitute's name, address and phone number so we know who is in charge while you are gone." The Fremont Tribune also supplies its carriers with a Vacation Handbook for Your Substitute.

On July 20, 1989, Valerie and her mother also signed a "Carrier Deposit Agreement" in which Valerie agreed to deposit $10 per month "for indefinite months, or until the total deposit has been paid." There is no place in this document for a signature by anyone representing the Fremont Tribune.

In *Employers Ins. of Wausau v. Greater Omaha Trans. Co.*, 208 Neb. 276, 303 N.W.2d 282 (1981), the transit company and the cabdriver had an agreement which provided the driver was an independent contractor, but there was also an operations manual which provided instructions about procedures drivers were required to use and memoranda to drivers. The court upheld the compensation court's finding that the cab company exercised control over its drivers. Several practices of the Fremont Tribune are inconsistent with the relationship supposedly established by the Independent Carrier Agreement. Several statements contained in the handbook clearly give the carriers direction on the details they were to follow in delivering the Fremont Tribune's newspapers. These statements would support a finding that the Fremont Tribune kept control of all significant aspects of delivery. The carrier deposit, required by the handbook but not by the Independent Carrier Agreement, illustrates the degree of control the Fremont Tribune had as a matter of fact, and a degree of control generally inconsistent

with an independent contractor relationship. There are numerous other matters by which the Fremont Tribune exercised authority inconsistent with the agreement, but these items are considered in the next section, where we consider whether the evidence supports the trial judge's findings. We will not discuss these items at this time, but we do determine that Valerie was not an independent contractor as a matter of law. We do not, however, determine that Valerie was an employee as a matter of law.

Sufficiency of the Evidence.

[5] The Nebraska Supreme Court has held that there is no single test to determine whether a worker is an employee or an independent contractor, but the determination must be made from all the facts in the case. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991).

> The determination of status as an employee, on the one hand, or as independent contractor, on the other, is a fact question for the trier of fact. The review is to see if sufficient competent evidence warrants the factfinder's conclusion. Such a conclusion will not be set aside unless clearly wrong.

Employers Ins. of Wausau, 208 Neb. at 278, 303 N.W.2d at 283. The question before the trial court was whether all the evidence regarding the relationship between Jennifer and the Fremont Tribune indicated Jennifer was an employee or an independent contractor. Upon review, we must view the evidence in a light most favorable to Jennifer, as the review panel should have done. *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992); *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

In *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984), the Nebraska Supreme Court set forth a number of factors to be used to consider whether a worker is an independent contractor or an employee. The first of these factors is the control of the alleged employer over the alleged employee. The court stated:

> "Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an

> independent contractor." . . . "However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms."

Id. at 804, 359 N.W.2d at 762.

When the evidence is viewed in a light most favorable to Jennifer, the record supports the trial court's finding that the Fremont Tribune exercised control "in every important respect" over the carriers. The trial court noted that the carrier handbook provided carriers with detailed instructions which they were expected to follow. In addition, the Fremont Tribune fixed the price which the carriers were to charge the subscribers for delivered newspapers. The Fremont Tribune also dictated when the carriers were to collect the payments from the subscribers, and carriers were forbidden to collect at any other time. We find there was sufficient evidence to support the trial court's finding that the Fremont Tribune exercised control over its carriers.

The second factor is whether the person employed is engaged in a distinct occupation or business, that is, whether the person offers a similar service for other businesses or persons. *Eden, supra.* The trial court found that the Fremont Tribune was the only paper delivered by Jennifer and that the Fremont Tribune's publisher admitted that the carriers are an integral part of the Fremont Tribune's system of delivering its newspapers to its subscribers. The trial court found that Jennifer and other carriers were not employed in a distinct occupation, but were employed to further the newspaper's business. Viewing the evidence in the light most favorable to Jennifer, we find there is sufficient evidence to support the trial court's finding.

The third factor to be determined is the level of supervision given to the worker. *Eden, supra.* When viewed in favor of Jennifer, the evidence shows there was supervision of the carrier's work. If the carrier did not perform the way a Fremont Tribune customer desired, the subscriber was instructed by advertisements in the newspaper to contact the Fremont Tribune. The district sales manager for out-of-town routes, who admitted her job duties included "supervising over 70

paper carriers," testified at trial that it fell to her to pass on complaints to the carriers and to work out problems customers were having with the carriers. There was sufficient evidence to support the trial court's finding that the Fremont Tribune supervised the carriers.

The fourth factor is the skill required to perform the work. *Eden, supra.* The less skill required, the greater the indication that the work is done by an employee rather than specially skilled independent workers. See *Employers Ins. of Wausau v. Greater Omaha Trans. Co.*, 208 Neb. 276, 303 N.W.2d 282 (1981). The trial court found that little skill is needed to be a carrier, stating that the Fremont Tribune's advertisement for carriers, which reads "HEY KIDS! . . . If you're 10 years or older . . . WE NEED YOU," is "a complete exposition of this factor." There is sufficient evidence in the record to support the trial court's finding.

Fifth, " 'That the worker supplies his own materials and tools may be indicative of contractor status.' " *Eden*, 218 Neb. at 805, 359 N.W.2d at 762 (quoting *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976)). The trial court found that the Fremont Tribune supplied the workplace, by assigning and configuring the paper routes. In addition, the trial court found that the Fremont Tribune supplied the product, including the newspapers, inserts, and "Shoppers," which were required to be delivered to nonsubscribers and which the newspaper, rather than the nonsubscriber, paid the carriers to deliver. The trial court found that the Fremont Tribune also gave the carriers, at no cost, collection calendars, collection cards with tear-off subscriber receipt forms, collection books, introduction pads the carriers used to introduce themselves to potential new subscribers, " 'vacation handbooks' " for substitute carriers, " 'vacation time' " forms the carriers used to notify subscribers that their carrier was going on vacation, and " 'free sample' " newspapers to use to solicit new subscriptions. There is sufficient evidence in the record to support the trial court's finding that the Fremont Tribune supplied substantial " 'instrumentalities' " to its carriers to assist the carriers in performing their jobs.

Sixth, the length of time which a person is employed is

another factor of the test. *Eden, supra*. The trial court found that Jennifer rendered continuous, albeit part-time, service, which indicated an employment relationship and not an independent contractor relationship. The court noted that while the Independent Carrier Agreement stated that the contract could be terminated by either party upon 24 days' notice, in practice, the Fremont Tribune terminated carriers without the specified notice. There is sufficient evidence to support the trial court's findings.

The seventh criterion deals with the method of payment. " 'Normally an employee is compensated while he works. An independent contractor's compensation, on the other hand, usually depends upon whether he makes a profit from the contract.' " *Eden*, 218 Neb. at 806, 359 N.W.2d at 763 (quoting *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979)). The record shows that the Fremont Tribune set the price the carriers could charge and set the price at which the carriers were "charged" for the papers delivered to the subscribers. The trial court found that Jennifer was paid on a piece rate, "measured by the difference between the prices of each paper delivered, and by the piece rates paid for delivering the Shoppers" to nonsubscribers. "[P]ayment of wages on a piece or quantity basis is not inconsistent with the status of an employee." *Riggins v. Lincoln Tent & Awning Co.*, 143 Neb. 893, 896, 11 N.W.2d 810, 812 (1943). There is sufficient evidence in the record to support the trial court's findings.

Eighth, whether or not the work performed is part of the regular business of the employer is another factor to be considered. *Eden, supra*. The record shows that 82 percent of the Fremont Tribune's circulation was received by its customers through home delivery. Of those papers which were home delivered, the record shows that 64 percent were delivered by carriers on foot or bicycle. The trial court found that in light of these facts, "It can scarcely be contended that delivery of its newspapers is not 'a part of the regular business of' the Tribune." Viewing the evidence in the light most favorable to Jennifer, we find there is competent evidence to support the trial court's conclusion.

Ninth, the court held in *Eden* that "we have repeatedly said

that the failure to withhold taxes indicates that an independent contract exists." 218 Neb. at 806, 359 N.W.2d at 763. "The deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication." *Stephens*, 205 Neb. at 20, 286 N.W.2d at 425. The evidence shows that the Fremont Tribune did not withhold income and Social Security taxes from the carriers' earnings. However, since federal law exempts the normal withholding of income and Social Security taxes from earnings of a newspaper carrier under the age of 18 years, this fact is not significant to this case. See I.R.C. §§ 3401(a)(10) and 3121(b)(14) (1988). State law adopts that exemption. See Neb. Rev. Stat. § 77-2753 (Cum. Supp. 1994). The factor does not have its usual significance.

Finally, the tenth factor to consider is whether the parties believed they were creating a master-servant relationship. *Eden, supra*. The trial court found:

> This is the weakest of the indicia. The carrier, Valerie Brauner, believed the carrier was an employee while the publisher . . . believed the carrier to be an independent contractor. It is beyond sophistry and closer to outright dishonesty to characterize a 10-year-old party to a contract as a "little merchant" and thus an independent contractor. The concept of "little merchant" is often accompanied by notions of self-reliance, independence, responsibility and perseverance. These admirable qualities can be inculcated to an employee as well as to an independent contractor.

In view of the factors set forth in *Eden*, we find that there was sufficient evidence in the record to support the trial court's finding that Jennifer was an employee of the Fremont Tribune for purposes of the Workers' Compensation Act.

Substitute Employee.

Jennifer did not deal directly with the Fremont Tribune, but, rather, agreed with Valerie to divide the route which Valerie agreed with the Fremont Tribune to deliver. We shall first consider the significance of this relationship.

The trial court found that Jennifer was a substitute employee

of Valerie who became an employee under the Workers' Compensation Act because the Fremont Tribune knew of and acquiesced in the hiring of Jennifer as a substitute. The trial court found that the Fremont Tribune had actual knowledge that Jennifer was assisting Valerie on a regular basis with Valerie's paper route. In addition, the trial court found that the Fremont Tribune directs its carriers to obtain substitutes when needed.

Our review of the record reveals that it is not devoid of any evidence of a contract of hire or contract of employment. The Fremont Tribune encouraged its carriers to engage substitutes to help with their routes and provided brochures to the carriers to use when training substitutes. Further, in her letter to the subscribers, Valerie informed them that Jennifer would share in the delivery of the papers, but that to have the paper held or stopped, the subscriber must call Valerie, "as this is still my responsibility."

Viewing the evidence in a light most favorable to Jennifer, we cannot say that the trial court was clearly wrong when it found Jennifer was a substitute employee.

[6] Thus, the question before us is whether Jennifer, as a substitute employee or subemployee of Valerie, is covered under the Workers' Compensation Act. The Supreme Court recognized in *Anderson v. Bituminous Casualty Co.*, 155 Neb. 590, 52 N.W.2d 814 (1952), that a person whose services were secured by a county sheriff was a county employee for purposes of the Workers' Compensation Act. The person engaged by the county sheriff had been asked by the sheriff to participate in a search for an escaped prisoner. The *Anderson* court noted that county sheriffs were authorized by statute to " 'call any person to their aid; and, when necessary, the sheriff may summon the power of the county.' " *Id.* at 595, 52 N.W.2d at 818. It is recognized that "[a] person working as a substitute for another may be an employee under a workmen's compensation act, at least where the employer knows of, and acquiesces in, the substitution . . . ." 99 C.J.S. *Workmen's Compensation* § 74 at 298 (1958). See, also, *Veit v. Courier Post Newspaper*, 154 N.J. Super. 572, 382 A.2d 62 (1977) (newspaper clothed newspaper carrier/employee with the authority to engage a substitute;

substitute therefore covered under workers' compensation act); *Bobik v. Indus. Comm.*, 146 Ohio St. 187, 64 N.E.2d 829 (1946) (if a master expressly or impliedly assents to an employee's hiring an assistant or substitute, assistant occupies the position of an employee of the master). The principle underlying these cases "is not so much one of compensation law as of the familiar agency doctrine of implied authority." 1B Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 48.17 at 8-478 (1994). Therefore, since Valerie was an employee of the Fremont Tribune, Jennifer, as a substitute employee of Valerie, is covered under the Workers' Compensation Act to the same extent as Valerie would have been had she been doing the work.

CONCLUSION

Viewing the evidence in a light most favorable to Jennifer, we find that there is competent evidence to support the trial court's finding that Jennifer was a substitute employee or subemployee of Valerie and that Jennifer was an employee, not an independent contractor, of the Fremont Tribune. We therefore must reverse the review panel's order, as its decision exceeded the scope of its review, and reinstate the award of the trial judge.

REVERSED.

LARRY DOUGLAS GARRETT, APPELLANT, V. JEANNE LEA GARRETT, APPELLEE.

527 N.W.2d 213

Filed January 31, 1995. No. A-94-237.

1. **Divorce: Appeal and Error.** In an action for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Child Custody: Appeal and Error.** The ultimate test in determining the appropriateness of an award of custody of minor children is reasonableness, as determined by the facts of each case, and the trial court's determination will be affirmed in the absence of an abuse of discretion.

3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
4. **Child Custody.** Neb. Rev. Stat. § 42-364 (Reissue 1993) sets forth the statutory basis for judicial determination of child custody.
5. _____. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 1993), the court may consider factors such as general considerations of the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between the child and the parents; the age, sex, and health of the child and the parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference for custody is based in sound reason; and the general health, welfare, and social behavior of the child.
6. **Divorce: Appeal and Error.** An appellate court is required to conduct a de novo review of dissolution cases and, when the evidence is in conflict, may consider, 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.
7. **Divorce: Child Custody.** In order for one parent's religion to constitute a ground for awarding custody of the couple's minor children to the other parent in a dissolution proceeding, a court must be able to determine from the record that the parent's religion as practiced by that parent constitutes an immediate and substantial threat to the minor children's temporal well-being.
8. **Constitutional Law: Courts.** The U.S. Constitution prohibits any court from evaluating the merits of religious doctrine or defining the contents of that doctrine.
9. **Divorce: Child Custody.** In examining the effect of a parent's religious practices on minor children for the purpose of determining custody in a dissolution proceeding, a court needs to separate the value judgments implicit in the so-called norm from any actual harm caused by these practices. A court must base its decision that a particular religious practice will harm the mental health of a child on more than the fact that the child will not participate in certain social activities.
10. _____: _____. In examining the effect of a parent's religious practices on minor children for the purpose of determining custody in a dissolution proceeding, a court cannot make its decision based on some hypothetical future accident or illness which might necessitate certain treatment.
11. **Constitutional Law: Child Custody.** Where one parent seeks custody of the couple's minor children, but fails to present sufficient evidence to convince the court that the other parent's religious practices pose an immediate and substantial threat to the minor children's temporal well-being, the court is

constitutionally prohibited from probing into the substance of the other parent's religious beliefs and interpreting them for itself.

12. **Trial.** A trial judge has broad discretion over the conduct of a trial.
13. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
14. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
15. **Judges: Recusal: Appeal and Error.** Where a case on appeal is tried de novo, refusal by the trial judge to disqualify himself or herself is immaterial.

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

John S. Mingus, of Mingus & Mingus, for appellant.

Steven R. Voigt, of Butler, Voigt & Brewster, P.C., for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Larry Douglas Garrett appeals the divorce decree issued by the Buffalo County District Court, wherein custody of his four minor children was awarded to his wife, Jeanne Lea Garrett. Upon our de novo review, we conclude that the district court did not abuse its discretion in awarding custody of the minor children to Jeanne, and therefore, we affirm.

I. FACTUAL BACKGROUND

Larry and Jeanne Garrett were married on January 29, 1982, in Hot Springs, South Dakota. At the time of trial, Larry was 45 or 46 years of age and Jeanne was 33 years of age. The couple had four children, whose ages at the time of trial were as follows: Laren, 10 years; Lindy, 8 years; Laurel Lea, 6 years; and Larry, Jr., 20 months.

1. PROCEDURAL HISTORY

On March 23, 1993, Larry filed a petition for divorce, requesting custody of the couple's minor children. Contemporaneous with the petition for divorce, Larry filed an affidavit and a request for an ex parte order granting him temporary custody of the children. Additionally, Larry filed a motion requesting that the court appoint a child custody officer to meet with the parties to discuss custody and visitation issues.

