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REPORTS OF CASES

DECIDED BETWEEN

MARCH 7, 2000 and MARCH 12, 2001

IN THE

Nebraska Court of Appeals

VOLUME IX

PEGGY POLACEK

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

For the benefit of the State of Nebraska

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RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge

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

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No. A-97-616: **Ford v. Plejdrup**. Affirmed in part, and in part reversed and remanded with directions. Hannon, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-98-899: **In re Application of Powder River Transp.** Affirmed as modified. Hannon, Mues, and Inbody, Judges.

No. A-98-1093: **Metrejean v. Hamling**. Affirmed in part, modified in part, and in part reversed and remanded for further proceedings. Moore, Hannon, and Inbody, Judges.

No. A-98-1211: **State v. Murteza**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-98-1212: **State v. George**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-066: **In re Interest of Jaden H.** Affirmed. Inbody and Sievers, Judges, and Howard, District Judge, Retired.

Nos. A-99-074, A-99-075: **In re Interest of Destiny M.** Affirmed. Inbody and Sievers, Judges, and Buckley, District Judge, Retired.

No. A-99-161: **Bruckner v. Bruckner**. Affirmed. Inbody, Hannon, and Carlson, Judges.

Nos. A-99-271, A-99-272: **State v. Bruno**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-313: **Conrad v. Hourt**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-320: **Garza v. Garza**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-332: **Prochnow v. Prochnow**. Affirmed in part, and in part reversed and remanded with directions. Hannon, Inbody, and Carlson, Judges.

No. A-99-345: **Beachy v. Glathar**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-99-375: **State v. Blanco**. Reversed and remanded. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-437: **Jasa v. Jasa**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-99-456: **Bender v. Williams**. Affirmed. Sievers and Inbody, Judges, and Buckley, District Judge, Retired.

No. A-99-472: **Hawbaker v. Hawbaker**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-492: **BJT, Inc. v. Cooperman**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-99-512: **In re Interest of Nyketa B. et al.** Reversed and remanded. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-513: **Johnson v. Board of Regents**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-604: **Helms v. Huston**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-605: **Muia v. Blank**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-613: **Maloley v. Glinsmann**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-644: **Fernau v. Fernau**. Affirmed in part, and in part vacated and remanded. Hannon, Inbody, and Carlson, Judges.

No. A-99-656: **In re Estate of Schultz**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

Nos. A-99-669, A-99-729: **In re Interest of Asia W. & Gabriella W.** Reversed and remanded for further proceedings. Sievers and Inbody, Judges, and Buckley, District Judge, Retired.

No. A-99-708: **Maxwell v. Montey**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-721: **State on behalf of Alexander P.** Reversed and remanded with directions. Hannon, Inbody, and Carlson, Judges.

No. A-99-724: **Morgan v. Nucor Steel**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-763: **Hughes v. Metro Area Transit**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-772: **McAdams v. McAdams**. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Sievers, and Moore, Judges.

No. A-99-780: **Denis v. Denis-Flows**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-815: **State v. Nunnenkamp**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-824: **State v. Gray**. Affirmed as modified. Irwin, Chief Judge, and Sievers and Moore, Judges.

No. A-99-829: **In re Interest of Jody J.** Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Carlson, Hannon, and Inbody, Judges.

No. A-99-837: **Rockford v. Rockford**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-99-838: **State v. Seckinger**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-839: **In re Interest of Kassandra A. and Wayne A.** Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-854: **James Neff Kramper Family Farm v. Beef Products, Inc.** Reversed and remanded for further proceedings. Carlson, Hannon, and Inbody, Judges.

No. A-99-887: **State v. Haase**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-99-889: **Henzel v. Hasley**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-899: **In re Interest of Christopher P. & Sarah P.** Appeal dismissed. Hannon, Sievers, and Inbody, Judges.

No. A-99-935: **Bennington Company v. Westergard**. Affirmed in part, and in part reversed. Hannon, Inbody, and Moore, Judges.

No. A-99-943: **Chramosta v. American Family Mut. Ins. Co.** Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-944: **Deerson v. Deerson**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Chief Judge, and Sievers and Moore, Judges.

No. A-99-945: **Hauptman, O'Brien v. American Fam. Ins.** Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-946: **State v. Good**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-99-960: **Connely v. Connely**. Affirmed in part, and in part reversed. Inbody, Hannon, and Carlson, Judges.

No. A-99-977: **State v. Goings**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-99-1002: **State v. Karst**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-1011: **Talbot v. Talbot**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Hannon, and Moore, Judges.

No. A-99-1012: **James Neff Kramper Family Farm v. City of South Sioux City**. Affirmed. Carlson, Hannon, and Inbody, Judges.

No. A-99-1025: **Svoboda v. Svoboda**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-1036: **Browne v. Browne**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-1057: **State v. Hunsaker**. Reversed and remanded with directions. Hannon, Carlson, and Moore, Judges.

No. A-99-1077: **Tyler v. Hopkins**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-1110: **Tyler v. Jones**. Reversed and remanded with directions. Carlson, Hannon, and Inbody, Judges.

No. A-99-1119: **Maas v. Maas**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-1127: **Tyler v. Tyler**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-1152: **State v. Werkmeister**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-1162: **Vecchio v. Vecchio**. Affirmed as modified. Carlson, Hannon, and Inbody, Judges.

No. A-99-1192: **Tidwell v. Department of Health**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-99-1196: **State v. Gurrola**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-1234: **State v. McArthur**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-1246: **Fowler v. Hill**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-1248: **State v. Bates**. Affirmed as modified. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-1277: **Fine v. Fine**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-99-1286: **State v. Doyle**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-1290: **Johnson v. Morrill Cty**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-99-1297: **Waller v. Waller**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-1302: **State v. Ternus**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-99-1310: **Eli's Inc. v. Commercial Lithographing Inc**. Affirmed. Inbody, Hannon, and Moore, Judges.

Nos. A-99-1316, A-99-1378: **Tyler v. Department of Corr. Servs**. Judgment in A-99-1316 affirmed. Judgment in A-99-1378 reversed and vacated. Sievers, Hannon, and Moore, Judges.

No. A-99-1327: **State v. Brust**. Affirmed. Carlson, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-99-1380: **Prokop v. Santin**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-99-1381: **Prokop v. Koziol**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-99-1397: **In re Interest of Wright**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-99-1409: **In re Interest of Jennifer F. & Kaylee C**. Affirmed. Carlson, Hannon, and Inbody, Judges.

No. A-99-1420: **Tyler v. Crosby**. Affirmed in part, and in part reversed. Moore, Hannon, and Sievers, Judges.

No. A-99-1424: **In re Interest of Ross**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-99-1428: **Rieker v. Rieker**. Affirmed. Inbody, Hannon, and Moore, Judges.

No. A-99-1449: **In re Interest of Ronald S**. Reversed and remanded with directions. Hannon, Inbody, and Moore, Judges.

No. A-99-1460: **In re Interest of Kayla M. & Kristopher M**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-99-1462: **State v. Groteluschen**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-00-026: **Blankemeyer v. Federal Land Bank of Omaha**. Affirmed. Hannon, Carlson, and Moore, Judges.

No. A-00-032: **State v. Fields**. Affirmed in part, and in part reversed and remanded for resentencing. Inbody, Hannon, and Moore, Judges.

No. A-00-034: **Russell v. Metro Area Transit**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-00-036: **Rivera v. Gibbon Packing Co**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-00-045: **In re Interest of Jane E. et al**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-00-060: **Schlenker v. Schlenker**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-00-093: **State v. Strange Owl**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-00-119: **Brown v. Ryder Trans. Servs., Inc**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-00-138: **State v. Rubio**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-00-140: **In re Guardianship of Coleman**. Reversed and remanded with directions. Hannon, Sievers, and Moore, Judges.

No. A-00-161: **Dowding v. Waverly Farmer's Co-op**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-00-163: **Duerr v. Armstrong**. Reversed and remanded. Sievers, Hannon, and Moore, Judges.

No. A-00-180: **State v. Roundtree**. Affirmed in part, and in part sentence vacated and cause remanded for resentencing. Moore, Hannon, and Inbody, Judges.

No. A-00-188: **In re Interest of Schoenrock**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

Nos. A-00-247, A-99-1309: **Woodbury v. Haworth**. Vacated and dismissed. Hannon, Sievers, and Inbody, Judges.

Nos. A-00-256, A-00-257: **State v. McGinness**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-00-279: **State v. Smiley**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-00-308: **Dropinski v. Douglas County**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-00-372: **State v. Ratkovec**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-00-422: **In re Guardianship & Conservatorship of Godfrey**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-00-443: **Eder v. Eder**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-00-478: **State v. Kelley**. Sentence vacated, cause remanded for resentencing. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-00-517: **State v. Miranda**. Reversed and remanded. Hannon, Judge.

No. A-00-562: **State v. Smith**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-00-589: **State v. Schaffer**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-00-595: **In re Interest of Preston C.** Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-00-613: **In re Interest of Ryan N.** Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Sievers, Judge.

No. A-00-674: **State v. Orosco**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-00-726: **State v. Culbreth**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-00-735: **State v. Campbell**. Affirmed. Moore, Judge.

No. A-00-761: **In re Interest of Tiffany C.** Affirmed. Sievers, Inbody, and Moore, Judges.

No. A-00-794: **Thomas v. U.S. West Communications**. Affirmed. Hannon, Carlson, and Moore, Judges.

No. A-00-956: **State v. Seda**. Affirmed as modified. Moore, Hannon, and Sievers, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-97-959: **In re Application of Cox Telcom.** Motion of appellant to dismiss appeal is considered; appeal dismissed at cost of appellant.

No. A-97-1005: **In re Application of Sprint Communications.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-1060: **Cascio v. Dowd.** Motion of appellee for summary dismissal filed October 12, 1999, reconsidered and sustained.

No. A-99-334: **In re Trust of VanDeWalle.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-357: **In re Interest of Jackson.** Affirmed. See rule 7A(1).

No. A-99-432: **Sullivan v. Varnum.** Affirmed. See rule 7A(1).

No. A-99-491: **Collection Bureau of Grand Island v. Alexander.** Affirmed. See rule 7A(1).

No. A-99-544: **Jones v. Clarke.** Affirmed. See, rule 7A(1); *Duff v. Clarke*, 247 Neb. 345, 526 N.W.2d 664 (1995); *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983).

No. A-99-577: **Shepard v. State.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-624: **Fuller v. Midwest Bank.** Stipulation allowed; appeal dismissed.

No. A-99-668: **Brechwald v. Brechwald.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998).

No. A-99-697: **In re Interest of Rucker.** Affirmed. See rule 7A(1).

No. A-99-733: **Nazeck v. York**: Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-99-745: **State v. Reed.** Affirmed. See rule 7A(1).

No. A-99-768: **State v. Calhoon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-792: **State v. Greene**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-794: **State v. Gallagher**. Affirmed. See rule 7A(1).

No. A-99-822: **Louderback v. Louderback**. Stipulation allowed; appeal dismissed.

No. A-99-825: **State v. Russell**. Appeal dismissed pursuant to the court's order of May 10, 2000, for failure to return record.

No. A-99-849: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-862: **State v. Magee**. Affirmed. See rule 7A(1).

Nos. A-99-863, A-99-864: **State v. Engert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-872: **El-Tabech v. Keithley**. Affirmed. See rule 7A(1).

No. A-99-875: **Tyler v. Hopkins**. Affirmed. See rule 7A(1).

No. A-99-877: **Tyler v. Higgins**. Affirmed. See rule 7A(1).

No. A-99-878: **Tyler v. McKenney**. Affirmed. See rule 7A(1).

No. A-99-879: **Tyler v. Finke**. Affirmed. See rule 7A(1).

No. A-99-880: **Lil'Temple v. Clarke**. Affirmed. See rule 7A(1).

No. A-99-886: **Tyler v. Edelman**. Affirmed. See rule 7A(1).

No. A-99-888: **Wall v. Wall**. Stipulation allowed; appeal dismissed.

No. A-99-898: **In re Interest of Arreola**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 43-287.01 et seq. (Reissue 1998); *In re Interest of William H.*, 3 Neb. App. 869, 533 N.W.2d 670 (1995).

No. A-99-917: **State v. Gulledge**. Affirmed. See rule 7A(1).

No. A-99-918: **State v. McCoy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-924: **Bank Midwest v. Hunter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-99-930 through A-99-934: **In re Interest of Reid**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-99-940: **State v. Frazier**. Affirmed. See rule 7A(1).

No. A-99-958: **State v. Cheshek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-971: **McClenahan v. Sloma**. Affirmed. See rule 7A(1).

No. A-99-984: **In re Application of Fentress**. Affirmed. See rule 7A(1).

No. A-99-993: **State v. Hoskinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1003: **State v. Herringer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1007: **State v. Worley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1021: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1026: **In re Guardianship & Conservatorship of Greenberg**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-99-1041: **Patmon v. Hopkins**. Motion of appellee for summary dismissal sustained. See *Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979).

No. A-99-1047: **Lucas v. Dahlke**. Appeal dismissed. See, rule 7A(2); *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

Nos. A-99-1052, A-99-1095: **State v. Clayton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1053: **State v. Borrego**. Affirmed. See, rule 7A(1); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-99-1062: **State v. Johnson**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-99-1063: **State v. Avery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1066: **State v. Morris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1067: **State of Morris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1068: **State v. Luster**. Affirmed. See rule 7A(1).

No. A-99-1069: **State v. D'Ombrain**. Motion for summary dismissal reconsidered and sustained. See *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. A-99-1070: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1071: **State v. Rea**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1098: **State v. Glantz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1103: **State v. Felix**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1105: **Tyler v. Clarke**. Affirmed. See rule 7A(1).

No. A-99-1106: **Stults v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1109: **State v. Blanco**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1116: **In re Interest of Rodriguez**. Appeal dismissed. See Neb. Rev. Stat. §§ 25-1912 and 25-2301.02 (Supp. 1999).

No. A-99-1124: **Keithley v. State of Nebraska**. Affirmed. See rule 7A(1).

No. A-99-1130: **State v. Willard**. Affirmed. See rule 7A(1).

No. A-99-1134: **State v. Hoaglin**. Affirmed. See rule 7A(1).

No. A-99-1138: **Media International v. Balboa Capitol Corp**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-99-1140: **State v. Mancilla**. Affirmed. See rule 7A(1).

No. A-99-1141: **State v. Wise**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1145: **State v. Miley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1151: **State v. Hanus**. Affirmed. See rule 7A(1).

No. A-99-1153: **State v. Minzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1158: **Tyler v. Hopkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1169: **State v. Purcell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1174: **State v. Bourn**. Affirmed. See rule 7A(1).

No. A-99-1176: **School Dist. No. 100 Washington Cty. v. Kettelhut**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-99-1179: **State v. Skala**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000).

No. A-99-1180: **State v. Whitcomb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1183: **State on behalf of Cady-Roe v. Roe**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-99-1184: **State v. Taylor**. Appeal dismissed. See, rule 7A(2); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. A-99-1185: **State v. Furnas**. Affirmed. See rule 7A(1).

No. A-99-1187: **State v. Buckley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1188: **State v. McKenzie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1189: **State v. Hiatt**. Affirmed. See rule 7A(1).

No. A-99-1190: **Hill v. Hill**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

No. A-99-1197: **State v. Torrez-Chaidez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1198: **State v. Brauckmuller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1200: **Stewart v. Stenberg**. Appeal dismissed. See rule 7A(2).

No. A-99-1206: **Mitchell v. Stevens**. Stipulation allowed; appeal dismissed.

No. A-99-1208: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1209: **State v. Denson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1217: **State v. Arneson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1218: **State v. Wemhoff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1219: **State v. Morgan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1220: **State v. Bicket**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1221: **Tyler v. Tesar**. Affirmed. See rule 7A(1).

Nos. A-99-1228, A-99-1229: **State v. Quignon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1231: **State v. Ott**. Affirmed. See rule 7A(1).

Nos. A-99-1232, A-99-1233: **State v. Talbot**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1236: **State v. Parrish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1237: **State v. Douglas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1241: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1258: **State v. Moore**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1259: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1260: **State v. Whitbeck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1261: **State v. Vanderkuur**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1267: **Bell v. Caldwell**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-99-1269: **State v. Connely**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1270: **State v. Phillips**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1278: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1284: **Goes v. Abramson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1285: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1292: **Scott v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1298: **State v. Phillippi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1299: **State v. Graham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1305: **Betson v. Dawes Cty. Bd. of Equal**. Special appearance granted. Case dismissed under rule 7B(1).

No. A-99-1308: **Nebco v. County of Cass**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-99-1311: **Tyler v. Savage**. Appeal dismissed. See, rule 7A(2); *State v. Schmidt*, 9 Neb. App. 500, 615 N.W.2d 116 (2000).

No. A-99-1312: **State v. Bauer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1313: **State v. Wragge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1314: **State v. Novak**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981); *State v. Johnson*, 8 Neb. App. 762, 602 N.W.2d 253 (1999).

No. A-99-1318: **Lincoln Lumber Co. v. Poe Real Estate Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1321: **Mumin v. Hopkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-99-1324 through A-99-1326: **State v. Palma**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1328: **State v. Kinchen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1330: **Prater v. Hopkins**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-99-1331: **Bodfield v. Wentink**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1336: **Schmidt Chiropractic Ctr. v. Robbins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1338: **Lanik v. Sannicks**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1341: **Griffin v. U S West**. Affirmed. See rule 7A(1).

No. A-99-1346: **State v. Dalton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1347: **State v. Brody**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1350: **Tyler v. Carey**. Affirmed. See rule 7A(1).

No. A-99-1351: **AG Servs. of America v. Nielsen**. Stipulation allowed; appeal dismissed.

No. A-99-1354: **State v. Van Dao**. Appeal dismissed. See rule 7A(2).

No. A-99-1356: **State v. McGinness**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1360: **State v. Ibarra**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1361: **State v. Neiss**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1362: **State v. Grieser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1367: **State v. Patterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1369: **Zalme v. Clarke**. Motion of appellee for summary dismissal sustained. Appeal dismissed. See rule 7B(1).

No. A-99-1370: **State ex rel. Tyler v. Griess**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1371: **State ex rel. Tyler v. Hopkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1372: **State ex rel. Tyler v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-99-1382: **State v. Brezenski**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1386: **McManus v. Hawkins Constr. Co**. Stipulation allowed; appeal dismissed.

No. A-99-1388: **State v. Cerda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1394: **State v. Lawrence**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1395: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1399: **State v. Arbuthnot**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-824(3) (Cum. Supp. 1998).

No. A-99-1400: **State v. Pelc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1403: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1404: **In re Interest of Martinez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-99-1410: **State v. McMillan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999); *State v. Kula*, 251 Neb. 471, 562 N.W.2d 717 (1999).

No. A-99-1413: **SID No. 177 v. Employer's Mut. Cas. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1418: **State v. Torres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1419: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1421: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1427: **State v. Cepak**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1432: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1435: **Carney v. Cassady**. Motion of appellee for summary dismissal granted. See rule 7B(5).

No. A-99-1439: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1440: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1445: **State on behalf of Douglas v. Goh**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Supp. 1999).

Nos. A-99-1446, A-99-1447: **State v. Alatriste**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1448: **Firstier Bank v. Lane**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-99-1451: **Dahlheimer v. Dahlheimer**. Appeal dismissed. See rule 7A(2).

No. A-99-1453: **Draucker v. Burns**. By order of the court, appeal dismissed for failure to file briefs.

No. A-99-1454: **Fundco v. Eldorado Hills Dev**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-99-1455: **State v. Turner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1458: **Wilke v. Farm Bureau Ins. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-99-1465: **Morosin v. Naggatz**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-99-1466: **State v. Griffing**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-001: **State v. Overton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-003: **State v. Choma**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-005: **State v. Vonseggern**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Johnson*, 8 Neb. App. 762, 602 N.W.2d 253 (1999).

No. A-00-006: **Allen v. Allen**. Stipulation allowed; appeal dismissed.

No. A-00-008: **State v. Sherivan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-015: **State ex rel. Tyler v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-018: **Haith v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-00-019: **Douglas Cty. Bd. of Equal. v. Viola**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-020: **In re Application of Neb. Pub. Serv. Comm**. Stipulation allowed; appeal dismissed.

No. A-00-024: **State v. Olmstead**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-027: **Tweedy v. Tweedy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-028: **Smith v. State**. Appeal dismissed. See rule 7A(2).

No. A-00-040: **Jones v. Jones**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-047: **State v. Partsch**. Appeal dismissed. See rule 7A(2).

No. A-00-050: **Larsen v. Weesner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-052: **State v. Roan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-056: **State v. Sampson**. Appeal dismissed.

No. A-00-057: **State v. Morris**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-058: **State v. Summers**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-059: **Malone v. American Business Info**. Appeal dismissed. See, rule 7A(2); *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998).

No. A-00-064: **Krussel v. Ryan & Assoc**. Affirmed. See rule 7A(1).

No. A-00-066: **Moore v. Moore**. Motion of appellant to dismiss considered; appeal dismissed as premature.

No. A-00-070: **State v. West**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999); *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999).

Nos. A-00-071 through A-00-073: **State v. Barker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-075: **VanDeMark v. City of Grand Island**. Affirmed. See rule 7A(1).

Nos. A-00-076, A-00-193: **Tyler v. Department of Corr. Servs**. Appeal dismissed.

No. A-00-077: **Kosmicki v. Kosmicki**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-081: **Donlen Corp. v. Vacanti**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-00-082: **Huffman v. Kinney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-088: **State v. Andersen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-089: **State v. Bishop**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-091: **State v. Strange Owl**. Affirmed. See, rule 7A(1); *State v. Harrison*, 255 Neb. 990, 558 N.W.2d 556 (1999).

No. A-00-098: **Tucker v. Tucker**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

Nos. A-00-099, A-00-100: **State v. McKimmey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-101: **State v. Flood**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-103: **Wriedt v. Wriedt**. Stipulation allowed; appeal dismissed.

No. A-00-108: **Tyler v. Langan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-110: **Terhune v. City of Lincoln**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-00-111: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-117: **Lott v. McCampbell**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-118: **Andrews Van Lines v. McCampbell**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-120: **In re Estate of Wahrman**. Affirmed. See rule 7A(1).

No. A-00-122: **Slangal v. Department of Motor Vehicles**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 60-4,105 (Supp. 1999); *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987).

No. A-00-124: **State v. Kipp**. Stipulation allowed; appeal dismissed.

No. A-00-125: **Burkey v. Lupfer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-126: **State v. Hayes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-128: **Midwest Food Distrib. Ctr. v. Food Servs. of Am.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-131: **Fraternal Order of Police Lodge 41 v. County of Scottsbluff.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-137: **State v. Bauer.** Stipulation allowed; appeal dismissed.

No. A-00-142: **Nielsen v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-144: **Tyler v. Miller.** Appeal dismissed. See rule 7A(2).

No. A-00-146: **State v. Lozano.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-152: **State v. Zink.** Affirmed. See, rule 7A(1); *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

No. A-00-153: **State v. Reiter.** Appeal dismissed. See, rule 7A(2); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

Nos. A-00-154 through A-00-156: **State v. Raven.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-160: **Wills v. Wills.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-164: **Reisig v. Department of Corr. IDC Comm.** Appeal dismissed. See rule 7A(2).

No. A-00-165: **Hubl v. Hubl.** Appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-166: **Nielsen v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-168: **State v. Zavala.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-173: **State v. Robben.** Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Johnson*, 8 Neb. App. 762, 602 N.W.2d 253 (1999).

No. A-00-174: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-175: **State v. Geiser.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-176: **Tyler v. Department of Corr. Servs. Appeals Bd.** Appeal dismissed. See, rule 7A(2); *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999).

No. A-00-179: **State v. Roundtree.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-183: **Carlson v. Wimes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-185: **Spellman v. City of Fremont.** Affirmed. See rule 7A(1).

No. A-00-187: **McIver v. North Platte Pub. Sch.** Appeal dismissed. See rule 7A(2). Action remains pending against defendant Johanson, and under Neb. Rev. Stat. § 25-705(6) (Supp. 1999), there is no final, appealable order.

No. A-00-189: **State v. Martinez-Rodriguez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-190: **State v. Gibson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-192: **Martin v. Department of Pub. Institutions.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-193: **Tyler v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-00-198: **Widtfeldt v. Butts.** Appeal dismissed. See, rule 7A(2); *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

No. A-00-202: **In re Interest of Nobe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-204: **State v. Sanderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-205: **State on behalf of Citta v. Jones.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-206: **State v. Smith.** Appeal dismissed. See Neb. Rev. Stat. § 25-2729(3) (Supp. 1999).

Nos. A-00-207, A-00-208: **State v. Pate.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-209: **State v. Ruppert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,196 (Reissue 1998); *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000); *State v. Werner*, 8 Neb. App. 684, 600 N.W.2d 500 (1999).