On March 25, the district court issued an order appointing Alana Anderson as child custody officer and directing Anderson to evaluate, mediate, and report to the court her findings. A hearing was held regarding the temporary custody order on April 1, whereupon the court took legal custody of the children and placed them in the physical custody of Larry.

On July 7, 1993, the court on its own motion requested an additional hearing regarding the temporary custody and temporary visitation issues. The court informed the parties that it had received a report from Dr. John Meidlinger, a certified clinical psychologist appointed by the court to conduct an independent evaluation and prepare recommendations for custody in the Garretts' case. After hearing arguments from both sides, the court ordered that the children should remain in the custody of the court, but that, consistent with Dr. Meidlinger's report, it would be in the best interests of the children to place them in temporary foster care, with visitation granted to each parent. The children were subsequently placed in the physical custody of the Schroll family.

On October 4, 1993, Jeanne filed a motion for temporary placement, requesting that the four minor children be removed from foster care and temporarily placed in Jeanne's physical custody. A hearing was held on Jeanne's motion on October 15. The district court received into evidence a new report from Dr. Meidlinger which indicated that foster care was no longer in the best interests of the children. On October 26, the district court issued an order wherein the court maintained custody over the children. However, temporary physical custody of the children was awarded to Jeanne, with weekend visitation rights granted to Larry. Larry was also ordered to pay child support.

A trial was held in the district court on all issues on December 9 and 10, 1993. On December 20, the district court issued an order dissolving the Garretts' marriage, dividing the property between the parties, awarding custody of the four minor children to Jeanne, and requiring Larry to pay $420 toward Jeanne's attorney fees. Additionally, Larry was granted certain visitation rights with the children and ordered to pay $423 per month in child support.

Larry filed a motion for new trial on December 30, 1993. A

hearing was held on that motion on January 31, 1994, and the motion was denied. The record indicates that Larry had filed a second motion for new trial on different grounds prior to the hearing on the first motion for new trial. At the hearing on the first motion for new trial, the district court refused to hear argument on the second motion for new trial, instructing Larry that he had to obtain a specific date and time for a hearing on those issues. The record does not indicate that a hearing on the second motion for new trial ever took place.

2. Evidence Adduced at Trial

The main issue in question at the trial on December 9 and 10, 1993, was custody of the children. Two psychologists, Dr. A. James Fix and Dr. Meidlinger, had examined Larry, Jeanne, and the four minor children and were called as expert witnesses to testify as to each parent's qualifications for obtaining custody.

As noted previously, Dr. Meidlinger was the expert appointed by the court to examine each parent for a determination of fitness for custody. Dr. Meidlinger described Jeanne as having "significant problems," including the fact that she suffered from what appears to be chronic depression. He noted that she came from a dysfunctional family and tended to be angry, tense, bitter, rigid, and resentful. Dr. Meidlinger also stated that Jeanne tended to be rather distant and emotionless in her presentation.

However, Dr. Meidlinger testified that Jeanne had made vast improvement since he first visited with her. He reported that Jeanne had consulted her physician and was currently taking antidepressant medication, as well as continuing her outpatient counseling. Additionally, Dr. Meidlinger was impressed that Jeanne returned to him voluntarily to seek further help and that they had discussed continuing counseling in the future. Dr. Meidlinger testified that Jeanne's energy level was increasing, that she was experiencing fewer symptoms of depression, and that she was more prepared to take on the responsibility of caring for her children.

Dr. Meidlinger testified that his first impression of Larry was that Larry was friendly, outgoing, and charming. However, the

tests that Larry took indicated that he was trying to present himself in the best possible light, rather than being open and honest. Dr. Meidlinger reported that further counseling sessions revealed that Larry was attempting to polarize the children by talking about the divorce when he visited with them and repeatedly saying bad things about Jeanne. Dr. Meidlinger testified that because of this polarization, the children were not capable of making a mature, responsible choice regarding which parent they would rather live with. However, Dr. Meidlinger did note that the children generally stated that they preferred to live with their mother. Dr. Meidlinger determined that it would be in the best interests of the children to have custody granted to Jeanne.

After Dr. Meidlinger issued his report, Larry sought a second opinion from Dr. Fix, who testified at trial during Larry's case in chief. Dr. Fix tested and interviewed Larry, Jeanne, and the four minor children. He determined that Jeanne suffered from chronic depression, which Dr. Fix classified as a "psychiatric disorder." He thought that Jeanne might be subject to flareups of depression symptoms. According to Dr. Fix, two of the children told him that they preferred to live with Larry. Dr. Fix determined that though neither Larry nor Jeanne was unfit, Larry would be in a better position to be a parent.

In addition to Dr. Fix, Larry called a number of witnesses to testify about the effect of Jeanne's religion on the children. Jeanne is a member of the Jehovah's Witnesses. The record reflects that the children are also being raised in that faith. As such, the children are discouraged from participating in birthday celebrations and the Pledge of Allegiance at school. A teacher from the children's elementary school, Lois Dimmitt, testified that the children have trouble understanding why they are not allowed to participate and that it makes the children feel awkward. Larry testified that in addition to the restrictions on school activities, the children are discouraged from celebrating any holiday, with the exception of a Jehovah's Witness holiday called Memorial. Furthermore, Jeanne testified that as a Jehovah's Witness, she would refuse to allow any of her children to receive a blood transfusion, even if the child's life was in peril and the transfusion was desperately needed. Jeanne

testified that in an emergency situation, it would not be easy to refuse the blood transfusion, but that she would request that the physicians use alternative methods of treatment.

In addition to the evidence set forth above, each side presented testimony indicating that the other inflicted excessive corporal punishment on the children in isolated instances. The record also reflected that the oldest child, Laren, had refused to accompany her siblings on visitation trips to Larry's residence after temporary custody was awarded to Jeanne because Laren felt that Larry did not care for the children as well as Jeanne did.

3. District Court's Decision

The district court determined that custody of the children should be awarded to Jeanne. The district court noted that Larry had attempted to show that Jeanne's religion adversely impacted the children, but held that

> [d]espite the presence of three psychologists [Drs. Meidlinger and Fix and Dr. Jerry Denton, who examined only Larry] during the course of the trial, no evidence was submitted to the court which would demonstrate that the mother's religious convictions or possible activity limitations would be detrimental to the proper development of the children's personality or well being.

Then, after briefly reviewing the testimony of Drs. Meidlinger and Fix, the district court held:

> The totality of the evidence reveals that each party has a psychological problem which could adversely affect and impact on the children. Mr. Garrett, through his behaviors in the instant matter, has confirmed Dr. Meidlinger's opinion that Mr. Garrett has attempted to be manipulative throughout these proceedings, has at times avoided frankness and candor, and has overly involved the children in the custody controversy. The evidence also reveals that Mr. Garrett has followed through on recommendations concerning counseling, but the evidence does not reveal that Mr. Garrett's approach to the custody issue and custody problems have been positively effected [sic].

> Mrs. Garrett has and does suffer from chronic depression. The evidence reveals that the depression in the past and currently is controllable by medications and counseling. The records indicate that Mrs. Garrett has acknowledged her problem, has obtained suitable and proper medical assistance, and will continue in the future to participate in the necessary help programs to regulate her condition.

The district court found, based on the totality of the evidence, that the four minor children should be placed in the custody of their mother subject to Larry's visitation rights.

II. ASSIGNMENTS OF ERROR

Larry asserts what appear to be 16 different assignments of error. Those assignments of error can be summarized as follows: The district court erred in (1) awarding custody of the four minor children to Jeanne, (2) excluding all testimony and documentary material relating to whether the Jehovah's Witnesses are a cult, (3) limiting the cross-examination of Jeanne and refusing to reschedule the trial so that such cross-examination could be had, and (4) sustaining and overruling various objections. Finally, Larry assigns as error the judge's failure to recuse himself on the grounds that he had prejudged the case in a fashion that affected his ultimate decision.

III. STANDARD OF REVIEW

[1] In an action for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

IV. ANALYSIS

1. Custody of the Children

[2] In our de novo review, our concern is whether the custody determination is in the best interests of the Garrett children. The ultimate test in determining the appropriateness of an award of custody of minor children is reasonableness, as determined by the facts of each case, and the trial court's determination will be affirmed in the absence of an abuse of

discretion. *Kroenke v. Kroenke*, 239 Neb. 699, 477 N.W.2d 583 (1991).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

[4,5] Neb. Rev. Stat. § 42-364 (Reissue 1993) sets forth the statutory basis for judicial determination of child custody. In determining a child's best interests under § 42-364, the court may consider factors such as general considerations of the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between the child and the parents; the age, sex, and health of the child and the parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension, regardless of chronological age, and when such child's preference for custody is based in sound reason; and the general health, welfare, and social behavior of the child. *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989).

The instant case presents a difficult situation because of the two primary grounds upon which Larry argues that Jeanne is not the proper choice for the custodial parent: Jeanne's well-documented depression and the fact that Jeanne practices the precepts of the Jehovah's Witnesses religion.

In its decree dissolving the marriage in the instant case, the trial court agreed that Jeanne suffered from depression, but also noted that Larry had been manipulative, involving the children to a high degree in the custody battle by constantly discussing the case and disparaging Jeanne in front of the

children. Testimony from Dr. Meidlinger indicated that Larry's actions in this regard showed that he was more concerned with himself and his winning the case than he was for the actual welfare of the children. Thus, the district court was left with the difficult decision of choosing between two parents, both of whom had serious problems. The district court chose Jeanne.

[6] An appellate court is required to conduct a de novo review of dissolution cases and, when the evidence is in conflict, may consider, 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. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). If the record contained nothing more than the above-referenced descriptions of the respective parties, the district court would clearly not have abused its discretion by awarding custody to Jeanne.

However, Larry contends that there is an additional factor which should tip the scales in his favor: the fact that Jeanne is a practicing Jehovah's Witness. The obvious constitutional problems raised by this argument were addressed by the Nebraska Supreme Court in *LeDoux v. LeDoux*, 234 Neb. 479, 485-86, 452 N.W.2d 1, 5 (1990):

> The free exercise clause of the first amendment to the U.S. Constitution forecloses governmental regulation of religious beliefs. "Government may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . ." . . . Courts must preserve an attitude of impartiality between religions and may not disqualify a parent solely because of his or her religious beliefs. . . .
>
> Although the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the first amendment is not so rigid. A state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom. . . .
>
> The paramount consideration in all cases involving the custody or visitation of a child is the best interests of the

> child. [§ 42-364]. . . . Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child. . . . Prohibiting a court from considering " 'religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child.' " . . . "The right to practice religion freely does not include liberty to expose . . . the child to . . . ill health . . . ." . . . Thus, *when a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat*. . . . In so doing, a court must narrowly tailor its order so as to result in the least possible intrusion upon the constitutionally protected interests of the parent.

(Citations omitted.) (Emphasis supplied.)

[7] Thus, in order for Jeanne's religion to constitute a ground for awarding custody to Larry, we must be able to determine from the record that the Jehovah's Witness religion as practiced by Jeanne constitutes an immediate and substantial threat to the minor children's temporal well-being. Courts from other jurisdictions that have dealt with this same issue have come down on both sides. See, generally, Annot., 22 A.L.R.4th 971, 998-1006 (1983).

As evidence of an immediate and substantial threat to the minor children, Larry makes reference to the fact that even in the case of a medical emergency, Jeanne would refuse to consent to any of the children's receiving a blood transfusion. There is also testimony in the record from a teacher and the principal at the minor children's elementary school indicating that Jeanne's insistence that the children not participate in the celebration of any birthday or holiday, as well as the fact that they are not allowed to pledge allegiance to the flag, causes the children to feel confused and separated from the other children.

[8,9] The problem with Larry's argument is that the record is devoid of any expert testimony indicating that Jeanne's religious practices are imminently harmful to the children. The U.S. Constitution flatly prohibits any court from evaluating the merits of religious doctrine or defining the contents of that doctrine. *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450

U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). While activities like celebrating birthdays and holidays, saying the Pledge of Allegiance, and participating in extracurricular activities are considered by most people to play an important role in the socialization of children, "we need to separate the value judgments implicit in the so-called norm from any actual harm caused by these practices." *Pater v. Pater*, 63 Ohio St. 3d 393, 398, 588 N.E.2d 794, 799 (1992). "[A] court must base its decision that a particular religious practice will harm the mental health of a child on more than the fact that the child will not participate in certain social activities." *Id.* at 399-400, 588 N.E.2d at 800. The record in the instant case contains no convincing evidence indicating that the limitations Jeanne places on the minor children's activities constitute a threat of immediate and substantial harm to the children. Therefore, we cannot say that Jeanne's actions in this regard negatively impact on her ability to be the custodial parent. See, *Smith v. Smith*, 90 Ariz. 190, 367 P.2d 230 (1961); *In re Marriage of Urband*, 68 Cal. App. 3d 796, 137 Cal. Rptr. 433 (1977).

[10] Likewise, regarding Jeanne's refusal to consent to a blood transfusion for her children even in the event of an emergency, no evidence was presented showing that any of the minor children were prone to accidents or were plagued with any sort of affliction that might necessitate a blood transfusion in the near future. We cannot decide this case based on some hypothetical future accident or illness which might necessitate such treatment. See, *In re Marriage of Urband, supra*; *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978). Facts such as the statistical frequency of blood transfusions for normal children and the degree of risk involved in taking or refusing blood or chemical substitutes must be proved by proper evidence, like any other facts. *Osier v. Osier*, 410 A.2d 1027 (Me. 1980). "In the absence of any such proof of that threshold factual requirement, there could be no legitimate occasion for the court's impingement upon [a parent's] constitutionally protected liberty interests." *Id.* at 1031 n.7.

[11] Larry did not present sufficient evidence to convince us that Jeanne's religious practices pose an immediate and substantial threat to the minor children's temporal well-being,

so we are constitutionally prohibited from probing into the substance of Jeanne's religious beliefs and interpreting them for ourselves. See, *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990). The record reflects that both Larry and Jeanne have problems. However, the independent court-appointed psychologist who interviewed the entire family recommended that custody be awarded to Jeanne. Other evidence in the record supported that finding. Therefore, upon our de novo review, we hold that the district court did not abuse its discretion in awarding custody of the couple's minor children to Jeanne.

2. Exclusion of Evidence Indicating that Jehovah's Witnesses Are a Cult

As his second assignment of error, Larry contends that the district court abused its discretion in excluding all the evidence that Larry presented which related to classifying the Jehovah's Witnesses as a cult. In particular, Larry complains that the district court refused to allow his expert witness on cults to testify regarding the status of the Jehovah's Witnesses as a cult.

Our review of the record indicates that the district court exhibited extreme tolerance with regard to Larry's counsel's presentation of this evidence. Indeed, in one instance, the trial judge stepped in and questioned the witness in a manner which aided Larry in adducing the testimony he sought. Jeanne's counsel made several evidentiary objections, which the trial judge properly ruled upon. There are 33 pages of direct examination testimony from this expert witness. The record reflects that the trial judge allowed the witness to fully explain the analysis behind his opinion that the Jehovah's Witnesses are a cult. Therefore, this assignment of error is without merit.

3. Limitation of Cross-Examination and Refusal to Reschedule Trial

In Larry's third assignment of error, he contends that the trial judge erroneously limited the time for his cross-examination of Jeanne and further complains that the trial judge abused his discretion in refusing to reschedule the trial so that the cross-examination could be completed. The record does reflect

that after 15 pages of cross-examination by Larry's counsel of Jeanne, the trial judge informed Larry's counsel that he had 10 minutes remaining to complete his cross-examination of that witness. Larry's counsel cross-examined Jeanne for another 3 pages' worth of testimony, then stated that he had no further questions. After redirect examination, Larry's counsel was permitted to conduct a full recross-examination. At no time did Larry's counsel object to the judge's time limitation, nor did counsel ever request additional time or that the trial be rescheduled.

[12,13] A trial judge has broad discretion over the conduct of a trial. *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994). Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

Based on these propositions and our de novo review of the record, we hold that it was not an abuse of discretion for the trial judge to limit the time for cross-examination. Larry's failure to object to the limitation imposed by the trial judge effectively waived his right to raise that ruling as an error on this appeal. Therefore, Larry's third assignment of error is without merit.