No. A-00-211: **In re Estate of Billingsley**. Affirmed. See rule 7A(1).

No. A-00-213: **In re Guardianship of Combs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-215: **State v. Chinowth**. Affirmed. See rule 7A(1).

No. A-00-217: **State v. Bazis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-218: **Onken v. Onken**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-222: **In re Interest of Johnson**. Affirmed. See rule 7A(1).

Nos. A-00-223, A-00-224: **State on behalf of Claypool v. Bush**. Appeal dismissed. See, rule 7A(2); *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997).

No. A-00-225: **Tyler v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-227: **State v. Bader**. Motion considered; appeal dismissed.

No. A-00-228: **Brandon v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917 (Supp. 1999).

No. A-00-229: **State v. Marion**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-235: **In re Trust of Laschanzky v. Davison**. Appeal dismissed. See *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-00-236: **Tyler v. Department of Corr. Servs**. Affirmed. See, rule 7A(1); *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

No. A-00-237: **In re Interest of Sanchez**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-00-239: **Meisinger v. Vallery**. Stipulation allowed; appeal dismissed.

No. A-00-244: **State v. Pascoe**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-246: **Domina v. American Family Mut. Ins. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-248: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-249: **State v. Clark**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-250: **State v. Griffith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-251: **State v. Hoover**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-259: **Village of Greenwood v. Harsch**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-00-262: **Atiqullah v. El-Touny**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-263: **Gilsdorf v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-265: **Lowe v. North Platte Pub. Sch. Dist. No. 1**. Appeal dismissed. See rule 7A(2). Action remains pending against defendant Johanson, and under Neb. Rev. Stat. § 25-705(6) (Supp. 1999), there is no final, appealable order.

No. A-00-266: **Tyler v. Department of Corr. Servs**. Appeal dismissed. See rule 7A(2).

No. A-00-270: **State v. Owens**. Appeal dismissed. See rule 7A(2).

No. A-00-271: **State v. Turner**. Appeal dismissed. See, rule 7A(2); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Mitchell*, 8 Neb. App. 659, 600 N.W.2d 497 (1999).

No. A-00-274: **Sanford v. Sanford**. Affirmed. See rule 7A(1).

No. A-00-278: **State v. Le**. Stipulation allowed; appeal dismissed.

No. A-00-281: **Sanders v. Sanders**. Stipulation allowed; appeal dismissed.

No. A-00-288: **In re Interest of Herndon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-289: **In re Estate of Wright**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-290: **State v. Scaletta**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981).

No. A-00-293: **State v. Hardy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. §§ 28-104 (Cum. Supp. 1998) and 28-101 and 28-324 (Reissue 1995); *State v. Johnson*, 9 Neb. App. 140, 609 N.W.2d 48 (2000).

No. A-00-294: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-295: **Department of Health & Human Servs. v. Escobar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-298: **Fundco, Inc. v. Witt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-303: **Sidles v. Norwest Bank**. Appeal dismissed as to appellee Sherry Delancey. See rule 7A(2).

No. A-00-303: **Sidles v. Norwest Bank**. Motions of appellees for summary affirmance sustained. See, Neb. Rev. Stat. § 25-217 (Reissue 1995); *McDonald v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999).

No. A-00-304: **Kruse v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-311: **Widtfeldt v. Butts**. Appeal dismissed. See, rule 7A(2); *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

No. A-00-314: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-315: **State v. Thoma**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-316: **State v. Aude**. Affirmed. See, rule 7A(1); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

No. A-00-317: **Underwood v. Turner**. Motion of appellee for summary affirmance sustained; affirmed.

No. A-00-318: **Gould v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-00-320: **State v. Buller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-321: **Christensen v. Lehman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-323: **McCarson v. McCarson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-325: **State v. Roberts**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990).

Nos. A-00-326, A-00-327: **State v. Dady**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

No. A-00-328: **Zoubek v. Pelster**. Stipulation allowed; appeal dismissed with prejudice.

No. A-00-330: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-331: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-332: **State v. Parrott**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-333: **State v. Jacobitz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-334: **State v. Goes**. Appeal dismissed.

No. A-00-335: **State v. Murry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-336: **State v. Cedillo**. Motion of appellee for summary affirmance sustained; affirmed as modified. See, rule 7B(2); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. A-00-339: **Henley v. Board of Adjustment of LaVista**. Appeal dismissed. See rule 7A(2).

No. A-00-341: **Snyder v. Wiese**. Motion of appellant considered; appeal dismissed.

No. A-00-342: **State v. Behm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-345: **State v. McSwine**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998).

No. A-00-349: **State v. Guzman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-350: **State v. Monroe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-351: **State v. Majorins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-00-353, A-00-354: **In re Interest of Gomez**. Affirmed. See rule 7A(1).

No. A-00-355: **Peterson v. Wimes**. Appeal dismissed. See, rule 7A(2); *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

No. A-00-356: **Todd v. Odorisio**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-359: **State v. Herrera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-360: **In re Interest of Dickson**. Affirmed. See rule 7A(1).

No. A-00-362: **Tyler v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-00-363: **Tyler v. Dept. of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-364: **Tyler v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-366: **Tyler v. Borchers**. Appeal dismissed. See rule 7A(2).

No. A-00-368: **Gangwish v. Gangwish**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-371: **Coulson v. Nebraska Bd. of Parole**. Motion of appellee for summary dismissal overruled. Affirmed. See, rule 7A(1); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

No. A-00-374: **Nox Crete v. Special Dispatch of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-379: **In re Guardianship of Walker.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

Nos. A-00-383, A-00-384: **State v. Cuva.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-387: **In re Guardianship & Conservatorship of Brown.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-388: **State v. Manns.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-389: **Sidles v. Lockhart.** Appeal dismissed. See, rule 7A(2); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

No. A-00-390: **Maciolek v. Maciolek.** Stipulation allowed; appeal dismissed.

No. A-00-393: **State v. Witmer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-395: **State v. Hartman.** Affirmed. See rule 7A(1).

No. A-00-397: **In re Interest of Griess.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-398: **Tyler v. Crosby.** Appeal dismissed. See rule 7A(2).

No. A-00-399: **State v. Hauck.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-400: **Coady v. Coady.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-405: **Veys v. Christensen Grading, Inc.** Stipulation allowed; appeal dismissed.

No. A-00-409: **Tyler v. Hopkins.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-410: **Tyler v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-412: **Lackman v. Rousselle.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-00-414: **State v. Willock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-417: **Poe v. Department of Corr. Servs.** Motion of appellant for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-418: **Board of Equal. of Sarpy Cty. v. Clatterbuck**. Motion of petitioner to dismiss appeal sustained; appeal dismissed.

No. A-00-420: **State v. Poderys**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-425: **In re Estate of Sidles**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 30-2429.01 (Reissue 1995).

No. A-00-426: **Tyler v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-427: **State v. Thompson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-428: **State v. Churchill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-430: **State v. Matheny**. Appeal dismissed. See rule 7A(2).

No. A-00-432: **Cooper v. Cooper**. Affirmed. See rule 7A(1).

No. A-00-434: **In the Interest of Prochaska**. Motion of appellant considered; appeal dismissed.

No. A-00-438: **State v. Decenzo**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-442: **State v. Dean**. Motion considered; appeal dismissed.

No. A-00-444: **Langenegger v. Langenegger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-00-446, A-00-447: **State v. Powell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-450: **Shields v. State ex rel. Board of Public Accountancy**. Appeal dismissed. See, rule 7A(2); *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

No. A-00-452: **State v. Halferty**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-454: **Tyler v. Legal Aid Society**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-456: **State v. Pierce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-457: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-461: **Schroeder v. Schroeder**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-463: **In re Interest of Booker**. Affirmed.

No. A-00-464: **In re Interest of Smith**. Appeal dismissed. See rule 7A(2).

No. A-00-465: **In re Interest of Stevens**. Appeal dismissed. See rule 7A(2).

No. A-00-466: **Tyler v. Tesar**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-471: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1990); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-472: **State v. VanNatter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-474: **State v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-476: **Hunt v. Clarke**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-00-479: **Tyler v. Carey**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-483: **State v. Pierce**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-489: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-490: **Simmons v. Atlantic Mortgage and Inv. Corporation**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-491: **Kellner v. Kellner**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-00-492: **Foote v. O'Neill Packing**. Affirmed. See, rule 7A(1); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

No. A-00-494: **Spanjer v. Spanjer**. Motion of appellant to dismiss appeal sustained; appeal dismissed; party to pay own costs.

No. A-00-495: **State v. Abraham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-496: **Cole v. Hopkins**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-00-499: **State v. Skeen**. Motion of appellee for summary affirmance sustained. See, *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-500: **State v. Dean**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-501: **State v. Putnam**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-504: **Tyler v. Colyer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-505: **In re Estate of Huebner**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-00-506: **State v. Ramires**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-507: **State v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-508: **State v. Drullinger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-509: **In re Interest of Thompson**. Appeal dismissed. See rule 7A(2).

No. A-00-510: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-518: **State v. Burton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-519: **State v. Hart**. Affirmed. See, rule 7A(1); *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000); *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997).

No. A-00-520: **State v. Van Auken**. Convictions and sentences affirmed.

No. A-00-521: **Locke v. Volkmer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-522: **Williams v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-523: **Forbes v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-524: **Cato v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-526: **Swanson v. Alley**. Appeal dismissed. See Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-527: **State v. Krutilek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-528: **State v. Zambrowski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-530: **State v. Findley**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-00-531, A-00-532: **State v. Spencer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-533: **State v. Vasquez-Alfredez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-534: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-537: **State v. Bogatz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-538: **In re Adoption of Trew**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-539: **Erikson v. Abels**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-540: **State ex rel. Hoeppner v. Pearson**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-543: **In re Trust of Laschanzky**. Motion of appellee to dismiss appeal sustained. See Neb. Rev. Stat. § 30-1601(3) (Supp. 1999).

No. A-00-545: **State v. Coleman**. Appeal dismissed. See rule 7A(2).

No. A-00-547: **Neff v. Wenzl**. Motion of appellee for summary dismissal sustained. See Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000).

No. A-00-549: **New Tek Mfg. v. Beehner**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-552: **Collins v. Collins**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-555: **State v. Karr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Bridge*, 234 Neb. 781, 452 N.W.2d 542 (1990).

Nos. A-00-556, A-00-557: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-558: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-559: **In re Estate of Malmsten**. Appeal dismissed for lack of final, appealable order. See, rule 7A(2); *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

No. A-00-560: **Rogers v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-00-561: **Svoboda v. Svoboda**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-566: **Sulc v. Moore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-567: **State v. Hopp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-569: **State v. Sims**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-570: **State v. Owen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-573: **Wasikowski v. Nebraska Quality Jobs Bd.** Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-00-575: **In re Guardianship & Conservatorship of Knezacek**. Motion of appellee for summary dismissal sustained; appeal moot due to death of ward.

No. A-00-576: **Denklau v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-577: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-578: **State v. Marshall**. Appeal dismissed. See rule 7A(2).

No. A-00-580: **State v. Morrow**: By order of the court, appeal dismissed for failure to file briefs.

No. A-00-581: **State v. Liekhus**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2315.01 (Reissue 1995); *State v. Gillett & Gaston*, 199 Neb. 829, 261 N.W.2d 763 (1978).

No. A-00-583: **Hanson v. Upper Republican NRD**. Appeal dismissed. See, rule 7A(2); *Norris P.P. Dist. v. State ex rel. Jones*, 183 Neb. 489, 161 N.W.2d 869 (1968).

No. A-00-586: **State v. Chavez**. Affirmed. See rule 7A(1).

No. A-00-587: **State v. Moreno**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-588: **State v. Hayes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-591: **Tyler v. Stennis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-593: **State v. Nekolite**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-594: **State v. Shields**. Motion of appellee for summary dismissal sustained. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-597: **Cole v. Gonzales**. Appeal dismissed. See rule 7A(2).

No. A-00-598: **Tyler v. Hopkins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-601: **State v. Kaeding**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-602: **State v. Pehanich**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-603: **State v. Gillham**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-607: **State v. Bush**. Appeal dismissed.

No. A-00-610: **In re Interest of King**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-611: **Eva Signal Corp. v. Sarpy Cty**. Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-00-612: **In re Interest of J.D**. Appeal dismissed. See rule 7A(2).

No. A-00-615: **In re Interest of Meyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-616: **Hayes v. State**. Motion of appellee for summary affirmance granted. See *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

No. A-00-618: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-620: **Benjamin v. City of Lincoln**. Appeal dismissed. See, rule 7A(2); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

No. A-00-621: **Geist v. Midwest Mechanical Contractors**. Motion of appellee to dismiss sustained, and motion to quash dismissed for lack of jurisdiction. See rule 7A(2). See, also, *Swain Constr. v. Ready Mixed Concrete Co.*, 4 Neb. App. 316, 542 N.W.2d 706 (1996); Neb. Ct. R. of Discovery 27(b) (rev. 2000); Workers' Comp. Ct. R. of Discovery 4 (2000).

No. A-00-622: **In re Interest of Overman**. Motion of appellee for summary dismissal sustained. See *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). See, also, *In re Interest of Murray*, 235 Neb. 430, 455 N.W.2d 185 (1990).

No. A-00-627: **State v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-628: **State v. Valdez-Valenzuela**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-629: **Elrod v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-632: **Wagner v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-00-635: **Boren v. Burlington Northern & Santa Fe R.R. Co**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-636: **Nesvan v. Immanuel Med. Ctr. Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-638: **State v. Digilio**. Affirmed. See rule 7A(1).

No. A-00-639: **State v. Taitte**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-640: **Tyler v. Department of Corr. Servs.** Appeal dismissed. See rules 7A(2) and 1C.

No. A-00-641: **Tyler v. Robertus**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-642: **Hoppe v. Lancaster Cty. Bd. of Equal.** Appeal dismissed. See, rule 7A; *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-00-645: **State v. Wilkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-646: **Tyler v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-648: **State v. Cottrell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-650: **State v. Vasquez-Alfredez**. Motion of appellee for summary dismissal sustained for failure to include necessary language in affidavit. See Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000).

No. A-00-651: **State v. Hodges**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-00-652, A-00-653: **State v. John**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-00-654, A-00-655: **State v. Elliott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-661: **M & M Constr. v. Greater Neb. Ins. Agency**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705 (Supp. 1999).

No. A-00-662: **Campbell v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-663: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-00-664: **Olderbak v. Okwumuo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-668: **State v. Walls**. Motion of appellee for summary affirmance sustained. See, *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-669: **State v. Zierke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-670: **State v. Cottrell**. Appeal dismissed. See rules 7A(2) and 1C.

No. A-00-671: **State v. Rogert-Janal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-673: **Starostka v. Preventive Maintenance, Inc**. Appeal dismissed. See rule 7A(2).

No. A-00-680: **In re Estate of Bergstrom**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-682: **In re Estate of Dobrovolny**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992).

No. A-00-685: **State v. Harper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-693: **State v. Kallhoff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-696: **State v. Robinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-697: **State v. Patino**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Supp. 1999).

No. A-00-700: **State v. Nuesch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-702: **State v. Dingman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-703: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Sievers*, 2 Neb. App. 463, 511 N.W.2d 205 (1994).

No. A-00-705: **Loeffler v. Imperial Manor Nursing Home**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-706: **In re Interest of Sands**. Appeal dismissed. See rule 7A(2).

No. A-00-707: **In re Interest of Sands**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1912 and 25-2031 (Supp. 1999).

No. A-00-708: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-712: **Tyler v. Thomas**. Affirmed. See rule 7A(1).

No. A-00-714: **State v. Moore**. Appeal dismissed. See, rule 7A(2); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989).

No. A-00-715: **Alexander v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-718: **Brunt v. Brunt**. Motion of appellant considered; appeal dismissed.

No. A-00-719: **Design Builders, Inc. v. Heyd-Lamb**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-722: **State v. Burson**. Motion of appellee for summary affirmance sustained. See *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-723: **State v. Zollars**. Conviction and sentence affirmed. See rule 7A(1).

No. A-00-725: **State v. Schwartz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-727: **State v. Gomez**. Appeal dismissed. See, rule 7A(2); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

No. A-00-728: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-730: **In re Interest of Collier**. Appeal dismissed. See rule 7A(2).

No. A-00-732: **Mace v. Mace**. Appeal dismissed. See, rule 7A(2); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000).

No. A-00-734: **State v. Kasanga**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-735: **State v. Campbell**. Appeal dismissed. See rule 7A(2).

No. A-00-736: **Moore v. Lancaster Cty**. Appeal dismissed. See, rule 7A(2); *State v. Schmidt*, 9 Neb. App. 500, 615 N.W.2d 116 (2000).

No. A-00-737: **Waite v. DeLair**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-738: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-739: **State v. Hamaker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-740: **State v. Weiler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-741: **State v. Hickman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-743: **In re Adoption of Tayon**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Supp. 1999).

No. A-00-749: **In re Interest of Overman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-753: **Hix v. Astor**. Stipulation allowed; appeal dismissed with prejudice.

No. A-00-755: **State v. Robinson**. Motion of appellee for summary affirmance sustained. See *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-756: **State v. Thompson**. Appeal dismissed. See rules 7A(2) and 1B(4).

No. A-00-757: **State v. Calderon-Ornelas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-759: **State v. Shaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-760: **Tyler v. Jorgens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-768: **State v. Moore**. Appeal dismissed. See, rule 7A(2); *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990).

No. A-00-769: **State v. Harper**. Appeal dismissed. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *Addision v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979).

No. A-00-771: **State v. Dieguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-772: **Dittberner v. Dittberner**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-00-777: **Rydberg v. I.H.S. Inc.** Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-778: **State v. Center**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-779: **Tyler v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-00-780: **Moore v. Thurber**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-781: **Eisenhart v. Lobb**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-782: **Waite v. Hippe**. Appeal dismissed. See rule 7A(2).

No. A-00-783: **State v. Cornwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

No. A-00-785: **Tri-Par Investments v. Woods**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-788: **State v. Sams**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-789: **State v. Akins**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-3001 (Reissue 1995).

No. A-00-793: **In re Interest of Blaylock**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-797: **State v. Scaife**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-798: **State v. Jones**. Appeal dismissed. See rule 7A(2).

Nos. A-00-801, A-00-802: **State v. Bell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-804: **Fairchild v. Fairchild**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-805: **Cone v. Cone**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-807: **Harman v. Harman**. Stipulation allowed; appeal dismissed.

Nos. A-00-822, A-00-823: **State v. Devries**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-828: **Snyder Sales & Service v. Deines Aero Spray, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-833: **State v. McBride**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-836: **First Nat. Bank of Omaha v. Acceptance Ins. Co**. Appeal dismissed. See, rule 7A(2); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1977); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-838: **State v. Hoffman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-840: **State v. James**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-843: **Kaura v. Kaura**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-00-844: **Chrysler Corp. v. Lee Janssen Motor Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-845: **In re Interest of Aguilar**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-00-847, A-00-848: **State v. Mann**. Motion of appellee for summary affirmance granted. See *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-850: **Tweedy v. Tweedy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-856: **In re Interest of Chester**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-860: **In re Interest of Mason**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-861: **State v. Briggs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-00-862 through A-00-864: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-865: **Fuhrmeister v. Fuhrmeister**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-869: **State v. Wirtz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-871: **McIntyre v. McIntyre**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-00-873: **Reppert v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; appeal dismissed at cost of appellant.

No. A-00-874: **Tyler v. Tyler**. Appeal dismissed. See rule 7A(2).

Nos. A-00-876, A-00-877: **In re Interest of Cullum**. Appeal dismissed. See, rule 7A(2); *In re Interest of Clifford M.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-00-882: **State v. Hall**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2729 (Supp. 1999); *State v. Mitchell*, 8 Neb. App. 659, 600 N.W.2d 497 (1999).

No. A-00-885: **Cole v. Clarke**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-889: **Craig v. Craig**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-890: **In re Interest of Lund**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-892: **Klabenes v. Klabenes**. Stipulation allowed; appeal dismissed.

No. A-00-897: **Lee Sapp Leasing v. Ciao Caffe & Espresso**. Appeal dismissed. See rule 7A(2).

No. A-00-898: **Tyler v. Savage**. Appeal dismissed. See, rule 7A(2); *State v. Schmidt*, 9 Neb. App. 500, 615 N.W.2d 116 (2000).

No. A-00-899: **McIntire v. McIntire**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

Nos. A-00-900 through A-00-902: **Murray Constr. Servs. v. Mecco-Henne Contracting**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-908: **State v. Brown**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-909: **State v. Glasenapp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-910: **Tasejo v. Excel Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-911: **Crandall v. Holland**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-912: **State v. Paris**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Supp. 1999).

No. A-00-920: **State v. Stapleton**. Appeal dismissed. See rule 7A(2).

No. A-00-924: **First Temporaries v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-926: **Tag v. Charlie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-927: **Driver v. Nebco-Ameriserve**. Affirmed. See, rule 7A(1); *Mendoza v. Pepsi Cola Bottling Co.*, 8 Neb. App. 778, 603 N.W.2d 156 (1999); *Lounnaphanh v. Monfort, Inc.*, 7 Neb. App. 452, 583 N.W.2d 783 (1998); *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 574 N.W.2d 533 (1998).

No. A-00-933: **State v. Nation**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-939: **State v. Peterson**. Stipulation allowed; appeal dismissed.

No. A-00-941: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-943: **Sherman v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-946: **Workman v. Workman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-947: **State v. Adcock**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-949: **Tyler v. Kenney**. Appeal dismissed. See, rule 7A(2); *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992).

No. A-00-952: **Lewandowski v. Lewandowski**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-00-953 through A-00-955: **State ex rel. Stenberg v. Seaboard Corp**. Appeal dismissed. See, rule 7A(2); *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

No. A-00-962: **In re Interest of Ray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-963: **Goltl v. Howard Kool Motors**. Appeal dismissed. See rule 7A(2).

No. A-00-972: **Beers v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-975: **Goodon v. Goodon**. Stipulation considered; appeal dismissed.

No. A-00-977: **Porter v. Porter**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-00-978: **Eva Signal Corp. v. County of Sarpy**. Appeal dismissed. See, rule 7A(2); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976).

No. A-00-982: **State v. Black**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-985: **State v. Hodges**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-00-986, A-00-987: **State v. Rodriquez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-988: **State v. Wood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-990: **Keefe v. Keefe**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-991: **Welch v. Broadmoor Dev. Co**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-992: **Borowiak v. Neafus Land & Cattle Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999); *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

No. A-00-993: **Moore v. Klaussen**. Affirmed. See, rule 7A(1); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

No. A-00-996: **State v. Farfalla**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-997: **State v. Riser**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1004: **Spradlin v. Dairyland Ins. Co**. Appeal dismissed. See, rule 7A(1); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-00-1005: **State v. Drugsvold**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

No. A-00-1007: **State v. Contreras**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1008: **In re Interest of Barrow**. Stipulation allowed; appeal dismissed.

No. A-00-1017: **State v. Arneson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1018: **Junker v. Junker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1019: **In re Interest of Hassler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1021: **Tyler v. Seaboard Hog Farm**. Appeal dismissed. See, rule 7A(2); *In re Interest of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

No. A-00-1022: **Tyler v. Hopkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1033: **In re Estate of Page**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1037: **State v. Porter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1039: **First National Bank of Osceola v. Gabel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. A-00-1046: **State v. Stooksbury**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1049: **State v. Murphy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1052: **Kohles v. Kohles**. Stipulation allowed; appeal dismissed.

No. A-00-1053: **Tri-County Area Hosp. Dist. v. Nebraska Dept. of Health**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1058: **Lee v. Rhodes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1060: **Oleson v. Physicians Mut. Ins. Co**. Motion of appellee for summary dismissal sustained.

No. A-00-1071: **Elkhorn Valley Cooperative v. Jelinek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1072: **Farmers Co-op Mercantile Co. v. Jelinek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1073: **State v. Timmerman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1081: **In re Estate of Gzehoviak v. Badura**. Appeal dismissed. See rule 7A(2).

No. A-00-1084: **State v. McDermott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-00-1085, A-00-1086: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1089: **Petersen v. Petersen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-00-1093: **Witherspoon v. Kuhlman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-1094: **State v. Sloderbeck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1103: **In re Interest of Bradford**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-00-1106: **State v. Stutzman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1107: **First Nat. Bank of Omaha v. Power Max Gymnasium**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-1113: **In re Interest of Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1125: **Ehlers v. Ehlers**. Stipulation allowed; appeal dismissed.

No. A-00-1127: **Sandhills Publishing Co. v. Domant**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-00-1129: **Davis v. Poderys**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1132: **State v. Tyrrell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1134: **In re Interest of Goeden**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-00-1138: **In re Interest of Thompson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-1143: **State v. Delong**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-1147: **State v. Higbee**. Appeal dismissed. See, rule 7A(2); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

No. A-00-1149: **In re Interest of Hunter**. Stipulation allowed; appeal dismissed.