4. Sustaining and Overruling Various Objections

[14] As his fourth assignment of error, Larry generally argues that the district court erred in its rulings on various objections. Larry did not argue or identify which objections he was referring to. A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). Larry appears to be asking us to review each individual evidentiary ruling made by the district court to see if that ruling might have been incorrect. We decline his invitation.

5. Trial Judge's Failure to Remove Himself From the Instant Case

[15] Larry's final assignment of error is that the trial judge abused his discretion in not recusing himself on the grounds that he had prejudged the case in a fashion that affected his ultimate decision. Again, there is no merit to Larry's assign-

ment of error. Where a case on appeal is tried de novo, refusal by the trial judge to disqualify himself or herself is immaterial. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980). In the instant case, Larry never made a motion to disqualify the trial judge. Additionally, this assignment of error was not discussed in Larry's brief and therefore will not be considered. See *Brewer v. Brewer, supra*.

V. CONCLUSION

Upon a de novo review of the record, we conclude that the district court did not abuse its discretion in awarding custody of the four minor children to Jeanne. Larry's other assignments of error are without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARTIN JUAREZ, APPELLANT.

528 N.W.2d 344

Filed January 31, 1995. No. A-94-488.

1. **Appeal and Error.** Absent plain error, an appellate court will address only those issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a verdict in a criminal case where such verdict is supported by relevant evidence.
3. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
4. **Criminal Law: Conspiracy: Intent.** An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
5. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion; that is, a sentence within the statutory limits will not be modified as excessive unless the trial court's

reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result.

6. **Sentences.** It is the minimum portion of an indeterminate sentence which measures its severity.
7. **Statutes: Sentences.** Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to that offense.
8. _____: _____. A statutory change which imposes a more burdensome punishment than what existed at the time the crime was committed runs afoul of ex post facto principles.
9. _____: _____. In a general sense, an ex post facto law is one which renders an act punishable in the manner in which it was not punishable when it was committed.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

William C. Peters for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

The defendant, Martin Juarez, was convicted of conspiring with others to dispense marijuana, a Class III felony, and was sentenced to a term of not less than 12 nor more that 14 years in prison. He appeals, claiming that certain evidence was improperly admitted, that the evidence was not sufficient to support the conviction, and that the sentence was excessive. We conclude that the evidence was properly admitted and that the evidence was sufficient to support his conviction. However, because Neb. Rev. Stat. § 83-1,105 (Reissue 1987) was still in effect at the time the crime was committed, we conclude the minimum sentence is excessive because that sentence was for more than one-third of the maximum authorized for a Class III felony. Accordingly, we affirm the conviction, but set aside the sentence and remand the cause for resentencing in accordance with the applicable statutes.

THE INFORMATION

The following is a summary of the information under which Juarez was tried. From May 1993 to August 20, 1993, Juarez

unlawfully, with the intent to promote the commission of the crime of delivery of marijuana, agreed with one or more persons including Travis Buechler, Andrew Requejo, Ricardo Pina Tapia, Juvenal Sanchez Ruiz, Jesus Flores, Jose Holguin, Alden John Hill, and others to engage in, solicit, or cause the "commission of the crime of . . . knowingly or intentionally manufacturing, distributing, delivering or dispensing a controlled substance, to wit: Marijuana [and] MARTIN JUAREZ did commit overt acts in pursuance of the conspiracy." The information contains eight paragraphs intended as allegations of overt acts pursuant to the conspiracy.

The information contains allegations that

> 2. [o]n or about June, 1993, Travis Buechler did receive $200 by Western Union wire in El Paso, Texas from Martin Juarez. . . .
>
> 3. On or about August 17, 1993, Martin Juarez did meet with Travis Buechler and Andrew Requejo at a house southwest of Morrill, Nebraska. . . .
>
> . . . .
>
> 7. In May, 1993, Martin Juarez purchased a vehicle to be used to transport marijuana.

These allegations are proper allegations of overt acts, and as will be seen in the summary of the evidence, the evidence clearly supports a finding that these acts were committed by Juarez in furtherance of the conspiracy.

The State also alleges other acts which it claims to have been committed pursuant to the conspiracy. However, some of these alleged acts are not clearly proper allegations of overt acts involving Juarez as compared to those contained above and were not established by the evidence. Therefore, these additional alleged overt acts will not be summarized, as it would not be helpful to the understanding of this opinion.

SUMMARY OF EVIDENCE

A great deal of the record consists of lengthy cross-examinations of two coconspirators. In an attempt to develop the inconsistencies of the coconspirators' respective testimony, the defense conducted an exhaustive cross-examination of them. With these witnesses, the State wisely used every piece of

information available to support them. Juarez does not allege these witnesses were unworthy of belief as a matter of law, and therefore, their credibility was for the jury. Therefore, the summary will not include evidence that served no purpose other than to support or attack the witnesses' credibility. The State also introduced elaborate evidence on the chain of custody of the drugs, other evidence that it seized, and the test results of this evidence. This foundational evidence will not be summarized.

On August 19, Travis Buechler and Andrew Requejo were stopped near Bradshaw, Nebraska, and arrested while in possession of a large amount of marijuana and cash. As a result of information the police obtained from them, the State obtained a search warrant for a home that was located about 1 mile south and 1 mile west of Morrill, Nebraska. During the search of that home, the police found scales and baggies used for packaging marijuana along with 42 pounds of marijuana. Earlier that night, a police officer watching the house had observed a car leaving the house, and he followed. The car was stopped by police, and a search revealed slightly less than a pound of marijuana.

Juarez lives in Torrington, Wyoming, and the evidence did not establish that he had any direct interest in the house located outside Morrill. The owner of the house testified that two laborers who worked for him, Ricardo Tapia and Juvenal Ruiz, lived in the house during 1993 until they were arrested in August. The owner had seen Juarez at the house and thought Juarez was a friend of Tapia's.

Buechler and Requejo both testified for the State after receiving immunity. They testified that they met about 3 months before their August arrest. At the time they were arrested on August 19, they were returning from a trip to eastern Nebraska, where they claimed to have sold between 15 and 45 pounds of marijuana. The police found a duffelbag located in the car containing around 5 pounds of marijuana and $4,000 in cash. Another $1,000 in cash was found in Requejo's wallet.

Buechler testified that just before the trip during which they were arrested, he and Requejo had gone to Torrington to talk to

Juarez. Later, they met Juarez at the house near Morrill, where Juarez gave them the marijuana, most of which they sold in Omaha and some of which they still had in the vehicle when they were arrested. According to them, Juarez had "fronted" the marijuana to them. The record establishes that "fronting" is an arrangement whereby the supplier of marijuana gives the distributor marijuana and the distributor pays for the marijuana after it is sold. Buechler testified they had obtained marijuana from Juarez under such an agreement on at least three different occasions. He testified that on one occasion, Juarez had gone to Omaha with them to sell drugs.

In the instant case, Requejo testified that the $5,000 in cash was obtained from the sale of marijuana that they had obtained from Juarez just before they left for eastern Nebraska. He explained that they only had $5,000 after selling 15 pounds of marijuana in Omaha because he had not obtained all of the money from the buyers.

Buechler testified that on other occasions, he had been in the house near Morrill, that he had seen marijuana in one bedroom, and that he had packaged marijuana in that house in the presence of Juarez. Buechler also testified that in late June or early July 1993, he was supposed to go to Mexico for Juarez and bring back marijuana. He testified that he had been at Juarez' home in Torrington to prepare a motor vehicle for this trip to Mexico. However, when the vehicle, a "Blazer," broke down in New Mexico, he called Juarez, who told him to get the Blazer towed to El Paso, Texas, and to wait at a particular home in El Paso. Buechler then asked Juarez to send him money by Western Union so he could pay for busfare back home. Buechler then returned to Nebraska without having obtained any marijuana.

When Wyoming police searched Juarez' home in Torrington, they found a Western Union receipt that documents the August 13 transaction where Martin Juarez wired $200 to "Travis Vvishuer [sic]" from Torrington, Wyoming, to El Paso, Texas. The code for identification on the wire transfer was Buechler's birth date, and Buechler's testimony corroborated this. However, the inconsistency between Buechler's testimony that he took the trip in June or July and the fact that the receipt

showed the money was wired in August is not explained.

When the police searched the house near Morrill, they found a receipt from a Grease 'N Go oil change establishment that lists the name of Martin Juarez. The police also found a wallet containing an insurance card bearing Martin Juarez' name.

At trial, a woman who works with Juarez' wife testified that she used to work near the Juarez residence and that she had been in the Juarez home. She testified that she had never observed marijuana around the Juarez home.

Juarez' wife testified about her homelife with Juarez, how they financed their modest home, and how they financed a 1993 Saturn automobile that they purchased in 1993. She testified to his work habits and similar matters which tended to establish that Juarez was a respectable family man. She testified Juarez needs an interpreter because he does not speak English well and that he is an undocumented foreigner from Mexico who works seasonally both as a welder and a field hand.

On cross-examination, Juarez' wife testified that a 1971 GMC motor vehicle that she and her husband had purchased in May 1993 was confiscated in New Mexico as a result of being used by a man by the name of John Hill to bring marijuana across the border. The 1993 registration of the vehicle showed the vehicle was registered to Martin Juarez, Route 2, Box 148, Morrill, Nebraska.

In rebuttal, the former owner of the 1971 GMC vehicle that was confiscated in New Mexico testified that he had sold the vehicle to Juarez for $3,000 cash. He testified that the sale took place as a result of Juarez pulling up beside him in the street one day and asking if he wanted to sell the vehicle. He told Juarez that he would sell it for $4,000. The former owner took Juarez' phone number and later called him. They negotiated the price down to $3,000, and Juarez paid with 13 $100 bills and the balance in $50's, $20's, and $10's. Juarez said he had a little bit of extra money, but that was all he could pay because he had to take the rest of the money back to Mexico. The former owner stated he paid $1,500 or $1,600 for the vehicle in 1985.

ASSIGNMENTS OF ERROR

[1] Juarez assigns seven different errors, but some of these

merely raise the sufficiency of the evidence question in different ways. The brief also contains seven arguments; however, not all of the arguments are the same as the assignments. Absent plain error, an appellate court will address only those issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). The errors that are both assigned and argued are as follows: The trial court erred in (1) admitting evidence seized from the Requejo motor vehicle and from the house near Morrill without first finding the State had established a prima facie case of conspiracy, (2) not determining the evidence was insufficient as a matter of law, and (3) imposing an excessive sentence.

EVIDENCE IN REQUEJO'S VEHICLE

Over an objection that the evidence was irrelevant, the court admitted into evidence the $5,000 in cash, the marijuana, and the other physical evidence that the State obtained when police searched Requejo's automobile on August 19. Juarez argues the evidence seized from Buechler and Requejo on August 19 and from the later search of the house near Morrill was not admissible because the court did not find that the State had first proven a prima facie case of conspiracy. Juarez' attorney cites the following quote from *State v. Copple*, 224 Neb. 672, 693, 401 N.W.2d 141, 156 (1987), to support his position:

> [F]or admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime *other than the conspiracy itself*, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.

(Emphasis supplied.)

In the above-quoted statement, it is clear from the words that are emphasized that the Supreme Court was not considering the steps in proving conspiracy. Instead, the court was considering the admissibility of a coconspirator's out-of-court statement under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1989). Thus,

Copple did not involve proof of the crime of conspiracy and therefore is not authority for the case at hand. There is no merit in this assignment.

SUFFICIENCY OF THE EVIDENCE

Standard of Review.

[2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d. 554 (1993).

[3] In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992).

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

Juarez' Arguments.

Juarez cites numerous cases which state rules to be used in judging circumstantial evidence and cases which state the rule for considering the sufficiency of the evidence when the conviction rests on circumstantial evidence. He then argues there is only circumstantial evidence linking the possession of the large quantities of marijuana found in Requejo's vehicle and in the house near Morrill to Juarez. Juarez argues that there is no evidence, direct or circumstantial, that he had constructive possession of the marijuana. He argues the evidence fails to establish him as "the marijuana kingpin of western Nebraska

and eastern Wyoming." Brief for appellant at 20. He argues extensively that there is no proof that he was in possession of a controlled substance with intent to deliver. He argues that in this type of case, it is essential that the State present evidence to support a finding that the defendant possessed the controlled substance, used it, or distributed it to others.

Juarez was not charged with possession of marijuana, but with conspiracy to distribute marijuana. Therefore, the State does not have to prove that Juarez was ever in possession of marijuana. However, the testimony of Buechler and Requejo clearly established that in the days prior to August 20, Juarez was in possession of and distributed marijuana to Buechler and Requejo at the house near Morrill. The direct testimony of Buechler and Requejo also established the agreement between the two of them and Juarez to dispense marijuana. Their direct testimony establishes the overt acts of Juarez in giving them the marijuana at the house near Morrill and in wiring $200 to Buechler in Texas in a failed attempt to bring marijuana back from Mexico. The evidence itself is sufficient to establish that they made an agreement to promote and facilitate the commission of the felony of distribution of marijuana. This evidence satisfies the elements of Neb. Rev. Stat. § 28-202 (Reissue 1989). Subdivision (3) of that statute provides that "[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship."

[4] In *State v. Anderson*, 229 Neb. 427, 435, 427 N.W.2d 764, 770 (1988) (quoting *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987)), the Supreme Court stated the following:

> " '[A]n overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. . . . An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.' "

The evidence shows that Juarez, Buechler, Requejo, and others did many acts pursuant to the conspiracy, but more importantly, it shows that Juarez did some of the overt acts that

the State alleged in its information.

The evidence is clearly sufficient to establish the alleged conspiracy and some of the overt acts, and therefore, there is no merit in Juarez' contention that the evidence is insufficient to sustain the conviction.

EXCESSIVE SENTENCE

[5,6] A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion; that is, a sentence within the statutory limits will not be modified as excessive unless the trial court's reasons or rulings are clearly untenable and unfairly deprive the defendant of a substantial right and a just result. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993); *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992). " '[I]t is the minimum portion of an indeterminate sentence which measures its severity.' " *State v. Haynie*, 239 Neb. 478, 491, 476 N.W.2d 905, 914 (1991) (quoting *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990)).

In the case at hand, the sentence is within the statutory limits if the repeal of § 83-1,105 was effective before Juarez committed the crime for which he was sentenced. However, if § 83-1,105 was not repealed at the time Juarez committed the crime, the sentence is not within the statutory sentencing limits that existed when the crime was committed and is therefore improper.

A review of the statutes controlling the sentencing will help in answering this question. The information charged that Juarez and his coconspirators made their conspiratorial agreement from "May, 1993, through August 20, 1993." Juarez was charged with and convicted of conspiracy to distribute marijuana, which is a violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 1992), and that crime is a Class III felony. Neb. Rev. Stat. § 28-105 (Reissue 1989) provides that the penalty for a Class III felony is a maximum of 20 years in prison, a $25,000 fine, or both, and a minimum of 1 year in prison. Section 28-202(4) provides: "Conspiracy is a crime of the same class as

the most serious offense which is an object of the conspiracy . . . ." The indeterminate sentence that the court could impose under § 28-105 was therefore not less than 1 nor more than 20 years.

Before its repeal, § 83-1,105 provided in relevant part:

> Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may:
>
> (1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law.

If Juarez was sentenced under this statute, the maximum sentence that could have been imposed is not less than 6 2/3 to 20 years. However, after the repeal of § 83-1,105, no similar limit existed. See, Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1994); 1993 Neb. Laws, L.B. 529; 1993 Neb. Laws, L.B. 627. Juarez was sentenced to imprisonment for an indeterminate term of 12 to 14 years. A minimum sentence of 12 years is considerably in excess of the 6 2/3-year limit imposed by § 83-1,105.

It is therefore necessary to determine the date when the repeal of § 83,1-105 was effective. The statute was specifically repealed by L.B. 529. L.B. 529 was approved by the Governor on May 4, 1993, but the act did not contain an emergency clause, and therefore it was not effective until 3 months after the Legislature adjourned, i.e., September 9, 1993. See Neb. Const. art. III, § 27.