No. A-00-1152: **In re Interest of Tucker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1154: **Cole v. Cole**. Appeal dismissed. See rule 7A(2).

No. A-00-1159: **In re Interest of Riblett**. Stipulation allowed; appeal dismissed.

No. A-00-1167: **Nucor Cold Finish v. Egr**. Appeal dismissed. See rule 7A(2).

No. A-00-1169: **Tyler v. Green**. By order of the court, appeal dismissed for failure to file briefs.

No. A-00-1171: **Hageman v. Hageman**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-00-1172: **State v. Kwiatkowski**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1174: **Clevenger v. Rehn**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. A-00-1179: **Midwest Neurosurgery v. Bakhit**. Appeal summarily dismissed.

Nos. A-00-1180, A-00-1181: **Tyler v. Stennis**. Appeal dismissed. See rule 7A(2).

No. A-00-1194: **Triplett v. Triplett**. Stipulation allowed; appeal dismissed.

No. A-00-1196: **State v. Buford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-00-1202: **State v. Page**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-1208: **Long v. Willard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

Nos. A-00-1211 through A-00-1213: **State v. Barnes**. Stipulation allowed; appeal dismissed with prejudice.

No. A-00-1218: **State v. Debus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1225: **Polinski v. State of Nebraska**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-1226: **Overshiner v. Simon Contractors**. Stipulation allowed; appeal dismissed.

No. A-00-1227: **Jordan v. Kenney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301 (Cum. Supp. 2000).

No. A-00-1235: **Vogel v. Vogel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-1238: **Omaha Steaks Intl. v. EHL Realty**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. A-00-1239: **Tyler v. Jones**. Appeal dismissed. See rule 7A(2).

No. A-00-1247: **Moore v. Lancaster Cty. Jail**. Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-00-1259: **State v. Shirley**. Appeal dismissed. See, rule 7A(2); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

No. A-00-1261: **State v. Herngren**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-00-1265: **State v. Easterling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-00-1267: **Cooperative Business Assoc. v. Brown**. Appeal dismissed. See rule 7A(2).

No. A-00-1279: **State v. Wagner**. Appeal dismissed. See, rule 7A(2); *State v. Carney*, 220 Neb. 906, 374 N.W.2d 59 (1985).

No. A-00-1308: **Forsyth v. Dabney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-00-1337: **Tyler v. Nebraska Board of Parole**. Appeal dismissed. See rule 7A(2).

No. A-01-013: **Hall v. Hall**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

Nos. A-01-014 through A-01-017: **Dover v. Madison Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2000); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

No. A-01-019: **Tyler v. Boozer**. Appeal dismissed. See rule 7A(2).

No. A-01-038: **American National Bank v. Cutler**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-01-056: **Tyler v. Kenney**. Appeal dismissed. See rule 7A(2).

No. A-01-057: **Sepulveda v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

No. A-01-062: **Repenning v. City of Norfolk**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-01-064: **State v. Colchin**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301 (Cum. Supp. 2000); *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001).

No. A-01-065: **Dowhower v. Dowhower**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-01-066: **Ziola v. Ziola**. Affirmed.

No. A-01-083: **State v. Adams**. Appeal dismissed. See, Neb. Rev. Stat. § 25-2729(3) (Cum. Supp. 2000); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

No. A-01-089: **Rieple v. Blaha**. Appeal dismissed. See, rule 7A(2); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998); Neb. Rev. Stat. §§ 25-1315 and 25-1912 (Cum. Supp. 2000).

No. A-01-094: **MCVI v. Hartford Fire Ins. Co**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-01-108: **Lopez v. IBP, inc.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000); *Schmidt v. Shoftstall Alfalfa*, 239 Neb. 248, 475 N.W.2d 523 (1991).

No. A-01-173: **In re Interest of Stickney.** Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-33-012: **State v. Kuhr**. Petition of appellant for further review overruled on June 14, 2000.

No. A-97-263: **State v. Tlamka**, 7 Neb. App. 579 (1998). Petition of appellant for further review overruled on April 12, 2000.

No. A-98-313: **Snowdon Farms v. Jones**, 8 Neb. App. 445 and 8 Neb. App. 599 (1999). Petition of appellee for further review overruled on June 28, 2000.

No. A-98-446: **James Neff Kramper Family Farm v. Dakota Indus.**, 8 Neb. App. 893 (1999). Petition of appellee for further review overruled on May 17, 2000.

No. S-98-623: **Schafersman v. Agland Coop**. Petition of appellant for further review sustained on July 25, 2000.

Nos. A-98-661, A-98-796, A-98-797, A-98-835: **James Neff Kramper Family Farm v. Dakota Cty. Bd. of Equal**. Petition of appellant for further review overruled on March 1, 2000.

No. A-98-861: **Martin v. Cameron**. Filing treated as petition of appellant for further review. Filed out of time (see rule 2F(1)); dismissed for lack of jurisdiction.

No. A-98-866: **City of Lincoln v. Nebraska Pub. Power Dist.**, 9 Neb. App. 465 (2000). Petition of appellee for further review overruled on September 27, 2000.

No. A-98-868: **Schott v. Hennings**. Petition of appellant for further review overruled on May 24, 2000.

No. A-98-899: **In re Application of Powder River Trans**. Petition of appellant for further review overruled on September 27, 2000.

No. A-98-929: **Geiger v. Eco Water Systems**. Petition of appellant for further review overruled on July 25, 2000.

No. A-98-942: **McCarville v. McCarville**. Petition of appellant for further review overruled on June 28, 2000.

No. A-98-942: **McCarville v. McCarville**. Petition of appellee for further review overruled on June 28, 2000.

No. S-98-954: **McDonald v. DeCamp Legal Servs.** Petition of appellee for further review sustained on June 21, 2000.

No. A-98-1022: **Anderson Excavating v. S.I.D. 177.** Petition of appellee for further review overruled on June 21, 2000.

No. A-98-1091: **Affiliated Foods Co-op v. State.** Petition of appellant for further review overruled on April 26, 2000.

No. S-98-1127: **In re Estate of Tvrz**, 9 Neb. App. 98 (2000). Petition of appellee Dept. of Health & Human Servs. Finance & Support for further review sustained on May 24, 2000.

No. A-98-1146: **Eifert v. Continental Casualty Co.** Petition of appellee for further review overruled on March 22, 2000.

No. A-98-1153: **Hoppe v. Hoppe.** Petition of appellant for further review overruled on March 1, 2000.

Nos. A-98-1182, A-98-1183: **Fauss v. Norfolk Big Red Bottle Shop.** Petition of appellees for further review overruled on December 20, 2000.

No. A-98-1203: **State v. Johnson**, 9 Neb. App. 140 (2000). Petition of appellant for further review overruled on June 21, 2000.

No. S-98-1213: **State v. Wright.** Petition of appellant for further review sustained on November 1, 2000.

No. A-98-1214: **State v. Ellis.** Petition of appellant for further review overruled on June 28, 2000.

No. A-98-1233: **In re Estate of Stephens**, 9 Neb. App. 68 (2000). Petition of appellant for further review overruled on June 28, 2000.

No. S-98-1247: **Gering - Ft. Laramie Irr. Dist. v. Baker**, 8 Neb. App. 1001 (2000). Petition of appellees for further review sustained on March 29, 2000.

No. A-98-1259: **Griess v. Griess**, 9 Neb. App. 105 (2000). Petition of appellee for further review overruled on May 17, 2000.

No. A-98-1270: **Amateis v. City of Bridgeport.** Petition of appellant for further review overruled on August 23, 2000.

No. A-98-1275: **Buschkamp v. Gill.** Petition of appellee for further review overruled on June 28, 2000.

No. A-98-1309: **Higgins v. Rausch Herefords**, 9 Neb. App. 212 (2000). Petition of appellant for further review overruled on May 24, 2000.

No. A-98-1310: **Mehlig v. Crusinberry**. Petition of appellee for further review overruled on May 24, 2000.

No. A-98-1314: **Wolters v. Johnson**. Petition of appellant for further review overruled on October 12, 2000.

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

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

No. A-98-1336: **Clean Harbors Envtl. Servs. v. Kimball Cty. Bd. of Equal**. Petition of appellant for further review overruled on March 15, 2000.

No. A-98-1371: **State v. Thompson**. Petition of appellant for further review overruled on September 7, 2000.

No. A-98-1383: **State v. Hauck**. Petition of appellant for further review overruled on March 29, 2000.

No. A-98-1384: **Carlson v. Gray**. Petition of appellant for further review overruled on June 28, 2000.

No. A-99-002: **State v. Schmidt**, 9 Neb. App. 500 (2000). Petition of appellant for further review overruled on September 20, 2000.

No. A-99-018: **German Mut. Ins. Co. v. Federated Mut. Ins. Co.**, 8 Neb. App. 1062 (2000). Petition of appellant for further review overruled on May 24, 2000.

No. A-99-021: **Janecek v. Boone**. Petition of appellant for further review overruled on June 28, 2000.

No. A-99-022: **D & J Electric, Inc. v. Tipp-It, Inc**. Petition of appellant for further review overruled on June 7, 2000.

No. A-99-028: **In re Estate of Morris**. Petition of appellants for further review overruled on July 12, 2000.

No. A-99-044: **Washington Cty. Real Estate v. Breithaupt**. Petition of appellant for further review overruled on July 25, 2000.

No. A-99-058: **Vieregger v. Robertson**, 9 Neb. App. 193 (2000). Petition of appellee for further review overruled on June 14, 2000.

Nos. A-99-074, A-99-075: **In re Interest of Destiny M.** Petition of appellant for further review overruled on May 11, 2000.

No. S-99-076: **State v. Davidson**. Petition of appellee for further review sustained on April 26, 2000.

No. S-99-079: **Casey v. Levine**. Petition of appellee Methodist Hospital for further review sustained on June 28, 2000.

No. S-99-079: **Casey v. Levine**. Petition of appellees Levine and Robertson for further review sustained on June 28, 2000.

No. A-99-105: **New Tek Mfg., Inc. v. Beehner**. Petition of appellee for further review overruled on March 1, 2000.

No. S-99-106: **Keller v. Bones**, 8 Neb. App. 946 (2000). Petition of appellant for further review sustained on March 15, 2000.

No. A-99-113: **Hoffart v. Hodge**, 9 Neb. App. 161 (2000). Petition of appellant for further review overruled on June 21, 2000.

No. A-99-114: **In re Interest of Kelly D.** Petition of appellant for further review overruled on May 24, 2000.

Nos. A-99-118, A-99-119: **State v. Gray**. Petitions of appellant for further review overruled on May 24, 2000.

Nos. A-99-118, A-99-119: **State v. Gray**. Petition of appellee for further review overruled on May 24, 2000.

No. A-99-120: **State v. Gray**, 8 Neb. App. 973 (2000). Petition of appellant for further review overruled on May 24, 2000.

No. A-99-120: **State v. Gray**, 8 Neb. App. 973 (2000). Petition of appellee for further review overruled on May 24, 2000.

No. A-99-124: **Wiseman v. Wiseman**. Petition of appellant for further review overruled on September 7, 2000.

No. A-99-130: **Braesch v. McGregor**. Petition of appellee for further review overruled on June 14, 2000.

Nos. S-99-138, S-99-139: **Adams v. State**. Petition of appellee for further review sustained on November 1, 2000.

No. A-99-146: **In re Adoption of Leslie P.**, 8 Neb. App. 954 (2000). Petition of appellee for further review overruled on May 24, 2000.

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

Nos. A-99-210, A-99-211: **Dellinger v. Omaha Pub. Power Dist.**, 9 Neb. App. 307 (2000). Petition of appellant for further review overruled on September 27, 2000.

No. A-99-212: **Sarpy Cty. Bd. of Comrs. v. Sarpy Cty. Land Reutil.**, 9 Neb. App. 552 (2000). Petition of appellant for further review overruled on September 27, 2000.

No. A-99-297: **Shelton v. Shelton**. Petition of appellee Holmes for further review overruled on July 12, 2000.

No. A-99-316: **Campos v. Excel Corp**. Petition of appellant for further review overruled on May 11, 2000.

No. A-99-329: **Appel v. Appel**. Petition of appellant for further review overruled on September 27, 2000.

No. A-99-339: **In re Interest of Amanda K.** Petition of appellant for further review overruled on May 24, 2000.

No. A-99-340: **State v. Sims**. Petition of appellant for further review overruled on July 12, 2000.

No. A-99-345: **Beachy v. Glathar**. Petition of appellant for further review overruled on October 12, 2000.

No. A-99-367: **State v. Lovejoy**. Petition of appellee for further review overruled on May 11, 2000.

No. S-99-374: **Hagan v. Upper Republican NRD**. 9 Neb. App. 289 (2000). Petition of appellee for further review sustained on November 15, 2000.

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

No. A-99-396: **Swisher v. Midwest Partitions**. Petition of appellee for further review overruled on July 12, 2000.

No. A-99-418: **State v. Ybarra**, 9 Neb. App. 230 (2000). Petition of appellee for further review overruled on September 7, 2000.

No. A-99-419: **State v. McGinnis**, 8 Neb. App. 1014 (2000). Petition of appellee for further review overruled on May 24, 2000.

No. A-99-421: **Parr v. Florence Drug, Inc**. Petition of appellant for further review overruled on August 23, 2000.

No. A-99-426: **Jensen v. Contemporary Obstetrics & Gyn.** Petition of appellee for further review overruled on May 24, 2000.

No. A-99-432: **Sullivan v. Varnum.** Petition of appellant for further review overruled on May 24, 2000.

No. S-99-440: **State v. Warren**, 9 Neb. App. 60 (2000). Petition of appellee for further review sustained on May 24, 2000.

No. A-99-444: **In re Interest of Destiny H. & Suede H.** Petition of appellant for further review overruled on September 13, 2000.

No. A-99-444: **In re Interest of Destiny H. & Suede H.** Petition of appellee for further review overruled on September 13, 2000.

No. A-99-459: **State v. Gafford.** Petition of appellant for further review overruled on September 13, 2000.

No. A-99-462: **Espersen v. Buffalo Cty. Pub. Sch. Dist. No. 119.** Petition of appellee for further review overruled on June 21, 2000.

No. A-99-471: **State v. Burchard.** Petition of appellant for further review overruled on July 12, 2000.

No. A-99-473: **Tschida v. Medical Enters., Inc.** Petition of appellant for further review overruled on August 23, 2000.

No. A-99-480: **Journal Broadcast Group v. Spaghetti Works.** Petition of appellant for further review overruled on December 13, 2000.

No. A-99-480: **Journal Broadcast Group v. Spaghetti Works.** Petition of appellee for further review overruled on December 13, 2000.

No. A-99-493: **Willcock v. Willcock.** Petition of appellant for further review overruled on June 21, 2000.

No. S-99-498: **Kirwan v. Chicago Title Ins. Co.**, 9 Neb. App. 372 (2000). Petition of appellant for further review sustained on December 13, 2000.

No. A-99-511: **In re Conservatorship & Guardianship of Tucker**, 9 Neb. App. 17 (2000). Petition of appellants for further review overruled on April 26, 2000.

No. A-99-512: **In re Interest of Nyketa B. et al.** Petition of appellee Robert W. for further review overruled on May 24, 2000.

No. A-99-514: **Harris v. Abramson**. Petition of appellant for further review overruled on October 12, 2000.

No. A-99-544: **Jones v. Clarke**. Petition of appellant for further review overruled on June 7, 2000.

No. A-99-545: **Johnson v. Wolford**. Petition of appellant for further review overruled on August 23, 2000.

No. A-99-545: **Johnson v. Wolford**. Petition of appellee for further review overruled on August 23, 2000.

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

No. A-99-583: **Powers v. Werner Enterprs., Inc**. Petition of appellant for further review overruled on September 20, 2000.

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

No. A-99-599: **State v. Harrington**. Petition of appellant for further review overruled on May 24, 2000.

No. A-99-603: **Huryta v. Huryta**. Petition of appellant for further review overruled on March 22, 2000.

No. A-99-605: **Muia v. Blank**. Petition of appellant for further review overruled on November 22, 2000.

No. A-99-607: **In re Interest of Tiffany P**. Petition of appellant for further review overruled on April 12, 2000.

No. A-99-613: **Maloley v. Glinsmann**. Petition of appellant for further review overruled on October 12, 2000.

No. A-99-630: **In re Estate of Ellis**, 9 Neb. App. 598 (2000). Petition of appellant for further review overruled on November 22, 2000.

No. A-99-640: **In re Interest of Christmas W. et al**. Petition of appellant for further review overruled on July 12, 2000.

No. A-99-644: **Fernau v. Fernau**. Petition of appellant for further review overruled on August 23, 2000.

No. S-99-663: **Wooldridge v. Wooldridge**. Petition of appellant for further review overruled on November 29, 2000.

No. S-99-663: **Wooldridge v. Wooldridge**. Petition of appellee for further review sustained on November 29, 2000.

Nos. A-99-669, A-99-729: **In re Interest of Asia W. & Gabriella W.** Petition of appellee and guardian ad litem for further review overruled on June 7, 2000.

No. S-99-673: **Bates v. Design of the Times, Inc.**, 9 Neb. App. 260 (2000). Petition of appellant for further review sustained on August 23, 2000.

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

No. S-99-708: **Maxwell v. Montey**. Petition of appellants for further review sustained on October 17, 2000.

No. A-99-712: **Clark v. Clark**. Petition of appellant for further review overruled on July 12, 2000.

No. A-99-730: **Reynoso v. Jacobo's Grocery**. Petition of appellant for further review overruled on May 24, 2000.

No. S-99-760: **Steele v. Sedlacek**. Petition of appellant for further review sustained on December 20, 2000.

No. A-99-770: **State v. Cole**. Petition of appellant for further review overruled on August 23, 2000.

No. A-99-779: **Waschinek v. Beers**. Petition of appellee for further review overruled on September 13, 2000.

No. A-99-781: **State v. Beach**. Petition of appellant for further review overruled on September 7, 2000.

No. A-99-782: **State v. Wead**, 9 Neb. App. 177 (2000). Petitions of appellant for further review overruled on June 14, 2000.

No. A-99-795: **Guzman v. IBP, inc.** Petition of appellee for further review overruled on October 25, 2000.

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

No. A-99-815: **State v. Nunnenkamp**. Petition of appellant for further review overruled on June 14, 2000.

No. A-99-831: **Gorup v. Hawkins Constr. Co.** Petition of appellant for further review overruled on July 12, 2000.

No. A-99-838: **State v. Seckinger**. Petition of appellant for further review overruled on September 20, 2000.

No. A-99-854: **James Neff Kramper Family Farm v. Beef Products, Inc.** Petition of appellant for further review overruled on November 22, 2000.

No. A-99-854: **James Neff Kramper Family Farm v. Beef Products, Inc.** Petition of appellee for further review overruled on November 22, 2000.

Nos. A-99-858, A-99-859: **State v. Buckner.** Petition of appellant for further review overruled on March 15, 2000.

Nos. A-99-863, A-99-864: **State v. Engert.** Petition of appellant for further review overruled on June 7, 2000.

No. A-99-868: **State v. Fynbu.** Petition of appellant for further review overruled on June 7, 2000.

No. S-99-869: **State v. Ray**, 9 Neb. App. 183 (2000). Petition of appellant for further review sustained on June 28, 2000.

No. A-99-874: **Tyler v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 1, 2000.

No. S-99-893: **Vopalka v. Abraham**, 9 Neb. App. 285 (2000). Petition of appellant for further review sustained on July 25, 2000.

No. A-99-918: **State v. McCoy.** Petition of appellant for further review overruled on April 26, 2000.

No. A-99-919: **State v. Glass.** Petition of appellant for further review overruled on October 17, 2000.

No. A-99-926: **Malleck v. Dow Chemical Co.** Petition of appellee for further review overruled on December 20, 2000.

No. A-99-935: **Bennington Company v. Westergard.** Petition of appellants for further review overruled on November 15, 2000.

No. A-99-945: **Hauptman, O'Brien v. American Fam. Ins.** Petition of appellant for further review overruled on October 12, 2000.

No. S-99-968: **State v. Gangahar**, 9 Neb. App. 205 (2000). Petition of appellee for further review sustained on July 25, 2000.

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

No. A-99-973: **Hoppes v. Board of Regents.** Petition of appellant for further review overruled on September 20, 2000.

No. A-99-985: **State v. Hansen**. Petition of appellant for further review overruled on November 22, 2000.

No. A-99-994: **In re Interest of Tyler P. et al.** Petition of appellant for further review overruled on September 13, 2000.

No. A-99-994: **In re Interest of Tyler P. et al.** Petition of appellee for further review overruled on October 25, 2000.

No. A-99-1000: **Rader v. Jajdelski**. Petition of appellant for further review overruled on September 13, 2000.

No. A-99-1001: **State v. Gould**. Petition of appellant for further review overruled on March 22, 2000.

No. A-99-1003: **State v. Herringer**. Petition of appellant for further review overruled on April 19, 2000.

No. A-99-1005: **State v. Navarette**. Petition of appellee for further review overruled on November 22, 2000.

No. A-99-1012: **James Neff Kramper Family Farm v. City of South Sioux City**. Petition of appellant for further review overruled on November 29, 2000.

No. S-99-1022: **State v. Gutierrez**, 9 Neb. App. 325 (2000). Petition of appellant for further review sustained on December 20, 2000.

Nos. A-99-1045, A-99-1046: **State v. Lobato**. Petition of appellant for further review overruled on March 1, 2000.

No. A-99-1047: **Lucas v. Dahlke**. Petition of appellant for further review overruled on September 20, 2000.

No. A-99-1055: **In re Estate of Trowbridge**. Petition of appellant for further review overruled on December 13, 2000.

No. A-99-1061: **State v. Mann**. Petition of appellant for further review overruled on April 12, 2000.

No. A-99-1062: **State v. Johnson**. Petition of appellant for further review overruled on March 29, 2000.

No. A-99-1068: **State v. Luster**. Petition of appellant for further review overruled on May 24, 2000.

No. A-99-1071: **State v. Rea**. Petition of appellant for further review overruled on March 15, 2000.

No. A-99-1077: **Tyler v. Hopkins**. Petition of appellant for further review overruled on August 23, 2000.

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

No. A-99-1083: **Stein v. Nider**. Petition of appellee for further review overruled on December 20, 2000.

No. S-99-1084: **Hageman v. BioNebraska, Inc.** Petition of appellee for further review sustained on November 1, 2000.

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

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

No. S-99-1118: **Blizzard v. Chrisman's Cash Register Co.** Petition of appellant for further review sustained on November 1, 2000.

No. A-99-1119: **Maas v. Maas**. Petition of appellant for further review overruled on November 15, 2000.

No. A-99-1122: **State v. Sapanajin**. Petition of appellant for further review overruled on May 24, 2000.

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

No. A-99-1130: **State v. Willard**. Petition of appellant for further review overruled on December 13, 2000.

No. A-99-1141: **State v. Wise**. Petition of appellant for further review overruled on May 24, 2000.

No. A-99-1144: **Al-Timimi v. Al-Timimi**. Petition of appellant for further review overruled on December 20, 2000.

No. A-99-1151: **State v. Hanus**. Petition of appellant for further review overruled on November 1, 2000.

No. A-99-1152: **State v. Werkmeister**. Petition of appellant for further review overruled on October 17, 2000.

Nos. A-99-1159, A-99-1160: **State v. Abbink**. Petition of appellant for further review overruled on September 7, 2000.

No. A-99-1162: **Vecchio v. Vecchio**. Petition of appellant for further review overruled on September 7, 2000.

No. A-99-1169: **State v. Purcell**. Petition of appellant for further review overruled on June 7, 2000.

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

No. A-99-1175: **State v. Jesseph**. Petition of appellee for further review overruled on October 12, 2000.

No. A-99-1185: **State v. Furnas**. Petition of appellant for further review overruled on July 12, 2000.

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

No. A-99-1194: **State v. Welch**. Petition of appellant for further review overruled on November 1, 2000.

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

Nos. A-99-1228, A-99-1229: **State v. Quignon**. Petition of appellant for further review overruled on May 11, 2000.

No. A-99-1231: **State v. Ott**. Petition of appellant for further review overruled on September 20, 2000.

Nos. A-99-1232, A-99-1233: **State v. Talbot**. Petition of appellant for further review overruled on May 17, 2000.

No. A-99-1234: **State v. McArthur**. Petition of appellant for further review overruled on August 23, 2000.

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

No. A-99-1247: **State v. Warburton**. Petition of appellee for further review overruled on September 27, 2000.

No. A-99-1248: **State v. Bates**. Petition of appellee for further review overruled on July 12, 2000.

No. A-99-1254: **Nelsen v. Grzywa**, 9 Neb. App. 702 (2000). Petition of appellant for further review overruled on December 20, 2000.