Before 1989, Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1988) provided that someone sentenced to probation could be sentenced to 90 days in jail. However, in 1989, the Legislature amended § 29-2262 to provide that such a person could be sentenced to 180 days in jail. See *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991). After the effective date of the 1989 amendment, Spiegel was convicted for having violated the law in 1988, and the trial court sentenced him to 180 days in jail. The Supreme Court stated: "The application of the 1989 amendment to § 29-2262 to crimes that occurred before the

date of the amendment violated the ex post facto clause of Neb. Const. art. I, § 16." *Spiegel*, 239 Neb. at 238, 474 N.W.2d at 877. See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). The Supreme Court held that the defendant could only be sentenced to 90 days in jail and reduced the sentence to that term.

[7-9] Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to that offense. *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975). A statutory change which imposes a more burdensome punishment than what existed at the time the crime was committed runs afoul of ex post facto principles. *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). "In a general sense an ex post facto law is one which 'renders an act punishable in the manner in which it was not punishable when it was committed.' " *Palmer*, 224 Neb. at 290, 399 N.W.2d at 715 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810)).

In the recent case *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994), the Supreme Court applied the above principles to prohibit the imposition of an indeterminate sentence for second degree murder under § 29-2204 (Supp. 1993) when the crime was committed in 1990 and at that time the law did not provide for an indeterminate sentence for that crime. While the statutes involved in *Martin* were different from those in this case and the time between the criminal act and the effective date of the statute was greater, the principles involved are the same.

Therefore, affirming a sentence that clearly exceeds the statutory sentencing limits that existed at the time the crime was committed would run afoul of the ex post facto provisions of the state and federal Constitutions. Thus, since § 83-1,105 was still in effect on the date the crime charged in the information took place, Juarez should have been sentenced in accordance with that statute, even if the sentencing limit was not in effect at the time Juarez was sentenced for that crime.

We therefore affirm Juarez' conviction, but remand the cause to the district court for resentencing in accordance with this opinion.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. NOLL, APPELLANT.

527 N.W.2d 644

Filed February 7, 1995. No. A-94-334.

1. **Pleadings: Final Orders: Appeal and Error.** A denial of a plea in bar is a final, appealable order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989).
2. **Constitutional Law: Double Jeopardy.** The constitutional Double Jeopardy Clause bars only a retrial in a criminal prosecution where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being retried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
3. _____: _____. Where there has been insufficient evidence presented to convict a defendant in a trial, the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.
4. **Convictions: Double Jeopardy: Appeal and Error.** If a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy in order to bar his retrial.
5. **Appeal and Error.** Where an appellate court is presented with both a trial error and a claim of insufficiency of the evidence, the court must address the insufficiency claim.
6. **Criminal Law: Child Support: Intent.** Intent is an essential element of the crime of nonsupport.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions to dismiss.

Louie M. Ligouri for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

IRWIN, Judge.

In this appeal, we determine whether a defendant may raise a double jeopardy claim to bar a retrial where his conviction has been reversed on appeal for trial error and where the appellate court failed to address defendant's insufficiency of the evidence claim. For the reasons set forth below, we hold that he may.

FACTUAL BACKGROUND

The record from defendant Donald L. Noll's first trial, which is contained in relevant part in the record on this appeal, establishes the following factual and procedural background of this case: On October 31, 1991, Noll was charged with criminal nonsupport, a Class IV felony, in the district court for Richardson County, Nebraska. See Neb. Rev. Stat. § 28-706 (Reissue 1989). A jury trial was held on September 21, 1992. Evidence offered by the State established that Noll and his ex-wife were divorced by a decree filed on January 23, 1976, in Brown County, Kansas. The decree required Noll to pay $150 per month in child support. Noll's ex-wife, the only witness to testify at the trial, testified that from the date the decree was entered through August 1, 1991, she had received no child support payments from Noll. The jury found Noll guilty, and Noll was subsequently sentenced to 5 years' probation.

Noll appealed his conviction to this court, claiming that the trial court had erred in omitting the element of intent from the jury instruction setting out the elements of the crime of nonsupport and that there was insufficient evidence to support the conviction. In *State v. Noll*, 2 Neb. App. 73, 507 N.W.2d 44 (1993), we reversed Noll's conviction because the trial court failed to include the element of intent when instructing the jury on the crime of nonsupport. Having found error in the jury instruction, this court declined to address the issue of sufficiency of the evidence. Upon remand for retrial, Noll filed a plea in bar, alleging that the Double Jeopardy Clause of the Nebraska and U.S. Constitutions prohibited his retrial because the State failed to present sufficient evidence to convict him in his first trial. The district court denied Noll's plea in bar, and he has appealed to this court.

ASSIGNMENT OF ERROR

Noll claims that the district court erred in overruling his plea in bar.

STANDARD OF REVIEW

The issues presented on this appeal involve questions of law. An appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Roche,*

Inc., 246 Neb. 568, 520 N.W.2d 539 (1994); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

ANALYSIS

Double Jeopardy.

[1] We begin by observing that Noll's appeal is properly before this court because a denial of a plea in bar is a final, appealable order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). See, *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990); *State v. Joseph*, 1 Neb. App. 525, 499 N.W.2d 858 (1993).

[2] Noll's plea in bar is based on his right to be free from double jeopardy. Both the U.S. and Nebraska Constitutions state that "[n]o person shall be . . . twice put in jeopardy" for the same offense. U.S. Const. amend. V; Neb. Const. art. I, § 12. In *State v. Bostwick*, 222 Neb. 631, 642, 385 N.W.2d 906, 914 (1986), the court summarized the constitutional protection against double jeopardy as follows:

> As a general principle, the constitutional prohibition against double jeopardy protects "an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). "The double-jeopardy provision of the Fifth Amendment, however, 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." *Wade v. Hunter*, 336 U.S. 684, 688, 69 S. Ct. 834, 93 L. Ed. 974 (1949). In a given case the constitutional double jeopardy clause bars only a retrial in a criminal prosecution where (1) jeopardy has attached in a prior criminal proceeding (see *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973)); (2) the defendant is being retried for the same offense prosecuted in that prior proceeding (see *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)); and (3) the prior proceeding has terminated jeopardy (see *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984)).

[3] In *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the U.S. Supreme Court held that where there has been insufficient evidence presented to convict a defendant in a first trial, the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." The Court reasoned that

> [s]ince we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, 437 U.S. at 16.

[4] The Court in *Burks* noted that not all appellate reversals of criminal convictions prohibit retrial. Rather, if a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy in order to bar his retrial. The Court explained:

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." [Citations omitted.] In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e. g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks, 437 U.S. at 15.

In Noll's first appeal to this court, he alleged (1) that the trial

court had erroneously instructed the jury and (2) that the State presented insufficient evidence to convict. This court found that the trial court had erroneously instructed the jury, and reversed on that basis alone, without addressing Noll's claim of evidentiary insufficiency. *State v. Noll*, 2 Neb. App. 73, 507 N.W.2d 44 (1993). Upon remand for new trial, Noll filed his plea in bar, once again alleging evidentiary insufficiency in his first trial.

In the present appeal, Noll argues that this court should have addressed the insufficiency claim in his first appeal, and because this court did not address such claim, he should be allowed to assert that claim in a plea in bar at his retrial.

An examination of Nebraska Supreme Court precedent leads us to conclude that Noll correctly asserts that this court should have addressed his insufficiency claim on direct appeal. In *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987), the defendant appealed from her convictions for possession of marijuana with intent to deliver and possession of cocaine, alleging that her trial was improperly joined with the trial of a codefendant and that the evidence was insufficient to sustain her convictions. After finding that the trial court had improperly joined the trials and that such improper joinder constituted reversible error, the court stated:

> We are not yet finished, however, as we *must* consider Lee's challenge to the sufficiency of the evidence to reach a complete resolution of this appeal. As we noted in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986): "[T]he U.S. Supreme Court [has] held that an appellate finding of insufficient evidence to convict is tantamount to an acquittal and, therefore, that the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 295-96, 399 N.W.2d at 718 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). *In light of our determination that joinder was improper, it is now necessary to examine the sufficiency of the evidence to support Lee's convictions.* If it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if

> the evidence is not sufficient under *Palmer, supra*, the cause must be dismissed.

(Emphasis supplied.) *Lee*, 227 Neb. at 283, 417 N.W.2d at 30. See, also, *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[5] Several courts have also held that where an appellate court is presented with both a trial error and a claim of insufficiency of the evidence, the court must address the insufficiency claim. See, *U.S. v. Haddock*, 961 F.2d 933 (10th Cir. 1992), *cert. denied* 506 U.S. 828, 113 S. Ct. 88, 121 L. Ed. 2d 50; *U.S. v. Szado*, 912 F.2d 390 (9th Cir. 1990); *U.S. v. Quinn*, 901 F.2d 522 (6th Cir. 1990); *U.S. v. Anderson*, 896 F.2d 1076 (7th Cir. 1990); *Vogel v. Com. of Pa.*, 790 F.2d 368 (3d Cir. 1986); *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994); *State v. Morris*, No. 1195, 1991 WL 241156 (Tenn. Crim. App. Nov. 20, 1991 (unpublished opinion)); *Glisson v. State*, 192 Ga. App. 409, 385 S.E.2d 4 (1989); *People v. Stofer*, 180 Ill. App. 3d 158, 534 N.E.2d 1287 (1989).

The rationale for requiring appellate courts to address the insufficiency claim is that a defendant's double jeopardy rights should not be solely dependent on the grace of a reviewing court. See, *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984) (Brennan, J., concurring in part and dissenting in part); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984) (Brennan, J., concurring in part and concurring in the judgment); *Vogel, supra*.

We recognize that opinions from various other courts have held that an appellate court is not required to examine a claim of insufficient evidence where it has reversed for trial error. See, *U.S. v. Gutierrez-Zamarano*, 23 F.3d 235 (9th Cir. 1994); *Vanderbilt v. Collins*, 994 F.2d 189 (5th Cir. 1993); *U.S. v. Ganos*, 961 F.2d 1284 (7th Cir. 1992); *Evans v. Court of Common Pleas, Del. Cty., Pa.*, 959 F.2d 1227 (3d Cir. 1992); *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), *cert. denied* 481 U.S. 1048, 107 S. Ct. 2178, 95 L. Ed. 2d 835 (1987); *Ex parte State*, 527 So. 2d 148 (Ala. 1988). These opinions generally rely on the following statement, taken from the majority opinion in *Richardson*: "Where, as here, there has

been only a mistrial resulting from a hung jury, *Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." 468 U.S. at 323.

Although other jurisdictions have relied on *Richardson* to support the view that an appellate court is not required to review an insufficiency claim where there is trial error, we find it significant that the Nebraska Supreme Court's decision in *Lee*, which concluded that an appellate court must review insufficiency claims where there is trial error, was decided 3 years after *Richardson*. We conclude that Noll correctly asserts that this court was required to examine his insufficiency claim on direct appeal.

Noll's Insufficiency Claim.

The question that we must now answer is, Can this court review Noll's insufficiency claim in this appeal? Jurisdictions that have addressed this issue have permitted a review of the first trial evidence in a subsequent appeal. See, *Anderson, supra* (reviewing sufficiency of first trial evidence in appeal from defendant's retrial); *United States v. Marolda*, 648 F.2d 623 (9th Cir. 1981) (reviewing sufficiency of first trial evidence in subsequent appeal from denial of motion to dismiss); *United States v. United States Gypsum Co.*, 600 F.2d 414 (3d Cir. 1979), *cert. denied* 444 U.S. 884, 100 S. Ct. 175, 62 L. Ed. 2d 114 (reviewing sufficiency of first trial evidence in subsequent interlocutory appeal); *Morris, supra* (reviewing sufficiency of first trial evidence in subsequent interlocutory appeal); *Glisson, supra* (reviewing sufficiency of first trial evidence in subsequent interlocutory appeal). Given the nature of a defendant's right to be free from double jeopardy, and considering the spirit of the Nebraska Supreme Court's decision in *Lee*, we conclude that Noll's insufficiency claim is properly before this court.

[6] Noll claims that the State failed to produce evidence of intent in his trial. Intent is an essential element of the crime of nonsupport. See § 28-706. An examination of the trial record establishes that the State did not produce any evidence of intent. The only witness to testify at the trial was his ex-wife, who admittedly had no knowledge of why Noll did not make

support payments. There was no evidence of Noll's income or earning capacity and no evidence that he owned any assets or that he was ever employed or employable since the entry of the decree in 1976. The only evidence that was presented was that Noll did not make his court-ordered support payments. That evidence alone is insufficient to convict a person under § 28-706(1).

We find it telling that the State, in preparing for Noll's retrial, filed a motion to amend the information and endorse five additional witnesses. Such action suggests that the State would use the second trial for the purpose of supplying "evidence which it failed to muster in the first proceeding."

CONCLUSION

We find that the State failed to produce sufficient evidence to convict at Noll's first trial and that the Double Jeopardy Clause prohibits the State from retrying him. We therefore reverse the district court's denial of Noll's plea in bar, and remand to the district court with directions to dismiss this action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. TAMMY L. MOORE, APPELLANT.

527 N.W.2d 223

Filed February 7, 1995. No. A-94-624.

1. **Prior Convictions: Weapons: Appeal and Error.** The legal issue of whether a defendant is a felon for purposes of Neb. Rev. Stat. § 28-1206 (Reissue 1989) is an issue of statutory construction, in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the determination of the trial court.
2. **Statutes.** Statutory language should be given its plain and ordinary meaning.
3. **Criminal Law: Judgments.** In a criminal case, the judgment occurs when the verdict and sentence are rendered by the court.
4. **Prior Convictions: Sentences.** The actual service of imprisonment or the payment of a fine has nothing to do with the question of determining whether a prior conviction has or has not been had.
5. **Prior Convictions: Sentences: Weapons: Appeal and Error.** A previously

convicted defendant whose conviction has been affirmed need not have commenced serving his or her sentence to be subsequently properly charged and convicted as a felon in possession of a firearm.

Appeal from the District Court for Hall County: JOHN C. WHITEHEAD, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired.

MILLER-LERMAN, Judge.

Tammy L. Moore appeals her conviction by the district court for Hall County of being a felon in possession of a firearm, a violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). Moore claims that she was not a felon on September 7, 1993, the date on which she was admittedly in possession of a .25-caliber semiautomatic pistol with a barrel of less than 18 inches. For the reasons recited below, we affirm.

ASSIGNMENT OF ERROR

On appeal, Moore raises one assignment of error, namely that she was not a felon for purposes of § 28-1206(1) on September 7, 1993. Moore notes that she was convicted of the Class III felony of manufacturing marijuana, Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992), on January 22, 1992, which conviction was affirmed by this court on March 16, 1993, in *State v. Moore*, 2 NCA 873 (1993), but that she was not directed to report to probation to commence serving her sentence until December 3, 1993. Moore argues that because the execution of sentence on her prior felony conviction commenced in December 1993, which was after the possession of a firearm incident on September 7, she was not yet a felon on September 7. The State argues that Moore was a convicted felon on September 7 because her conviction had not been set aside.

STANDARD OF REVIEW

[1] The legal issue of whether Moore was a felon for purposes

of § 28-1206 is an issue of statutory construction, in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the determination of the trial court. See *Kuhl v. Skinner*, 245 Neb. 794, 515 N.W.2d 641 (1994).

ANALYSIS

At the bench trial, the parties stipulated to the following facts which are substantiated by the record: Moore was charged with the manufacture of marijuana on May 29, 1991; was convicted of this charge by a jury on January 22, 1992; and was sentenced to 3 years' probation on March 5, 1992. Her conviction was affirmed on March 16, 1993. The record shows that the mandate of the Nebraska Court of Appeals was filed with the clerk of the district court on April 8, 1993. The parties stipulated that on September 7, 1993, officers were called to Moore's Grand Island address regarding gunshots and that Moore was in possession of a firearm. At sentencing in the instant case, defense counsel indicated that Moore was shooting at a stray cat which was causing a disturbance. Finally, the record shows that the execution of mandate from the prior case, directing Moore to report to the probation office, was filed on December 3, 1993.

Moore correctly notes that the status of being a felon is an element of the crime of possession of firearms by a felon or a fugitive from justice, set forth in § 28-1206(1). Section 28-1206 reads in relevant part: "Any person who possesses any firearm with a barrel less than eighteen inches in length . . . and who has previously been convicted of a felony . . . commits the offense of possession of firearms by a felon . . . ." Moore argues that the expression "previously been convicted of a felony" must be read in connection with other penal statutes. Moore claims that because the execution of sentence is "suspended" pending appeal under Neb. Rev. Stat. § 29-2301 (Cum. Supp. 1994), a defendant is not a convicted felon until the sentence is both affirmed and executed.

[2,3] Statutory language should be given its plain and ordinary meaning. *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). Under Nebraska law in a criminal case, the judgment

occurs when the verdict and sentence are rendered by the court. *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994). Under § 29-2301, the execution of sentence is suspended "until such time as the appeal has been determined." Although by statute the execution of a sentence is suspended until the appeal is decided, neither § 29-2301 nor § 28-1206(1) adds the further qualification propounded by Moore that the conviction is abated until a defendant is serving his or her sentence following an affirmance. This court declines Moore's invitation to add these qualifiers to an otherwise plainly written statute.

[4,5] In interpreting "conviction," as that word was used in the statute designed to enhance a driving while intoxicated charge which was then in effect, the Nebraska Supreme Court noted in connection with the prior conviction requirement that "[t]he actual service of imprisonment or the payment of a fine has nothing to do with the question of determining whether a [prior] conviction has or has not been had." *Danielson v. State*, 155 Neb. 890, 894, 54 N.W.2d 56, 58 (1952). We logically apply this interpretation of the term "conviction" to § 28-1206(1) and hold that a previously convicted defendant whose conviction has been affirmed need not have commenced serving his or her sentence to be subsequently properly charged and convicted as a felon in possession of a firearm.

The interpretation we give to the felon in possession of a firearm statute is consistent with the treatment of similar statutes in other jurisdictions. See, *Burkett v. State*, 518 So. 2d 1363 (Fla. App. 1988); *State v. Watie*, 223 Kan. 349, 573 P.2d 1034 (1978); *State v. Anderson*, 10 Or. App. 34, 497 P.2d 1218 (1972). Although the federal statute has since been amended, see 18 U.S.C. § 922(g) (1988), we note that the prohibition against transporting firearms in interstate commerce had historically been broadly extended under federal statutes to include those merely indicted as well as to those convicted of felonies. *DePugh v. United States*, 393 F.2d 367 (8th Cir. 1968), *cert. denied* 393 U.S. 832, 89 S. Ct. 101, 21 L. Ed. 2d 102. Indeed, it had been held that notwithstanding the fact that the underlying state indictment was quashed, the federal conviction for possession of firearms could stand. *Id.*

It has been said that the rationale underlying the prohibition

against certain persons carrying firearms is " 'to protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities . . . .' " *Id.* at 370 (quoting *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied, Velazquez v. United States*, 319 U.S. 770, 63 S. Ct. 1431, 87 L. Ed. 2d 1718 (1943)). We find this policy consideration to be consistent with our holding in the instant case.

For the reasons recited above, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FERNANDO JIMENEZ, APPELLANT.

530 N.W.2d 257

Filed February 14, 1995. No. A-94-344.

1. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, the instructions correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error which would necessitate a reversal.
2. **Convictions: Appeal and Error.** Not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
3. **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.
4. **Jury Instructions.** As long as there is a Nebraska jury instruction that accurately states the law and applies to the case, it is the instruction which should be given.
5. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court.
6. **Miranda Rights: Impeachment.** While impeachment by silence may be permissible, the government may not argue that a defendant's silence is inconsistent with a claim of innocence.
7. **Miranda Rights: Juries.** The identity of the person making the improper comment regarding a defendant's silence is not dispositive, but, rather, the

examination should focus on the effect of the comment on the jury.

8. **Tape Recordings: Corroboration.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded.

Michael W. Meister, of Meister & Segrist, for appellant.

Don Stenberg, Attorney General, and David K. Arterburn for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

Fernando Jimenez appeals his conviction for delivery of marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992). Jimenez alleges that he was convicted solely on the uncorroborated testimony of a "cooperating individual," in violation of Neb. Rev. Stat. § 28-1439.01 (Cum. Supp. 1994). In addition, Jimenez argues that the court erred in its instructions to the jury and in failing to uphold objections regarding the prosecutor's conduct during voir dire and responses by a witness to cross-examination at the trial. Because a witness for the State gave an unresponsive answer which injected evidence of Jimenez' silence and his request for an attorney, we must reverse.

I. STATEMENT OF FACTS

In January 1993, the Gering Police Department made an agreement with Daniel Hubbard in which Hubbard agreed to become a cooperating individual in exchange for a reduction in charges for delivery of marijuana. As part of the agreement, Hubbard informed the Gering police that Jimenez sold marijuana. Hubbard agreed to participate in a controlled buy of marijuana from Jimenez. On January 21, Hubbard met two Gering police officers, who were members of a drug task force, at the task force's headquarters. Investigator Robert Greer searched Hubbard's vehicle after Hubbard arrived and found a marijuana "roach," which Greer described as the burnt end of a marijuana cigarette. Det. Mark Overman searched Hubbard,

during which he patted Hubbard down and asked Hubbard to remove his shirt, shoes, and socks. Overman did not find any drugs or other contraband. Overman counted the money Hubbard had with him and gave him $100 to purchase the marijuana. In addition, Overman equipped Hubbard with a body transmitter.

Hubbard then drove to an apartment building in Gering. Gering police had earlier confirmed that Jimenez' mother was living in an apartment in the building. Greer and Overman followed Hubbard and observed Hubbard park his car and walk to the apartment building. Greer and Overman drove past Hubbard and parked about one block north of the apartment building, where they monitored the transaction through use of Hubbard's body transmitter. Greer and Overman taped Hubbard's activity from the time Hubbard entered the apartment building until Hubbard left after buying marijuana from Jimenez. After Hubbard completed the transaction, Greer and Overman followed Hubbard to a police parking lot. Greer searched Hubbard's vehicle and found nothing. Hubbard gave Overman the marijuana he bought from Jimenez, and Hubbard was then searched by Overman. Overman testified that he found $10 in change from the buy money on Hubbard.

Hubbard testified that he had been to the apartment several times before January 21. Hubbard stated that when he knocked on the apartment door, someone answered and let him in. Hubbard testified that he waited in the living room with Jimenez' brother and mother for about 10 minutes while Jimenez talked on the phone. At trial, the tape recording was played, and Hubbard identified his own voice and those of Jimenez' brother and mother, as well as the sound of a television playing in the background. Hubbard then went into Jimenez' bedroom. At trial, Hubbard again identified his own voice and the voice of Jimenez on a tape recording of the drug transaction in the bedroom which was played in court. On the tape, Hubbard indicates to Jimenez that he has $100 to buy marijuana. Jimenez states that he will let Hubbard have the marijuana for $90. The two talk about the size of the buds on the marijuana and that the marijuana "[s]mells kind of mildewy." Hubbard finishes a beer; leaves the building; gets in a

car; and drives off, telling the police officers who are monitoring the transaction which direction he is headed.

Jimenez was subsequently arrested and charged with delivery of marijuana.

II. ASSIGNMENTS OF ERROR

Jimenez alleges the district court erred in (1) failing to grant his motion to dismiss, which was based on Jimenez' argument that the cooperating individual's testimony had not been corroborated; (2) failing to give Jimenez' proposed jury instructions; (3) failing to order certain discovery; (4) failing to sustain Jimenez' objection to the prosecutor's remarks during voir dire; and (5) failing to immediately instruct the jury on the law regarding a defendant's right to counsel when a witness testified Jimenez told police he wanted to talk to a lawyer. Because of our conclusion, we will address the first assignment of error last.

III. STANDARD OF REVIEW

[1] All the jury instructions must be read together, and if, taken as a whole, the instructions correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error which would necessitate a reversal. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

[2] Not all trial errors, even of a constitutional magnitude, entitle an accused to reversal of an adverse trial result; it is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

IV. ANALYSIS

1. Jury Instructions

(a) Corroboration Instruction

Jimenez argues that the jury was improperly instructed because the instruction regarding the elements of the charge of delivery of marijuana stated, "The material elements which the State must prove by evidence beyond a reasonable doubt in

order to convict the defendant of the crime charged are . . . ," and the instruction on corroboration of the testimony of a cooperating individual stated, in relevant part, "Corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue."

Jimenez argues that when read together the instructions mislead the jury into believing that the testimony of the cooperating individual standing alone is sufficient to convict, because both instructions use the term "material." We are at a loss to understand how this could be the case. The "material elements" language is a standard, classic instruction which tells the jury what the State must prove to sustain a conviction. The "corroboration" instruction, as discussed hereafter, is a correct statement of the law.

Jimenez also complains that the foregoing instruction on the sufficiency of corroboration was an incomplete statement of the law. This instruction is a direct, word-for-word quote regarding the law on sufficiency of corroboration as stated in *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982). Citing *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988), Jimenez argues that instead the jury should have been instructed that "[c]orroboration may be supplied by observation that the meeting between the defendant and the cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place."

In *Knoefler*, the police attempted to record the drug transaction, but the attempt failed. The *Knoefler* court found that corroboration could be established by a myriad of investigative methods and that corroboration in that case was established by police observations and a search of the cooperating individual. *Knoefler* does not stand for Jimenez' argument that there must be a visual observation by law enforcement officers that a meeting between the cooperating individual and the defendant actually took place in every case in order to provide corroboration.

[3] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show

that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). 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. Nelson*, 2 Neb. App. 289, 509 N.W.2d 232 (1993).

Because Jimenez' tendered instruction on corroboration was not a correct statement of the law and the district court's instruction correctly states the law in that regard, there was no error in its instruction to the jury on corroboration.

(b) Intent Instruction

[4] Jimenez next argues that the instruction regarding intent was incorrect. The instruction given states: "Intent is an element of the crime of distribution or delivery of marijuana. In deciding whether the defendant acted with intent you should consider his words and acts and all the surrounding circumstances." Jimenez argues that the phrase "his words and acts" instructs the jury that Jimenez is the other male speaking on the tape during the transaction and therefore improperly tells the jury what is fact, rather than allowing the jury to find the fact regarding whose voice is on the tape. The intent instruction given is from NJI2d Crim. 5.1. "[S]o long as there is an NJI instruction that accurately states the law and applies to the case, it is the instruction which should be given." *State v. Davis*, 1 Neb. App. 502, 515, 500 N.W.2d 852, 859 (1993). The NJI instruction given on intent in this case is an accurate statement of the law. See *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

(c) Expert Testimony Instruction

Finally, Jimenez alleges that the instruction given to the jury regarding expert testimony was unnecessary and caused the jury to place undue weight upon Overman's testimony regarding drug terms used by Jimenez and Hubbard in the tape recording. Overman testified regarding the meaning of some terms Jimenez and Hubbard used during the transaction. In

relevant part, the jury was instructed: "A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness." The instruction is from NJI2d Crim. 5.4 and is a correct statement of the law. See *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986). In addition, because the jury was told that only it could determine the weight, if any, to place on an expert's testimony, we are at a loss to understand Jimenez' argument that the instruction placed undue weight on Overman's testimony. We find that Jimenez' assignment of error regarding the jury instructions is wholly without merit.

2. DISCOVERY

Jimenez alleges that the district court erred because it did not grant his pretrial discovery request for Overman's personal notes. In his discovery motion, Jimenez requested, among other items, "All personal or business notes, memorandums [sic], and writings prepared by investigators in this case which are not furnished pursuant to any other provisions of this request."

At trial, Overman testified, "[I]n my notes it shows that I turned [the tape recorder] off . . . ," "I recall from my notes that I gave [Hubbard] a hundred dollars total . . . ," and "I've looked through my notes and they don't [reflect how Overman knew Jimenez' mother was his mother]." At trial, Jimenez' attorney did not request Overman's notes upon Overman's testimony regarding those notes.

Jimenez argues that it was an abuse of discretion to deny him the opportunity to review the notes prior to trial, and as a result, he was deprived of a substantial right of effective assistance of counsel and the ability to prepare for trial. The district court noted at the discovery motion hearing that Jimenez would have the opportunity to review any documents used to refresh any witness' recollection at trial, as required by Neb. Rev. Stat. § 27-612 (Reissue 1989). In addition, Jimenez requested and was allowed to depose Overman. The defendant in *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990), made a similar

discovery request for police documents, which was denied, but like Jimenez, had the opportunity to depose the police officers and to request the documents under § 27-612. The *Boppre* court found:

> Boppre fails to show how he was prejudiced by the district court's refusal to grant discovery of the three items. He does not claim that he was denied the opportunity at trial to review any documents used to refresh any witness' recollection, and nothing in the record indicates that the State possessed [evidence] that persons other than Boppre had a motive to commit the crimes. Furthermore, Boppre was allowed to depose the three witnesses whose testimony was most prejudicial to him, providing him an opportunity to inquire as to the existence of any prior statements made by those witnesses.
>
> . . .
>
> Boppre makes no claim that the district court's failure to grant discovery of the requested items infringed his sixth amendment right to confrontation. Nor does Boppre claim that the prosecutor withheld evidence favorable to him and material to his guilt or innocence, and thus he raises no issue under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Even if he were making such claim, it would fail. Under *Brady* . . . although the due process clause requires the prosecutor to disclose exculpatory evidence which is material to the accused's guilt or innocence, such evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. See *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). The record simply fails to demonstrate that the outcome of the trial would have been different had Boppre's discovery requests been granted.

234 Neb. at 942-43, 453 N.W.2d at 423. Jimenez makes no *Brady* claims, nor does he claim he was denied the opportunity at trial to request the notes pursuant to § 27-612. There is nothing in the record to show Jimenez was prejudiced by the denial of discovery of the notes, nor does the record demonstrate that the outcome of the trial would have been

different had Jimenez been given the personal notes of Overman prior to trial.

3. PROSECUTOR'S REMARKS DURING VOIR DIRE

Jimenez argues that during voir dire, the prosecutor made a remark which coached the venirepersons how to answer defense counsel's questions regarding potential bias on the nature of a charge of selling marijuana. In voir dire, one venireperson indicated that she was involved in antidrug programs in the school system and belonged to Mothers Against Drunk Driving. She was asked whether her affiliation with such groups caused her to have some predetermined ideas about drug cases, to which she answered:

> [Venireperson]: I would try to be impartial but I'm afraid it would, yes.
>
> [Defense attorney]: You said you would try to be impartial?
>
> [Venireperson]: Um-hum.
>
> [Defense attorney]: But then you indicated that you're afraid it would probably impact you?
>
> . . . .
>
> [Venireperson]: I just very severely am antidrug and it just causes too many problems with too many people and I'm afraid it might be a problem, yes.

The venireperson was excused for cause. The next venireperson was asked:

> [Prosecutor]: Ms. [venireperson], I assume you're not in favor of drugs either, I take it; is that right?
>
> [Venireperson]: Right.
>
> [Prosecutor]: Now, to be a juror, that doesn't mean you have to be in favor or not in favor of drugs, the question is really this, can you put aside your feelings, whatever they might be, and listen to the evidence, listening to what the Judge tells you is the law and make a decision based on the evidence and the law, can you do that?
>
> [Venireperson]: Right, I can do that.
>
> [Prosecutor]: Okay. If you can do that, you can be a juror in this case even if you don't like drugs.

At this point, Jimenez' attorney objected, alleging that the

prosecutor was coaching the venirepersons. The objection was overruled.

[5] We fail to see how the prosecutor's remarks could be regarded as coaching. The prosecutor's remarks were a correct statement of the law. "The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court." *State v. Boppre*, 234 Neb. 922, 936, 453 N.W.2d 406, 420 (1990).

4. WITNESS' REMARKS ON CROSS-EXAMINATION

Jimenez alleges the district court erred when it did not give an immediate curative jury instruction after Overman testified that Jimenez told him he did not want to talk to the police until he had talked to an attorney. The following cross-examination of Overman was had by Jimenez' counsel: "Q. Mr. Jimenez said he didn't do this crime, didn't he? A. As I recall, Mr. Jimenez said he didn't want to talk to us without a lawyer." Jimenez' counsel immediately objected to Overman's testimony as nonresponsive. The objection was overruled.