No. A-99-1257: **McCroy v. Sprint Communications Co**. Petition of appellant for further review overruled on June 28, 2000.

No. A-99-1269: **State v. Connely**. Petition of appellant for further review overruled on May 17, 2000.

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

No. A-99-1278: **State v. Lewis**. Petition of appellant for further review overruled on May 11, 2000.

No. A-99-1284: **Goes v. Abramson**. Petition of appellant for further review overruled on June 14, 2000.

No. A-99-1285: **State v. Gonzales**. Petition of appellant for further review overruled on April 19, 2000.

No. A-99-1296: **State v. Miller**, 9 Neb. App. 617 (2000). Petition of appellant for further review overruled on October 17, 2000.

No. A-99-1313: **State v. Wragge**. Petition of appellant for further review overruled on June 14, 2000.

No. A-99-1314: **State v. Novak**. Petition of appellant for further review overruled on September 27, 2000.

No. A-99-1319: **In re Estate of Dobrovolny**. Petition of appellant for further review overruled on March 29, 2000.

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

No. A-99-1322: **Broberg v. Wal-Mart Stores, Inc.** Petition of appellant for further review overruled on November 15, 2000.

No. A-99-1322: **Broberg v. Wal-Mart Stores, Inc.** Petition of appellee for further review overruled on November 15, 2000.

No. A-99-1330: **Prater v. Hopkins**. Petition of appellant for further review overruled on July 25, 2000.

No. A-99-1340: **State v. Scott**. Petition of appellant for further review overruled on November 22, 2000.

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

No. A-99-1354: **State v. Van Dao**. Petition of appellant for further review overruled on April 12, 2000.

No. S-99-1362: **State v. Grieser**. Petition of appellant for further review sustained on August 23, 2000.

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

No. A-99-1383: **Bean v. Maplewood Care Center**. Petition of appellant for further review overruled on September 20, 2000.

No. A-99-1389: **Gorman v. Dude's Steak House**. Petition of appellee for further review overruled on November 22, 2000.

No. A-99-1409: **In re Interest of Jennifer F. & Kaylee C.** Petition of appellant for further review overruled on July 12, 2000.

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

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

No. A-99-1462: **State v. Groteluschen.** Petition of appellant for further review overruled on November 29, 2000.

No. A-00-001: **State v. Overton.** Petition of appellant for further review overruled on November 20, 2000.

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

No. A-00-005: **State v. Vonseggern.** Petition of appellant for further review overruled on September 27, 2000.

No. A-00-024: **State v. Olmstead.** Petition of appellant for further review overruled on June 14, 2000.

No. A-00-070: **State v. West.** Petition of appellant for further review overruled on September 20, 2000.

No. A-00-075: **VanDeMark v. City of Grand Island.** Petition of appellant for further review overruled on October 25, 2000.

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

No. A-00-093: **State v. Strange Owl.** Petition of appellant for further review overruled on August 23, 2000.

Nos. A-00-099, A-00-100: **State v. McKimmey.** Petition of appellant for further review overruled on August 23, 2000.

No. A-00-120: **In re Estate of Wahrman.** Petition of appellant for further review overruled on November 15, 2000.

No. S-00-138: **State v. Rubio.** Petition of appellant for further review sustained on December 13, 2000.

No. A-00-151: **Melroy v. Kawasaki Motors Mfg. Corp.** Petition of appellant for further review overruled on December 20, 2000.

No. A-00-173: **State v. Robben.** Petition of appellant for further review overruled on August 14, 2000.

No. A-00-174: **State v. Moore.** Petition of appellant for further review overruled on September 20, 2000.

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

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

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

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

No. S-00-209: **State v. Ruppert**. Petition of appellant for further review sustained on September 13, 2000.

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

No. A-00-225: **Tyler v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 7, 2000.

No. S-00-228: **Brandon v. Department of Corr. Servs**. Petition of appellant for further review sustained on June 14, 2000.

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

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

No. A-00-318: **Gould v. Department of Motor Vehicles**. Petition of appellant for further review overruled on October 12, 2000.

No. S-00-325: **State v. Roberts**. Petition of appellant for further review sustained on October 12, 2000.

No. A-00-330: **State v. Brown**. Petition of appellant for further review overruled on December 6, 2000.

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

No. A-00-371: **Coulson v. Nebraska Bd. of Parole**. Petition of appellant for further review overruled on October 17, 2000.

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

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

No. A-00-425: **In re Estate of Sidles**. Petition of appellant for further review overruled on November 15, 2000.

No. A-00-428: **State v. Churchill**. Petition of appellant for further review overruled on October 12, 2000.

No. A-00-456: **State v. Pierce**. Petition of appellant for further review overruled on December 13, 2000.

No. A-00-457: **State v. Taylor**. Petition of appellant for further review overruled on December 13, 2000.

No. A-00-472: **State v. VanNatter**. Petition of appellant for further review overruled on October 25, 2000.

No. A-00-476: **Hunt v. Clarke**. Petition of appellant for further review overruled on December 20, 2000.

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

No. S-00-492: **Foote v. O'Neill Packing**. Petition of appellant for further review sustained on December 20, 2000.

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

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

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

No. A-00-527: **State v. Krutilek**. Petition of appellant for further review overruled on November 15, 2000.

No. A-00-549: **New Tek Mfg. v. Beehner**. Petition of appellant for further review overruled on September 20, 2000.

No. A-00-577: **State v. Brown**. Petition of appellant for further review overruled on December 20, 2000.

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

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

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

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

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

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

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

No. A-00-768: **State v. Moore**. Petition of appellant for further review overruled on September 27, 2000.

No. A-00-769: **State v. Harper**. Petition of appellant for further review overruled on October 25, 2000.

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

No. A-00-789: **State v. Akins**. Petition of appellant for further review overruled on December 13, 2000.

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

No. A-00-920: **State v. Stapleton**. Petition of appellant for further review overruled on November 15, 2000.

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

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

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

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

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

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

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-96-917: **Hynek v. Hynek**. 00 NCA No. 29. Affirmed as modified. Irwin, Chief Judge.

No. A-98-623: **Schafersman v. Agland Coop**. 00 NCA No. 22. Affirmed. Inbody, Judge.

No. A-98-868: **Schott v. Hennings**. 00 NCA No. 11. Affirmed. Irwin, Chief Judge.

No. A-98-891: **Roesch v. American Fam. Mut. Ins. Co**. 00 NCA No. 16. Affirmed. Carlson, Judge.

No. A-98-893: **Schuldt v. Schuldt**. 00 NCA No. 15. Affirmed. Hannon, Judge.

No. A-98-929: **Geiger v. Eco Water Systems**. 00 NCA No. 23. Affirmed. Inbody, Judge.

No. A-98-942: **McCarville v. McCarville**. 00 NCA No. 19. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-98-954: **McDonald v. DeCamp Legal Servs**. 00 NCA No. 10. Reversed and remanded. Irwin, Chief Judge.

No. A-98-1022: **Anderson Excavating v. SID No. 177**. 00 NCA No. 18. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-98-1077: **Schweers v. West Point Dairy Products**. 00 NCA No. 11. Affirmed. Howard, District Judge, Retired.

No. A-98-1091: **Affiliated Foods Co-op v. State**. 00 NCA No. 10. Affirmed. Inbody, Judge.

No. A-98-1100: **Miner v. Miner**. 00 NCA No. 23. Reversed and vacated. Carlson, Judge.

No. A-98-1106: **Cunningham v. Russell**. 00 NCA No. 37. Reversed and remanded with directions. Inbody, Judge.

No. A-98-1181: **Washington Cty. v. Speece-Lewis Engineers**. 00 NCA No. 20. Reversed and remanded for a new trial. Carlson, Judge.

No. A-98-1182: **Fauss v. Norfolk Big Red Bottle Shop**. 00 NCA No. 43. Appeal dismissed. Hannon, Judge.

No. A-98-1183: **Fauss v. Norfolk Avenue Liquor Mart**. 00 NCA No. 43. Appeal dismissed. Hannon, Judge.

No. A-98-1213: **State v. Wright**. 00 NCA No. 37. Affirmed. Carlson, Judge.

No. A-98-1214: **State v. Ellis**. 00 NCA No. 17. Affirmed as modified. Per Curiam.

No. A-98-1248: **Carlson v. Carlson**. 00 NCA No. 16. Affirmed. Howard, District Judge, Retired.

No. A-98-1270: **Amateis v. City of Bridgeport**. 00 NCA No. 26. Affirmed. Buckley, District Judge, Retired.

No. A-98-1275: **Buschkamp v. Gill**. 00 NCA No. 16. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-98-1310: **Mehlig v. Crusinberry**. 00 NCA No. 14. Reversed and remanded for a new trial. Inbody, Judge.

No. A-98-1313: **Lammers v. Lammers**. 00 NCA No. 40. Appeal dismissed. Hannon, Judge.

No. A-98-1314: **Wolters v. Johnson**. 00 NCA No. 29. Affirmed. Irwin, Chief Judge.

No. A-98-1360: **Garner v. Frenchman Valley Farmers Co-op**. 00 NCA No. 20. Affirmed. Inbody, Judge.

No. A-98-1371: **State v. Thompson**. 00 NCA No. 24. Affirmed. Buckley, District Judge, Retired.

No. A-98-1384: **Carlson v. Gray**. 00 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-99-004: **State v. Mak**. 00 NCA No. 13. Affirmed as modified. Buckley, District Judge, Retired.

No. A-99-019: **Reetz v. Richardson**. 00 NCA No. 21. Affirmed in part as modified, and in part reversed and remanded with directions. Inbody, Judge.

No. A-99-021: **Janecek v. Boone**. 00 NCA No. 18. Affirmed. Sievers, Judge.

No. A-99-022: **D & J Electric, Inc. v. Tipp-It, Inc**. 00 NCA No. 12. Affirmed. Howard, District Judge, Retired.

No. A-99-028: **In re Estate of Morris**. 00 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-99-033: **Biloff v. Biloff**. 00 NCA No. 25. Reversed. Hannon, Judge.

No. A-99-034: **In re Interest of Nicholas S. et al**. 00 NCA No. 18. Affirmed. Carlson, Judge.

No. A-99-044: **Washington Cty. Real Estate v. Breithaupt**. 00 NCA No. 22. Affirmed. Hannon, Judge.

No. A-99-051: **Bloom v. Bloom**. 00 NCA No. 29. Affirmed. Carlson, Judge.

No. A-99-079: **Casey v. Levine**. 00 NCA No. 18. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-99-085: **Yost v. Strehle**. 00 NCA No. 19. Reversed and remanded with directions. Irwin, Chief Judge.

No. A-99-089: **Solis Painting v. Hicks Constr. Co**. 00 NCA No. 22. Affirmed. Carlson, Judge.

No. A-99-090: **Mid-America Expositions v. City of Omaha**. 00 NCA No. 22. Affirmed. Buckley, District Judge, Retired.

No. A-99-114: **In re Interest of Kelly D**. 00 NCA No. 13. Affirmed. Howard, District Judge, Retired.

No. A-99-124: **Wiseman v. Wiseman**. 00 NCA No. 28. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge.

No. A-99-130: **Braesch v. McGregor**. 00 NCA No. 17. Reversed. Howard, District Judge, Retired.

Nos. A-99-138, A-99-139: **Adams v. State**. 00 NCA No. 37. Reversed and remanded with directions. Carlson, Judge.

No. A-99-155: **In re Interest of Justin W. & Jason W**. 00 NCA No. 29. Affirmed. Irwin, Chief Judge.

No. A-99-182: **Sloggett v. Community Alternatives of Neb**. 00 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-99-213: **Kemp v. Kemp**. 00 NCA No. 20. Affirmed in part as modified, and in part reversed. Howard, District Judge, Retired.

No. A-99-217: **In re Interest of Lance B. et al**. 00 NCA No. 14. Affirmed. Sievers, Judge.

No. A-99-220: **Lorenz v. Yancey**. 00 NCA No. 20. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-99-221: **Javitch v. Kohll**. 00 NCA No. 18. Affirmed as modified. Inbody, Judge.

No. A-99-269: **In re Estate of Anderson**. 00 NCA No. 30. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-99-279: **Morrow v. Starostka**. 00 NCA No. 20. Affirmed. Carlson, Judge.

No. A-99-280: **Hansen v. Hansen**. 00 NCA No. 10. Affirmed. Carlson, Judge.

No. A-99-281: **Weitzenkamp v. Morgan**. 00 NCA No. 25. Affirmed. Hannon, Judge.