Overman's answer, in our opinion, was unresponsive. A responsive and accurate answer to the question would have been: "No, he didn't say that," or "Yes, he said he didn't do the crime." Because Overman's answer was not only unresponsive but also commented upon Jimenez' *Miranda* right to remain silent and request counsel, we must decide whether the district court's refusal to give a curative instruction amounted to prejudicial error and whether such prejudicial error was harmless beyond a reasonable doubt.

Cases in which evidence of a defendant's silence and request for counsel are put before the jury fall into two categories: (1) those in which the evidence is used to impeach the defendant's testimony at trial and (2) those in which the evidence is used to imply guilt. In the first category, the state may not refer to post-*Miranda* silence to impeach an exculpatory story told by the defendant for the first time at trial. *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988); *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988); *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct.

2240, 49 L. Ed. 2d 91 (1976). In contrast, the defendant's prearrest, pre-*Miranda* silence may be used to impeach the defendant's exculpatory testimony. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). The record here does not reveal whether the conversation testified to by Overman was prearrest or postarrest or pre- or post-*Miranda* warnings. "[A]ny ambiguity regarding precisely when the defendant declined to talk to the police impermissibly taints evidence of the defendant's silence." *State v. Wells*, 229 Neb. at 102, 425 N.W.2d at 346.

[6] The second category of cases includes those in which, during the state's case in chief, the state has introduced evidence of the defendant's silence. The Nebraska Supreme Court has made it very clear that such references in the state's case in chief are impermissible, regardless of whether the silence was pre-*Miranda* or post-*Miranda*. *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (1990). The purpose of the state's references to a defendant's silence in such a case is not to impeach, but "to suggest that he was guilty . . . . [While] impeachment by silence [may be] permissible, the government may not argue that a defendant's silence is inconsistent with a claim of innocence." *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). Thus, had the prosecutor in this case solicited Overman's answer, Overman's testimony would clearly be inadmissible under *State v. Rowland, supra*. The question is whether Overman's testimony still creates error when Overman volunteered the information in an unresponsive answer to Jimenez' counsel on cross-examination.

[7] In *United States v. Shaw*, 701 F.2d 367 (5th Cir. 1983), *cert. denied* 465 U.S. 1067, 104 S. Ct. 1419, 79 L. Ed. 2d 744 (1984), the government argued on appeal that a police officer's testimony at trial regarding the defendant's silence was "gratuitous, merely a recitation of events, and did not constitute an invitation to the jury to infer [the defendant's] guilt from the fact of his silence." *Id.* at 381. However, the court found that "the identity of the person making the improper comment regarding a defendant's silence is not dispositive . . . but rather . . . the examination should focus on the effect of the comment upon the jury." *Id.* at 381 n.8.

We believe that Overman's testimony, which he volunteered

in an unresponsive answer during cross-examination, must be viewed for what it was. The testimony was from one accustomed to testifying, obviously identified with the prosecution, who injected Jimenez' exercise of his right to remain silent and consult with counsel into the case. It appears to be an attempt by the witness to have the jury infer guilt from the desire to remain silent and speak with counsel. The question of Jimenez' counsel which generated Overman's response seems clearly designed to imply innocence while avoiding placing Jimenez on the stand to make that claim himself. At first blush, this gives us some concern. Nonetheless, the answer went beyond the question and was unresponsive. As a timely objection was made on the ground of unresponsiveness, it should have been sustained and the jury immediately instructed to disregard Overman's response. However, since the trial court overruled the objection and did not give an immediate cautionary instruction, as defense counsel requested, we must now examine the effect of Overman's volunteered statement upon the jury in the proper context. In our view, the proper context is that there was an error in allowing inadmissible testimony to be placed before the jury. It cannot be characterized as a matter of no import, since the erroneously admitted evidence details the exercise by Jimenez of a constitutional right to remain silent and have the assistance of counsel at a point in time (prearrest or postarrest or pre- or post-*Miranda* warnings) indiscernible from the record.

"An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt." *State v. Rowland*, 246 Neb. at 853, 452 N.W.2d at 763. In the case at hand, Jimenez' objection to Overman's answer was overruled, and no immediate curative jury instruction was given. The proof linking Jimenez to the crime committed is certainly less than overpowering. The State's case relies heavily on the testimony of the cooperating individual. It may well be true that the jury perceived the evidence of Jimenez' request for counsel as evidence of his guilt, thus filling in the crucial nexus connecting him to the crime he was accused of having committed. Therefore, we

cannot say that the admission of Overman's testimony, without an immediate curative instruction, was harmless beyond a reasonable doubt.

5. CORROBORATION OF TESTIMONY OF COOPERATING INDIVIDUAL

Jimenez alleges that the trial court should have granted his motion to dismiss at the end of the evidence, because the State failed to present evidence which sufficiently corroborated Hubbard's testimony regarding the transaction. This assignment generally attacks the sufficiency of the evidence to sustain Jimenez' conviction. Although we believe the admission of Overman's testimony was reversible error, it is necessary to a complete resolution of this appeal for us to examine the sufficiency of the evidence to support Jimenez' conviction. In *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987), the defendant appealed her convictions for possession of marijuana with intent to deliver and possession of cocaine. On appeal, she claimed an improper joinder of her trial with that of a codefendant and that the evidence was insufficient to support the convictions. The Supreme Court, having concluded that the joinder was improper and that it was reversible error, stated that it was still "necessary to examine the sufficiency of the evidence to support Lee's convictions." *Id.* at 283, 417 N.W.2d at 30. By way of explanation for this, the court stated:

> As we noted in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986): "[T]he U.S. Supreme Court [has] held that an appellate finding of insufficient evidence to convict is tantamount to an acquittal and, therefore, that the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 295-96, 399 N.W.2d at 718 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). . . . If it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient under *Palmer, supra*, the cause must be dismissed.

State v. Lee, 227 Neb. at 283, 417 N.W.2d at 30.

Lee teaches of the *necessity* for an appellate court to address

a claim of insufficiency of the evidence, even though a trial error has occurred which otherwise demands a reversal, because if the evidence is insufficient to sustain the conviction, the cause must be dismissed rather than remanded for further proceedings.

Under § 28-1439.01, "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual." The Nebraska Supreme Court has held that "corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue." *State v. Beckner*, 211 Neb. 442, 447, 318 N.W.2d 889, 893 (1982).

Jimenez argues that in this case there is insufficient corroboration that he was the person that sold Hubbard the marijuana. In addition, he argues that it is insufficient corroboration to have the cooperating individual identify the voices on the tape. Because he alleges there was no independent identification of Jimenez as the seller, beyond Hubbard's testimony, Jimenez argues that Hubbard's testimony was uncorroborated, and the conviction cannot stand.

Jimenez argues that under *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988), "for the corroboration to be sufficient there needs to be observation that the meeting between the subject and the cooperating individual took place." Brief for appellant at 10. Jimenez misreads *Knoefler*. At issue in *Knoefler* was whether a cooperating individual's testimony that a sale of drugs took place was corroborated when a body microphone malfunctioned and police failed to record the transaction. The only corroboration was a search of the cooperating individual and his automobile before the sale, the observation by the officers that the cooperating individual met with the defendant, and that the cooperating individual had drugs on his person after he met with the defendant. The *Knoefler* court noted that in *State v. Beckner, supra*, the court had listed various methods of corroboration, but the *Knoefler* court stated that "[s]uch language was illustrative only. *Beckner* expressly rejected the argument that a cooperating individual be corroborated on every element of the crime. . . . We have not at

any time implied that corroboration is absent if one or more investigative techniques [are] not employed . . . ." 227 Neb. at 413, 318 N.W.2d at 219.

The court in *Beckner* noted that the legislative history of § 28-1439.01 established that

> "[a] corroboration requirement does not mean that a commissioned law enforcement agent would have to be physically present at the time a drug purchase is made. Corroboration could be supplied, by instance, through the use of electronic surveillance, observations which indicate simply that the meeting between the subject and the cooperating individual actually took place, searches of the cooperating individuals both before and within a reasonable time after the drug purchase is alleged to have taken place, the use of marked buy money, the use of cooperating individuals in teams, the use of fingerprint analysis and numerous other investigative techniques."

211 Neb. at 446-47, 318 N.W.2d at 892-93. The *Beckner* court further noted that during floor debate on the legislation which enacted the predecessor of § 28-1439.01, the corroboration needed under § 28-1439.01 was equated to that needed to support a conviction for the offense of rape. "In that regard this court has previously held that corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue." *State v. Beckner*, 211 Neb. at 447, 318 N.W.2d at 893.

The principal fact in issue in this case is the identity of the person who sold the marijuana to Hubbard. The identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence. *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987); *United States v. Royals*, 777 F.2d 1089 (5th Cir. 1985); *United States v. Lawrence*, 699 F.2d 697 (5th Cir. 1983), *cert. denied* 461 U.S. 935, 103 S. Ct. 2103, 77 L. Ed. 2d 309; *United States v. Quimby*, 636 F.2d 86 (5th Cir. 1981). Under § 29-1439.01, Hubbard's testimony, standing alone, that Jimenez sold him the marijuana is not enough, and corroboration of the drug seller's identity must be had. However, corroboration that Jimenez was the person who sold

that marijuana to Hubbard may be had by circumstantial evidence.

The Gering Police Department first learned of Jimenez from Hubbard, who had identified Jimenez to police as someone from whom Hubbard could buy marijuana. Overman testified at trial that Hubbard gave police the description of the apartment building in which Hubbard stated Jimenez lived. The police then determined the exact address of the building by checking customer lists of utilities and determined that Jimenez' mother resided in the apartment building. Overman said that the apartment building matched Hubbard's description of the building in which Hubbard stated Jimenez lived. Overman stated that after the building was identified, he drove past the building multiple times in a week and observed Jimenez at the location. Finally, on the tape, one can hear Hubbard knock on a door, which someone answers, of whom Hubbard asks, "Hey, is Fernando around?" While one cannot hear the person's response, one can hear that Hubbard is admitted inside.

[8] Jimenez alleges that the tape recording of the drug transaction between Hubbard and Jimenez is insufficient evidence because Hubbard was corroborating his own testimony. "[T]ape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid." *State v. Loveless*, 209 Neb. 583, 589, 308 N.W.2d 842, 846 (1981).

In *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985), the court held that a tape recording of a drug transaction offered for corroboration was admissible, as sufficient foundation had been laid by the cooperating individual's testimony. The defendant complained that the recording should have been inadmissible because the voices on the tape were not properly identified. However, the court noted that the cooperating individual testified that the defendant was the person from whom he had purchased the drugs and that the defendant was the only male spoken to during the transaction. "The jury heard the agent testify and also make the introduction to the tape. This would enable the jury to discern between the two

male voices on the tape. . . . Other voices on the tape were merely incidental and did not relate to the drug transaction." *Id.* at 117, 375 N.W.2d at 613. In the case before us, the tape recording made of the actual drug transaction contains only two male voices. Hubbard testified that the transaction took place in Jimenez' bedroom. The jury had an opportunity to hear Hubbard's voice when he testified and compare it to the voices on the tape. The tape corroborates the details of Overman's and Hubbard's testimony. On the tape, Hubbard indicates to Jimenez that he has $100 to buy marijuana. Jimenez states that he will let Hubbard have the marijuana for $90. The two talk about the size of the buds on the marijuana and that the marijuana "[s]mells kind of mildewy." Hubbard finishes a beer; leaves the building; gets in a car; and drives off, telling the police officers who are monitoring the transaction which direction he is headed. Hubbard gave the marijuana to Overman, and Hubbard and his vehicle were searched. On Hubbard's person, Overman found $10 in change from the $100 he gave Hubbard for buy money.

In short, the State's evidence did not consist solely of the uncorroborated testimony of Hubbard. When viewed most favorably to the State, it is sufficient to support the verdict. This conclusion, however, in no way mitigates the trial error which occurred. That error was not harmless, and reversal must follow.

V. CONCLUSION

We find that the jury instructions complained of were correct statements of the law, and therefore there was no error. Next, we find that there is nothing in the record to show Jimenez was prejudiced by the denial of discovery of Overman's personal notes, nor does the record demonstrate that the outcome of the trial would have been different had Jimenez been given the personal notes of Overman prior to trial. In addition, we do not find that there was any error in overruling Jimenez' objection to the questions and remarks made by the prosecutor to the venirepersons. However, we conclude that evidence of Jimenez' silence and request for an attorney was wrongfully admitted over proper objection and that such error was not harmless.

Hubbard's testimony was sufficiently corroborated in this case, and the evidence was legally sufficient to support Jimenez' conviction. Nevertheless, because of the erroneous admission of evidence of Jimenez' silence and request for an attorney, we must reverse the conviction and sentence and remand the cause to the district court for a new trial.

REVERSED AND REMANDED.

HANNON, Judge, dissenting.

I find I must dissent from that portion of my colleagues' opinion that holds the trial court committed prejudicial error by not sustaining the defense counsel's objection to Detective Overman's improper answer to his question. The answer was nonresponsive, and therefore I agree the objection should have been sustained, and upon request the jury should have been instructed to disregard the answer. See *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966). However, in my view, the defense opened up the matter. By asking a question which implied the defendant had asserted his innocence upon his initial contact with the police, defense counsel waived his client's right to prevent the State from proving that he asserted his right to remain silent. The trial judge should have sustained the objection, and then upon request the State should have been allowed to ask what the defendant really said at that time. The same evidence would have been before the jury by either route. Therefore, the improper shortcut was not prejudicial to the defendant, particularly when the prosecutor never sought to use the police officer's statement in his questions or arguments.

I base my position on a line of cases that are based upon a footnote found at the end of the majority opinion in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). That footnote states:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. *United States* v. *Fairchild*,

505 F. 2d 1378, 1383 (CA5 1975).
426 U.S. at 619-20 n.11.

What happens when the defense seeks to avoid the effect of the *Fairchild* exception by the defendant's attorney asserting on cross-examination of a police officer that the defendant protested his or her innocence? In the case *State v. Hjerstrom*, 287 N.W.2d 625, 628 (Minn. 1979), the opinion states: "The prosecutor sought and obtained permission to elicit [certain] testimony only after defense counsel, in cross-examining the arresting officer, asked a series of questions for the purpose of showing that the arresting officer had not questioned the defendant in any detail about what he had been doing." The prosecutor elicited testimony from a different officer that he had attempted to get a complete story from the defendant, and cross- and recross-examination showed that the defendant had remained silent after being given *Miranda* warnings.

In that case, the Minnesota court approved the examination, stating:

> Here defense counsel tried to create the impression on cross-examination of the arresting officer that the police were not interested in letting defendant give his full and complete version of what had happened on the evening in question, so it was proper for the state to rebut this by showing that the police had tried but were unable to obtain a complete statement from defendant.

287 N.W.2d at 628.

In a similar case, *State v. Bell*, 446 So. 2d 1191 (La. 1984), the Louisiana court approved cross-examination which elicited the invocation of *Miranda* silence and in so doing, stated: "In *Fairchild*, a defendant's post-arrest silence was admissible to rebut a contention of active cooperation with the police when in fact the defendant had invoked his Fifth Amendment rights." 446 So. 2d at 1193. The Louisiana court stated that the "defendant invited the state's inquiry into what happened in the early stages of the investigation." *Id.* at 1193-94. In my opinion, the defendant's attorney invited Overman's nonresponsive answer. I would affirm the conviction and sentence.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY PIERCE, APPELLANT.

527 N.W.2d 872

Filed February 14, 1995. No. A-94-398.

1. **Convictions: Juries: Circumstantial Evidence.** When circumstantial evidence is the only basis upon which to support a conviction, two initial questions of law must be determined by the trial court prior to the submission of the evidence to the jury: (1) whether the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and (2) if so, whether the inference of guilt is stronger than the inference of nonguilt.
2. _____: _____: _____. If the inference of nonguilt is stronger than or equal to the inference of guilt, then the case should not be submitted to the jury, and the circumstantial evidence is insufficient to sustain a conviction.
3. **Convictions: Circumstantial Evidence: Appeal and Error.** On appeal of a conviction based solely on circumstantial evidence, an appellate court must first independently decide as a matter of law whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or equal to the inference of guilt.
4. **Convictions: Juries: Appeal and Error.** If an appellate court determines that the evidence was properly submitted to the jury, then on appeal the State is entitled to have all conflicting evidence and the reasonable inferences which can be drawn from the evidence viewed in its favor.
5. **Criminal Law: Circumstantial Evidence: Proof.** The probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed only during the commission of the crime.
6. **Convictions: Circumstantial Evidence.** In a solely circumstantial evidence case, fingerprint evidence is sufficient to sustain a conviction only if the record contains sufficient evidence from which the trier of fact can reasonably infer that the defendant's fingerprints were in fact impressed on the object in question while he was committing the crime and not at some other time.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions to dismiss.

Leonard G. Tabor for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

SIEVERS, Chief Judge, and HANNON and MUES, Judges.

SIEVERS, Chief Judge.

The conviction of Timothy Pierce on appeal here is premised solely upon circumstantial evidence. Consequently, we must

utilize the Nebraska Supreme Court's recent pronouncements on the subject of the standard of appellate review from *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995).

Pierce was convicted by a Scotts Bluff County District Court jury of forcibly breaking and entering the home of Julie Pengelly, with the intent to commit a felony or steal property, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1989). After an enhancement hearing, Pierce was found to be a habitual criminal as defined in Neb. Rev. Stat. § 29-2221 (Reissue 1989), and he was sentenced to an indeterminate term of 14 to 17 years' imprisonment. For the reasons cited below, we reverse the conviction.

FACTUAL BACKGROUND

Julie Pengelly resided alone in a house at a lakeside development comprising 30 to 35 homes at Lake Minatare located in Scotts Bluff County. On the evening of August 24, 1993, she worked in her home at tasks associated with her position as the volleyball coach at Scottsbluff High School. She retired at approximately 10:15 p.m. and awoke a minute or two before 1:49 a.m. to find a man with his hand or hands upon her shoulder. She screamed, called him a "son of a bitch," pulled her knees up to her chest, and kicked hard against his chest, propelling him across the room, where he hit a wall and fell into a chair. Pengelly immediately ran out of her home to a neighbor's, where a call was placed to 911 which was received at 1:49 a.m. Within 7 minutes, Deputy Scotts Bluff County Sheriff Vern Hessler and a Minatare police officer arrived and began an investigation of the incident.

Although there had been no interior lights on at the residence, Pengelly described the man to Hessler as a

> white male suspect, 5'6" tall, average, indicating not muscular build, late 20's to early 30's in age, dishwater blond hair, ear lobe length parted down the middle. She said he had no mustache or beard, no chest hair, no alcohol on his breath, she said he was wearing no shirt or cap, and she was unaware if he had anything below — on below the waist, she didn't observe that.

Pengelly had run from her home using the door on the road

side of the home, but had noticed as she passed that the other door, on the lake side of the home, was closed. During the inspection of the residence in the course of the investigation, the door on the lake side was found to be open. A nearly floor-to-ceiling window screen had been removed and had been set inside the residence. Pengelly had gone to bed with this window open, but with the screen in place. The key piece of physical evidence was a Miller Genuine Draft beer bottle found by Hessler and Pengelly sitting on the ground outside of the home in front of the window where the screen had been removed. The bottle was found as Pengelly and Hessler examined the area within a matter of minutes of the occurrence. Pengelly described the bottle, when it was first discovered, as "obviously fresh, there was foam in it," and she said that the ground was wet and cold where the contents of the bottle had spilled. Pengelly and Hessler left the beer bottle where it was, but later that morning at approximately 10:30 when Pengelly returned from her volleyball practice, she decided that the beer bottle may be important. Pengelly testified that she picked the bottle up with a pencil inside the neck of the bottle; poured out the remaining beer, observing foam when it hit the ground; and took it inside. On the afternoon of August 25, this beer bottle was taken by Alex Moreno, a sheriff's investigator, who checked it for latent fingerprints. Three prints were found on the bottle, one of which was read by Linda Brokofsky, a fingerprint expert with the Nebraska State Patrol, as being a match with the right ring finger of Pierce. Moreno dusted several areas in the residence for fingerprints, including the window screen and the doorknob on the lake side door which was standing open when Pengelly and Hessler returned to the residence and examined it after the incident. However, no fingerprints or smudges were found.

Hessler found a knife (described variously in the record as a utility and a paring knife), in the yard on the road side of the residence. However, Pengelly did not testify that the man who stood over her bed displayed any weapon. A search of the home where Pierce lived, the third home west of Pengelly's, did not turn up a similar set of knives or any other matching set of knives with one missing which would account for the knife

found in Pengelly's yard. No fingerprints or smudges were found on the knife.

Pengelly testified that when she fled her house, she was being chased and barked at by a dog named "Bear" which she recognized as belonging to Pierce. The evidence established that Bear was a German shepherd-Chow cross which had the physical appearance of a Rottweiler. The evidence also established that Pierce's sister, Tamara Miller, who lived with Pierce, owned a purebred Rottweiler named "Sammi Jo." Various witnesses throughout the trial related that there were typically 8 to 10 free-roaming dogs in the area, plus an occasional stray or two. Katherine Pierce, formerly Katherine Carmodie, who then lived with Pierce and his sister, testified that although Bear was often chained in the daytime, the dog was allowed to run loose at night.

When Hessler arrived in the area in response to the call, the only lights on in any residence in the area were at Bonnie Wickard's, where Pengelly had run to make the 911 call. Pierce was contacted about 3:15 on the morning of the incident after Pengelly told Hessler that "the neighbor man down the road might match the description." Hessler testified that when he first saw Pierce, he appeared as though he had just woken up, he was wearing just blue jeans, and "[h]e did have chest hair, he did have a mustache and beard." In his deposition used at trial for impeachment, Hessler testified that Pierce had said he had been asleep at the residence for several hours. When Hessler drove up to the Miller-Pierce residence at about 3:15 a.m. he observed two dogs running loose and barking at him. Hessler testified that it took a long time to rouse someone to come to the door. Hessler testified that while inside the Miller-Pierce residence, he saw Miller Genuine Draft beer, in cans, and that Pierce admitted to him that this was the brand he drank.

On the evening prior to this incident, a group of people were having a party on the beach approximately 550 feet from Pengelly's home, and included in this group were Edward Gonzales, Juanita Martinez, Cenovio Gonzales, and Lori Gonzales, all of whom testified for the State. None of these witnesses testified to seeing Pierce enter Pengelly's residence. They did testify that Pierce spent time with them that evening at

that party drinking beer.

Edward Gonzales testified that he first saw Pierce around 8:30 to 9 p.m. when he came to their beach campsite with one dog following him, but looking for another one. Pierce was directed down the beach to another campsite, and he later returned with the Rottweiler-looking dog. Juanita Martinez was with Art Rivera that evening. She testified that this party was the first time she had seen Pierce, and her recollection of seeing Pierce for the first time was when he walked up to their campsite party with "the dogs" and started "talking to the guys there." She testified that they were running low on beer, and Rivera and Pierce left and came right back with "tall beer" which had Harley-Davidson logos on the cans. Edward testified that Pierce returned from this "beer run" with Rivera with cans of Miller Genuine Draft beer with Harley-Davidson logos on them. During Moreno's search of the beach area the next day, he found empty cans like these. Edward testified that when Pierce returned with the Harley Davidson cans, Pierce was drinking from an open bottle of beer of an unspecified brand. Martinez placed the time of this "beer run" at 8:30 to 9 p.m., and no other evidence introduced has Pierce drinking from a beer bottle at any other time except upon the return from this "beer run."

Martinez testified that Pierce left the party a second time with herself and Rivera in her car. Martinez testified that Pierce had them stop along the beach and that Pierce indicated that he would be back in 5 minutes, but that he never returned to the vehicle. At the spot where they let Pierce out on the beach, Martinez could see up the hill toward the houses, and she described this as being around 11 or 11:30 p.m.

Cenovio Gonzales testified that he first saw Pierce at Gilligan's, a lakeside store that sells beer, that evening around 8:30 or 9, when Cenovio had stopped to get beer. Cenovio invited Pierce to the beach party. Pierce showed up at the party, and Cenovio described him as "walk[ing] through the trees and some dogs follow[ing] him." Cenovio testified that Pierce left the party for 10 to 15 minutes, came back, and then left a second time with Rivera and Martinez, but Pierce did not come back after the second time. Cenovio testified that when Pierce

left the first time, Pierce brought back big Miller cans with Harley-Davidson pictures on the back of them, but that at Gilligan's, Pierce had been drinking Miller beer from bottles. Cenovio testified that "when [Pierce] left the second time he said he was going home because everybody else was going to sleep." Cenovio described being at the party during the day and seeing the Rottweiler-looking dog running around and said that evening when Pierce came, there were four or five other dogs. Cenovio said that Pierce had obviously been drinking, as had the other males at the party.

Lori Gonzales testified that she recalled seeing Pierce at the party and recalled him leaving with Rivera to get some beer and that they returned with beer. On a second occasion, Pierce left with Rivera and Martinez to look for firewood. Lori testified that on this occasion, "he took the dogs with him. . . . [T]hey jumped in the back of [Martinez'] hatchback." Martinez and Rivera came back without Pierce, saying that he was taking too long and that they had to leave because Martinez had to go to work the next day. Pierce then returned, apparently at a time when only four people were left at the party: Lori and Edward Gonzales, Jessica Gomez, and Cenovio Gonzales. Lori testified that Pierce came back without the dogs, but that they showed up later on because "wherever he was the dogs seemed to come around." The only testimony from Lori about Pierce's drinking was that he was drinking a "can of — it was gold with [a] black label."

Edward Gonzales' direct testimony was that Pierce left the party site for the last time around 2 a.m. Edward also testified that when Pierce returned on foot after Rivera and Martinez had left, the two dogs were with him. According to Edward, the dogs were also sniffing around the tent when he woke up in the morning, even though Pierce was not there. On cross-examination, Edward was confronted with his deposition testimony where he had testified that he " 'was already inside the tent with Lori and I didn't know when he [Pierce] had left, I didn't know, I have no recall of when he left.' "

Reynaldo "Ray" Ramirez testified that he was the manager of Gilligan's on August 24 and 25, that he was familiar with the neighborhood, and that there were 8 or 10 dogs in the

neighborhood, including a large black dog that came and went. Ramirez further testified that in the summer of 1993 Pierce worked part time at odd jobs at Gilligan's including stocking the beer coolers. On weekends, this might mean stocking three or four times per day, which also included breaking down larger containers such as 6- or 12-packs to stock the "singles." During the week, the coolers were usually stocked once a day in the evening. Of the Miller brands, Ramirez said that Genuine Draft in bottles was the top seller. Ramirez testified that Pierce had worked August 24.

Tamara Miller, Pierce's sister and Ramirez' girl friend, testified that there were always stray dogs in this area. She also corroborated Ramirez' testimony that Pierce stocked the coolers at Gilligan's, including the day before the crime. Miller testified that she and Ramirez had driven Pierce home from Gilligan's that evening shortly after 10:30. That evening, Miller's children were being babysat by Pierce's girl friend, Katherine Carmodie (now Katherine Pierce). Miller testified that she had called Katherine to check on her children several times during the evening, including a call around 12:30 a.m. Katherine testified that after that phone call, she and Pierce went to bed and did not get up until Hessler arrived around 3:15 a.m. Katherine also testified that when Pierce came home that evening around 10:30 she could smell smoke and alcohol on him.

ASSIGNMENTS OF ERROR

Pierce assigns error by the trial court in the following particulars: (1) the failure to sustain his motion for a directed verdict at the close of the evidence; (2) that the evidence was insufficient as a matter of law to sustain a finding of guilt; (3) the failure of the State to prove all of the essential elements of the crime; (4) the admission over objection of exhibits 8, 18, and 12 through 16; (5) the failure to grant a motion for new trial; and (6) the imposition of an excessive sentence.

STANDARD OF REVIEW

Because this is a circumstantial evidence case, we are bound to apply the standard of review found in the Nebraska Supreme Court's recent decision *State v. Skalberg*, 247 Neb. 150, 526

N.W.2d 67 (1995).

[1,2] In *Skalberg*, the Nebraska Supreme Court held that when circumstantial evidence is the only basis upon which to support a conviction, there are two initial questions of law to be determined by the trial court prior to the submission of the evidence to the trier of fact. These questions are whether the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and if so, whether the inference of guilt is stronger than the inference of nonguilt. *Skalberg* then holds that if the inference of nonguilt "is stronger than or equal to the inference of guilt, then the case should not be submitted to the trier of fact." *Id.* at 156, 526 N.W.2d at 71.

[3,4] *Skalberg* also addresses the question of the standard of review for the appellate court and holds:

> [T]he appellate court must first *independently decide as a matter of law* whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or equal to the inference of guilt. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

(Emphasis supplied.) *Id.* at 156, 526 N.W.2d at 71. If, after our independent review, we determine that the evidence was properly submitted to the trier of fact, "then on appeal the State is entitled to have all conflicting evidence and the reasonable inferences which can be drawn from the evidence viewed in its favor." *Id.* at 157, 526 N.W.2d at 71.

Skalberg also contains the following passage:

> In *Covarrubias*, 244 Neb. at 374, 507 N.W.2d at 253, we explained our earlier holding in *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992): "*LaFreniere* holds that in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *LaFreniere* requires a reasonable inference from circumstantial evidence to be taken most favorably to the accused when

> circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. See, also, *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992)."

State v. Skalberg, 247 Neb. at 156, 526 N.W.2d at 71.

Thus, in a jury trial there are three possible combination in a solely circumstantial evidence case where the evidence is reasonably susceptible of two interpretations: (1) The inference of guilt is stronger than that of nonguilt, in which instance the matter is properly submitted to the fact finder, and upon appellate review of the conviction the State is entitled to have the evidence and the inferences drawn therefrom viewed in its favor; (2) the inference of nonguilt is stronger than that of guilt, in which instance the case should not be submitted to the jury; or (3) the inferences of guilt and nonguilt are equal, in which event the case also should not be submitted to the jury. In the latter two instances, when the case should not be submitted to the fact finder, the evidence will be deemed insufficient to sustain the conviction. We read *Skalberg* as saying that the appellate courts are to weigh the inferences and judge their relative strength in order to reach an independent conclusion, as a matter of law, as to where the case falls among the three possibilities outlined herein.

ANALYSIS

We take it as established that at some point in time Pierce touched, handled, or held the beer bottle found outside Pengelly's window through which entry was made. The proposition is well established that "[f]ingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification." *State v. Riley*, 182 Neb. 300, 303, 154 N.W.2d 741, 743 (1967). Although much is now said and written about DNA evidence, see *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), we believe the statement from *Riley* still retains its vitality. However, the question is whether Pierce's fingerprint

on the beer bottle is sufficient to sustain the conviction, since the inferences from the other circumstantial evidence in this case are equivocal.

We face a question which has not previously been addressed by the Nebraska courts. That question is whether the evidence should be submitted to the jury and whether the evidence is sufficient to sustain a conviction when (1) all evidence of guilt is circumstantial, (2) the principal piece of evidence is the defendant's fingerprint impressed upon a movable object found outside of the illegally entered residence, and (3) the State's evidence fails to establish that the defendant's access to the object was limited so that his print could only have been impressed on the object during the commission of the crime.

As there is no Nebraska case on point, we turn to other jurisdictions and begin with the opinion, from which much of the precedent on this subject seems to have been derived, *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967). Borum was convicted of housebreaking. The victim's home was entered and ransacked in his absence between 11:45 a.m. and 3 p.m., and four fingerprints taken from empty jars were identified as Borum's. The victim testified that the jars had contained a valuable coin collection which was stolen along with other items of personal property. The government's evidence also placed Borum within 1 1/2 miles of the victim's home at approximately 1 p.m. on the day of the break-in.

In footnotes, the circuit court in *Borum* cited testimony that the fingerprint expert could not tell whether Borum's fingerprints were " 'recent prints or old prints,' " *id.* at 597 n.9, and found it noteworthy that Borum's prints were not found anywhere else in the house, although it had been "forcibly entered and thoroughly ransacked." *Id.* at 597 n.8. The court reasoned that there was no evidence, "either direct or circumstantial, which indicates that he [Borum] touched the jars in the course of a housebreaking on June 2, 1965." (Emphasis omitted.) *Id.* at 596. The court acknowledged that the jury may have thought that Borum could not have touched the jars at any other time or in any other place except during the housebreaking, but that such a conclusion would be based on speculation alone. The failure of the government to introduce

evidence that the jars were inaccessible to Borum except during the course of the housebreaking resulted in reversal of the conviction. The court reasoned:

> The jury had no way to determine where the complainant purchased the jars, or how long he had them before June 2, or whether complainant ever removed them from his home, or how long the prints were on the jars. The Government need not negate all inferences consistent with innocence which could arise from the fingerprints. It negated none.
>
> With evidence so inconclusive, a reasonable person must have a reasonable doubt about Borum's guilt. The case should not have been submitted to the jury, for the Government produced no evidence, either direct or circumstantial, which could support an inference that the fingerprints were placed on the jars during commission of the crime. Fingerprint evidence is very reliable. It is a kind of evidence courts should encourage police to obtain. But to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of a crime may be convicted, provided he was within a mile and a half of the scene when the crime may have been committed. We decline to adopt such a rule.

(Emphasis omitted.) *Id.* at 597.

It seems to us that *Borum* is very close to the instant case. There were no other prints found inside the Pengelly residence, despite Moreno's thorough examination of places that the intruder was likely to have touched during the course of the crime. However, two other prints described as unsuitable for comparison were found on the beer bottle, allowing one to at least speculate that someone else had also handled the bottle. The fingerprint expert who testified in this case also admitted that depending on the oiliness of the skin, temperature, moisture on the object, and humidity, it was possible to touch an object and not leave fingerprints.

The evidence which supports the conclusion that the bottle had recently been placed where it was found outside of Pengelly's residence is that Pengelly said the beer in the bottle still had visible foam, and the ground was wet and cold where

beer had spilled. However, that by itself does not compel the conclusion that the bottle had been placed there by Pierce, or if he placed it there, that he then entered the residence. Hessler, who found the bottle with Pengelly, testified that he did not take the bottle because, given "the proximity of the house from the lake, it could have been dropped there from anyone that may have walked across the yard." Moreover, even recent placement of the bottle does not establish when Pierce's fingerprint was impressed thereupon, particularly when the undisputed evidence is that Pierce is the beer stocker at the neighborhood off-sale location. Moreover, there was no expert testimony as to whether this was an old or new fingerprint. Thus, on the accessibility question, the evidence fails to limit Pierce's access to the beer bottle to the time of the crime, which is deemed essential under the line of authority beginning with *Borum*.

[5] Citing *Borum*, the Fourth Circuit Court of Appeals has said that the probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed only during the commission of the crime. *United States v. Corso*, 439 F.2d 956 (4th Cir. 1971). In *Corso*, a burglary conviction was reversed where the trial court had charged the jurors that if they found that the fingerprints on a matchbook cover (which had been placed in the door lock to prevent the door from locking) were those of the defendant, then they must conclude that he was the one who put the cover in the lock at the time of the burglary. Although the fingerprint expert's testimony was that Corso's prints were on the matchbook cover, there was no evidence as to how or when they were impressed thereupon. Furthermore, this expert admitted that the prints could have been on the matchbook cover for months.

The doctrine was further refined in *United States v. Van Fossen*, 460 F.2d 38 (4th Cir. 1972), which involved the reversal of convictions for possession of engraving plates with intent to use them to counterfeit federal reserve notes and for printing and photographing likenesses of the notes. The convictions were based solely on the presence of Van Fossen's fingerprints on a plate and on two negatives, one of which had been used in the counterfeiting. The seizure of these items occurred when

Brown's Business Forms, a printing shop, was raided by federal agents, resulting in the arrest and conviction for counterfeiting of Roger Leo Brown. Other than the fingerprints, there was no evidence which connected Van Fossen to Brown or to the counterfeiting operation uncovered in Brown's printing shop. Relying upon *Corso* and *Borum*, the court held:

> Read together, these cases illustrate a well established rule concerning the sufficiency of fingerprint evidence. To warrant conviction the trier of fact must be able to reasonably infer from the circumstances that the fingerprints were impressed at the time the crime was committed. *See* State v. Smith, 274 N.C. 159, 161 S.E.2d 449, 452 (1968); 3 Wharton's Criminal Evidence § 982 (12th ed. 1955, Supp.1971); Annot. 28 A.L.R.2d 1115, 1150(1953).

United States v. Van Fossen, 460 F.2d at 40-41. The court detailed a number of gaps in the government's case as to when and how Van Fossen's prints came to be on the items, noting that Brown also ran a legitimate printing shop and that the evidence did not show that the items were unavailable to a person in the shop on legitimate business. Nor did the evidence show any knowledge on the part of Van Fossen that the items which had his prints were known by him to be contraband. The court reversed the convictions, concluding that such gaps could only be filled by speculation, which was insufficient to sustain the convictions.

In *Mikes v. Borg*, 947 F.2d 353 (9th Cir. 1991), *cert. denied* 502 U.S. 1229, 112 S. Ct. 3055, 120 L. Ed. 2d 921 (1992), a first degree murder conviction was overturned on a federal habeas corpus proceeding where the only fact connecting the defendant, Mikes, to the murder was the presence of Mikes' fingerprints on three pieces of a disassembled turnstile unit, a piece of which was used to bludgeon the victim to death during the course of a burglary. There was no evidence placing Mikes at the scene of the crime, either on the day of the murder or on any other occasion, nor were any of the stolen items found in Mikes' possession. Additionally, none of Mikes' fingerprints were found on any other items that were clearly handled by the burglar in the course of the crime.

Citing undisputed defense evidence that fingerprints may last indefinitely, the *Mikes* court examined the custody, location, and function of the turnstile posts to determine if Mikes' prints could have been impressed thereon before the victim's purchase of the turnstile, at a hardware store's going-out-of-business sale approximately 4 months before the murder, and remained intact thereon until the time of the murder. The court concluded that the fingerprints in question could have been impressed by one disassembling the turnstile, by one who sold the turnstile to the victim, or by one who considered buying (and handled) the turnstile prior to the victim's acquisition. Although conceding that it was less likely, the court also concluded that the fingerprints could have been impressed on the last occasion when the turnstile was in general public use. We do note that in contrast to the instant case, there was no evidence that Mikes had ever done any of these things concerning the turnstile, much less that he had been in a position to do so. Nonetheless, the Ninth Circuit held in *Mikes*:

> In order to support a finding that Mikes is guilty beyond a reasonable doubt, the record must demonstrate that he in fact touched the posts at the time the crime was committed and not at some earlier point. Under our judicial system, the defendant has no duty to explain the presence of his fingerprints. *Borum*, 380 F.2d at 597 n. 11. Likewise, he is under no obligation to illuminate any inferences from the fingerprint evidence that are consistent with his innocence. To put it more directly, the defendant need not explain how or when his fingerprints were placed on the object in question; that burden lies elsewhere. *Id.* at 597. On the basis of the record before us, a reasonable factfinder could not conclude beyond a reasonable doubt that Mikes' fingerprints were placed on the turnstile posts at the time of the commission of the crime. There is insufficient evidence to warrant that conclusion rather than the conclusion that the fingerprints were impressed on the posts at an earlier time. There is, in short, a total failure of proof on the "accessibility" question.

947 F.2d at 359.

[6] The law appears quite well established that in a solely circumstantial evidence case, fingerprint evidence is sufficient to sustain a conviction only if the record contains sufficient evidence from which the trier of fact can reasonably infer that the defendant's fingerprints were in fact impressed on the object in question while he was committing the crime and not at some other time. See cases collected at Annot., 28 A.L.R.2d 1154 et seq. (1953), and Annot., 28-31 A.L.R.2d Later Case Service 1115-1158 § 29 at 140 et seq. (1981). We set forth further examples of the doctrine: *United States v. Collon*, 426 F.2d 939 (6th Cir. 1970) (robbery conviction was reversed where a defendant's fingerprints and palm prints were found on a roadmap in the getaway car, without evidence of the age of the prints; the prints were said to be insufficient to place him in the automobile at the scene of the crime); *Ladd v. State*, 363 So. 2d 1017 (Ala. Crim. App. 1978) (defendant's conviction for buying, receiving, or concealing a stolen automobile was reversed where the only evidence linking him to the car was his fingerprints on a rearview mirror; the court reasoned that fingerprints prove identity and presence, which alone is insufficient circumstantial evidence to prove the defendant's guilt beyond a reasonable doubt); *Wilkerson v. State*, 232 So. 2d 217, 219 (Fla. App. 1970) (breaking and entering conviction was reversed where only evidence against defendant was his fingerprint on a fragment of broken glass from a broken front door of a clothing store said by the court to be "certainly a place readily accessible to the general public"); *Gray v. State*, 4 Md. App. 155, 241 A.2d 725 (1968), *vacated on other grounds*, 254 Md. 385, 255 A.2d 5 (1969) (robbery conviction was reversed where only evidence was defendant's fingerprints in getaway car, a rental car, where the evidence was that defendant had been legitimately in the car for a ride with an employee of National Car Rental some 2 weeks earlier); *State v. Gilliam*, 245 S.C. 311, 140 S.E.2d 480 (1965) (defendant's fingerprint on a fragment of a broken pane of glass found outside building was insufficient to sustain the conviction); *People v. Rhodes*, 85 Ill. 2d 241, 249, 422 N.E.2d 605, 608 (1981) (the Illinois Supreme Court reviewed a series of cases from the Illinois Appellate Court involving convictions resting principally on fingerprint

evidence and held that in order to sustain a conviction solely on such evidence, "fingerprints corresponding to the fingerprints of the defendant must have been found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed").

People v Himmelein, 177 Mich. App. 365, 442 N.W.2d 667 (1989), *cert. denied* 498 U.S. 1096, 111 S. Ct. 985, 112 L. Ed. 2d 1070 (1991), is a case which serves to demonstrate how fingerprint evidence, together with limiting evidence on the accessibility of the movable object, is sufficient to sustain a conviction. The *Himmelein* court upheld convictions for criminal sexual conduct, unarmed robbery, and unlawful driving based solely on a fingerprint, although acknowledging that "[t]he general rule is that fingerprint evidence alone is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could have only been made at the time of the commission of the crime." 177 Mich. App. at 374-75, 442 N.W.2d at 672. The defendant's fingerprint, the only incriminating evidence, was on a yardstick with which the victim had been struck during the attack. The defendant, an acquaintance of the victim's husband, had been in the house on one occasion 18 months prior to the attack and had had no more recent opportunity for access to the yardstick. An expert testified that latent fingerprints were fragile and would not survive constant handling of the object by others.

In *United States v. Harris*, 530 F.2d 576 (4th Cir. 1976), the court made it clear that the doctrine of *United States v. Corso*, 439 F.2d 956 (4th Cir. 1971), would not apply where there was other evidence to sustain the conviction. In *Harris*, although the fingerprint evidence suffered from the same sort of deficiencies as in the other cases we have detailed, Harris had provided a detailed confession which, although recanted, was sufficient to sustain the conviction. In the instant case, we have searched the record for some other evidence to bolster the fingerprint evidence, as in *Harris*. We turn to the physical description of the intruder given to Hessler immediately after the crime and compare it to Hessler's own observation of Pierce's appearance when he was roused from bed by Hessler at 3:15 a.m.

Although Pengelly's description of height and weight matched Pierce, she told Hessler that the intruder had no beard or mustache, that he was bare chested and did not have chest hair—she placed her bare feet on his bare chest and pushed him across the room—and that she smelled no alcohol. When Hessler saw a just-awakened Pierce, he saw a man clad in jeans who had a beard and mustache and a hairy chest. The evidence was also abundant that Pierce had been drinking the entire evening. This evidence of the intruder's appearance does not make this case into a *Harris*-type exception to the doctrine of *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967), because it tends to exclude rather than implicate Pierce as the intruder.

In the case at hand, the undisputed evidence establishes that Miller Genuine Draft in bottles is the best selling Miller beer at Gilligan's, the neighboring lakeside bar and off-sale location. Miller beer bottles are common at this lakeside recreation area, and a good number of them may well have Pierce's fingerprints impressed thereon. Pierce, the beer stocker at Gilligan's, handles the beer sold there, including the singles. The fact that he handled this beer bottle as evidenced by his fingerprint thereupon does not allow one to make a choice, with any degree of certainty based on logic and reason, between whether he touched the bottle at some time prior to the time of the break-in, whether he was handling the beer bottle outside of Pengelly's window prior to breaking in, whether he was outside the window but did not enter the residence, or whether the intruder had purchased or acquired a beer stocked by Pierce at Gilligan's. After our independent review of the inferences in this solely circumstantial evidence case, we conclude that Pierce's fingerprint on the beer bottle found *outside* of Pengelly's residence, without more, is insufficient to sustain the conviction.

We now look to the other evidence to see if the fingerprint stands alone or whether it is bolstered by other evidence as in *Harris*. The State appears to rely upon, along with the beer bottle, three other items of evidence to sustain the conviction. The first is Pengelly's testimony that she was chased by Pierce's dog as she fled her residence. The State's apparent conclusion, and perhaps the jury's, is that Pierce's dog would not have been

by Pengelly's home in a position to chase Pengelly if Pierce also were not there. This attributes a characteristic to the dog which is not sustained by the evidence, to wit: that the dog and Pierce were *always* in the same place. The evidence is different. The evidence is that the dog was allowed to run loose at night. Edward Gonzales testified that during this evening Pierce was looking for his dog when he came to the party, thereby establishing that Pierce and his dog were not always together. Hessler observed two loose dogs that evening when he arrived at Pierce's home to talk to him. Additionally, Pengelly's home was only three homesites east of Pierce's home. We do not believe it can be said that Pierce was in Pengelly's residence because his dog may have been located close thereby when Pengelly fled from it. There is no evidence to establish that the dog's behavior was predictable to this degree.

The next piece of evidence is simply that Pierce was "out and about" that evening at the beach party occurring within 200 yards of Pengelly's residence and that he may have been up as late as 2 a.m. The most that can be said about this evidence is that Pierce was in close proximity to the crime, but so were the other people who live in this lakeside development, as well as the partygoers, and we observe that there was testimony of another party that evening in the area besides the one attended by Pierce. Additionally, Pierce had a reason to be in the area, since he lived there.

Finally, Pierce had been observed drinking beer from a bottle while at the beach party on one occasion, but the brand was not identified. However, taking the evidence of the partygoers together, it appears that the only evidence of when this occurred was from Martinez, and her testimony would have placed this observation of him consuming beer from a bottle in the neighborhood of 8:30 to 9 p.m. Other than this testimony, there was no evidence of any consumption from a bottle of Miller Genuine Draft beer by Pierce while on the beach. In fact, the evidence is to the contrary and shows that he brought Miller Genuine Draft in tall commemorative Harley-Davidson cans to the beach party, which were found the next day by Moreno. Although there was evidence that Pierce was seen drinking Miller Genuine Draft from a bottle at Gilligan's before he left

work, there is no such evidence that he was doing so after he left Gilligan's—which could have been anywhere from 8:30 to 10:30 p.m., depending on which witness' testimony is examined. Moreover, the Miller Genuine Draft observed by Hessler at Pierce's residence was in cans.

The separate pieces of circumstantial evidence which the State relies upon are each reasonably susceptible of inferences of guilt and nonguilt. The State's principle piece of evidence, the beer bottle, is a movable object with Pierce's fingerprint impressed thereupon. But the undisputed evidence is that the object was potentially accessible to Pierce at a time other than when the crime was being committed. Thus, under the precedent we have detailed herein, the fingerprint alone cannot support the conviction. We conclude that the fingerprint in this case is proof of only one thing—that Pierce at some time handled this beer bottle. But the evidence does not establish the critical fact of when he did so. Moreover, we cannot ignore the material discrepancies between Pengelly's detailed description of the intruder as given to Hessler immediately after the crime and Pierce's actual appearance as observed by Hessler within minutes after speaking to Pengelly.

We conclude that the totality of circumstantial evidence, even if reasonably susceptible of two inferences, which we doubt, is such that the inference of nonguilt is stronger than that of guilt. The case should not have been submitted to the jury, and the evidence is not sufficient to sustain the conviction. Therefore, we reverse the conviction and remand the cause with directions that the information be dismissed. Obviously, we need not address Pierce's other assignments of errors.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.