No. A-99-297: **Shelton v. Shelton**. 00 NCA No. 23. Reversed and remanded with directions. Hannon, Judge.

No. A-99-299: **Thomas Livestock, Inc. v. Rapp**. 00 NCA No. 17. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Judge.

No. A-99-316: **Campos v. Excel Corp**. 00 NCA No. 12. Affirmed. Carlson, Judge.

No. A-99-317: **Doty v. Doty**. 00 NCA No. 37. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-99-329: **Appel v. Appel**. 00 NCA No. 29. Affirmed. Moore, Judge.

No. A-99-338: **Baldwin v. Baldwin**. 00 NCA No. 40. Affirmed in part, and in part reversed and vacated. Sievers, Judge.

No. A-99-340: **State v. Sims**. 00 NCA No. 15. Affirmed. Irwin, Chief Judge.

No. A-99-350: **Steinhauser v. Steinhauser**. 00 NCA No. 15. Affirmed. Sievers, Judge.

No. A-99-359: **Polinski v. Omaha Airport Authority**. 00 NCA No. 30. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-364: **State v. Williams**. 00 NCA No. 12. Affirmed. Howard, District Judge, Retired.

No. A-99-366: **Kudron v. Department of Motor Vehicles**. 00 NCA No. 26. Affirmed. Inbody, Judge.

No. A-99-367: **State v. Lovejoy**. 00 NCA No. 12. Reversed and remanded with directions to vacate and dismiss. Carlson, Judge.

No. A-99-371: **Einspahr v. United Fire & Cas. Co**. 00 NCA No. 24. Affirmed. Carlson, Judge.

No. A-99-372: **Ostendorf v. Ostendorf**. 00 NCA No. 45. Affirmed as modified. Irwin, Chief Judge.

No. A-99-376: **Thielen v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-377: **Fenton v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-378: **Peery v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-379: **Snyder v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-380: **Stoll v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-381: **Private Equity Partnership v. Kirkpatrick, Pettis**. 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-396: **Swisher v. Midwest Partitions**. 00 NCA No. 12. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-99-421: **Parr v. Florence Drug, Inc**. 00 NCA No. 24. Affirmed. Sievers, Judge.

No. A-99-423: **Richardson v. Civil Service Comm. of Douglas Cty**. 00 NCA No. 15. Reversed and remanded for further proceedings. Sievers, Judge.

No. A-99-426: **Jensen v. Contemporary Obstetrics & Gyn**. 00 NCA No. 19. Reversed and remanded. Buckley, District Judge, Retired.

No. A-99-427: **Collection Bureau v. West Nobes Car Wash**. 00 NCA No. 21. Affirmed. Inbody, Judge.

No. A-99-433: **A-1 Track & Tennis v. Asphalt Maintenance**. 00 NCA No. 25. Affirmed. Sievers, Judge.

No. A-99-444: **In re Interest of Destiny H. & Suede H**. 00 NCA No. 29. Affirmed. Inbody, Judge.

No. A-99-459: **State v. Gafford**. 00 NCA No. 28. Affirmed. Irwin, Chief Judge.

No. A-99-462: **Espersen v. Buffalo Cty. Pub. Sch. Dist. No. 119**. 00 NCA No. 18. Reversed and remanded for further proceedings. Buckley, District Judge, Retired.

No. A-99-471: **State v. Burchard**. 00 NCA No. 19. Affirmed. Irwin, Chief Judge.

No. A-99-473: **Tschida v. Medical Enters., Inc**. 00 NCA No. 25. Affirmed. Moore, Judge.

No. A-99-474: **McLeay v. Bergan Mercy Health Sys**. 01 NCA No. 9. Reversed and vacated, and cause remanded for a new trial. Carlson, Judge.

No. A-99-479: **Sukup v. Sukup**. 00 NCA No. 11. Affirmed as modified. Irwin, Chief Judge.

No. A-99-480: **Journal Broadcast Group v. Spaghetti Works**. 00 NCA No. 40. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-99-481: **Lynch v. Weslo, Inc**. 00 NCA No. 24. Affirmed. Sievers, Judge.

No. A-99-514: **Harris v. Abramson**. 00 NCA No. 37. Affirmed. Sievers, Judge.

No. A-99-516: **Gochenouer v. Gochenouer**. 00 NCA No. 11. Affirmed. Carlson, Judge.

No. A-99-521: **Slape v. Slape**. 00 NCA No. 28. Appeal dismissed. Irwin, Chief Judge.

No. A-99-531: **State v. Pinkelman**. 00 NCA No. 12. Affirmed. Inbody, Judge.

No. A-99-539: **Kroupa v. Kroupa**. 00 NCA No. 17. Affirmed. Howard, District Judge, Retired.

No. A-99-545: **Johnson v. Wolford**. 00 NCA No. 25. Affirmed in part, vacated in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-99-554: **State v. Hoppy**. 00 NCA No. 30. Affirmed. Irwin, Chief Judge.

No. A-99-557: **In re Interest of Derrick D. et al**. 00 NCA No. 11. Reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-99-565: **In re Interest of Tiffany H**. 00 NCA No. 12. Reversed and remanded with directions to dismiss. Carlson, Judge.

No. A-99-569: **State v. Snodgrass**. 00 NCA No. 30. Affirmed. Irwin, Chief Judge.

No. A-99-570: **State v. Csuhta**. 00 NCA No. 30. Affirmed. Irwin, Chief Judge.

No. A-99-583: **Powers v. Werner Enters., Inc**. 00 NCA No. 29. Affirmed. Irwin, Chief Judge.

No. A-99-593: **State v. Akins**. 00 NCA No. 20. Affirmed in part, and in part vacated and remanded for resentencing. Irwin, Chief Judge.

No. A-99-597: **Lincoln Lumber Co. v. Poe**. 00 NCA No. 28. Affirmed in part, and in part reversed and remanded. Sievers, Judge.

No. A-99-601: **Bayless v. Wal-Mart Stores**. 00 NCA No. 18. Affirmed. Carlson, Judge.

No. A-99-610: **Cederburg v. Cederburg**. 00 NCA No. 28. Affirmed in part, affirmed in part as modified, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-99-640: **In re Interest of Christmas W. et al**. 00 NCA No. 16. Affirmed. Irwin, Chief Judge.

No. A-99-653: **Semin v. First Nat. Bank of Omaha**. 00 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-99-654: **REG, Inc. v. Rayho**. 00 NCA No. 37. Affirmed as modified. Irwin, Chief Judge.

No. A-99-663: **Wooldridge v. Wooldridge**. 00 NCA No. 38. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-99-674: **Folgers Architects v. Pavel**. 01 NCA No. 3. Affirmed as modified. Moore, Judge.

No. A-99-675: **State v. Johnson**. 00 NCA No. 18. Affirmed. Carlson, Judge.

Nos. A-99-681, A-99-682, A-99-687: **State v. Shepherd**. 00 NCA No. 37. Sentence of restitution vacated, and cause remanded with directions. Hannon, Judge.

No. A-99-688: **Pietzyk v. Pietzyk**. 00 NCA No. 37. Affirmed. Carlson, Judge.

No. A-99-693: **State v. Kozisek**. 00 NCA No. 38. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Irwin, Chief Judge.

No. A-99-695: **In re Guardianship & Conservatorship of Basan**. 00 NCA No. 44. Reversed and remanded for further proceedings. Moore, Judge.

No. A-99-711: **Todd K. v. Sarah P**. 00 NCA No. 24. Affirmed. Carlson, Judge.

No. A-99-712: **Clark v. Clark**. 00 NCA No. 18. Affirmed. Buckley, District Judge, Retired.

No. A-99-720: **Tyler v. City of Omaha**. 00 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-99-730: **Reynoso v. Jacobo's Grocery**. 00 NCA No. 12. Affirmed. Carlson, Judge.

No. A-99-734: **Tyler v. Daub**. 00 NCA No. 37. Reversed and remanded. Moore, Judge.

No. A-99-735: **Popp v. Hughes**. 00 NCA No. 37. Appeal dismissed. Hannon, Judge.

No. A-99-736: **State v. Williams**. 00 NCA No. 21. Affirmed. Inbody, Judge.

No. A-99-744: **In re Interest of Michael E.** 00 NCA No. 30. Reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-99-748: **Slape v. Slape**. 00 NCA No. 22. Affirmed in part, and in part dismissed. Irwin, Chief Judge.

No. A-99-752: **Lopez v. Automatic Printing Co**. 00 NCA No. 12. Affirmed. Irwin, Chief Judge.

No. A-99-760: **Steele v. Sedlacek**. 00 NCA No. 37. Affirmed. Inbody, Judge.

No. A-99-770: **State v. Cole**. 00 NCA No. 26. Affirmed. Sievers, Judge.

No. A-99-773: **State v. Martinson**. 00 NCA No. 14. Affirmed. Inbody, Judge.

No. A-99-779: **Waschinek v. Beers**. 00 NCA No. 28. Reversed and remanded with directions. Irwin, Chief Judge.

No. A-99-781: **State v. Beach**. 00 NCA No. 15. Affirmed. Irwin, Chief Judge.

No. A-99-785: **Miller v. Miller**. 00 NCA No. 37. Affirmed. Moore, Judge.

No. A-99-795: **Guzman v. IBP, inc**. 00 NCA No. 37. Reversed and remanded for further proceedings. Sievers, Judge.

No. A-99-812: **In re Guardianship of Ybarra**. 00 NCA No. 21. Affirmed. Inbody, Judge.

No. A-99-821: **State v. Greco**. 00 NCA No. 29. Affirmed. Irwin, Chief Judge.

No. A-99-827: **In re Interest of Angela C**. 00 NCA No. 14. Affirmed. Sievers, Judge.

No. A-99-830: **Diaz v. Diaz**. 00 NCA No. 33. Affirmed. Irwin, Chief Judge.

No. A-99-831: **Gorup v. Hawkins Constr. Co**. 00 NCA No. 22. Affirmed. Carlson, Judge.

No. A-99-836: **Carter v. Carter**. 01 NCA No. 6. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-99-851: **State v. McGinn**. 00 NCA No. 21. Appeal dismissed, and cause remanded with directions. Moore, Judge.

No. A-99-856: **Madonna Rehab. Hosp. v. Leroy**. 00 NCA No. 40. Affirmed. Sievers, Judge.

No. A-99-857: **State v. Pelster**. 00 NCA No. 32. Affirmed. Sievers, Judge.

No. A-99-871: **State v. Gaston**. 00 NCA No. 30. Affirmed. Irwin, Chief Judge.

No. A-99-873: **Wilson v. Wilson**. 00 NCA No. 23. Affirmed and remanded with directions. Inbody, Judge.

No. A-99-891: **Klahn v. Klahn**. 00 NCA No. 49. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-905: **In re Interest of Theresa S. & Gary S.** 00 NCA No. 30. Affirmed. Carlson, Judge.

No. A-99-919: **State v. Glass**. 00 NCA No. 28. Affirmed. Carlson, Judge.

No. A-99-926: **Malleck v. Dow Chemical Co**. 00 NCA No. 38. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-938: **State v. Patel**. 00 NCA No. 38. Affirmed. Irwin, Chief Judge.

No. A-99-950: **Newburn v. Newburn**. 00 NCA No. 31. Affirmed. Inbody, Judge.

No. A-99-953: **In re Interest of Joseph W.** 00 NCA No. 37. Affirmed. Inbody, Judge.

No. A-99-956: **Swartwood v. Wimes**. 00 NCA No. 37. Affirmed. Sievers, Judge.

No. A-99-967: **In re Guardianship & Conservatorship of Thompson**. 00 NCA No. 24. Appeal dismissed. Sievers, Judge.

No. A-99-969: **Lueders v. Lueders**. 00 NCA No. 33. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-99-970: **GSR, Inc. v. Hecht**. 00 NCA No. 40. Reversed and remanded with directions. Carlson, Judge.

No. A-99-972: **Sawyer v. United of Omaha Life Ins. Co.** 00 NCA No. 37. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-99-973: **Hoppes v. Board of Regents.** 00 NCA No. 31. Affirmed in part, and in part reversed. Inbody, Judge.

No. A-99-976: **State on behalf of Novacek v. Schmidt.** 00 NCA No. 31. Affirmed. Carlson, Judge.

No. A-99-985: **State v. Hansen.** 00 NCA No. 43. Affirmed. Carlson, Judge.

No. A-99-987: **Kroupa v. Seedorff Masonry, Inc.** 00 NCA No. 24. Affirmed. Carlson, Judge.

No. A-99-990: **Thulin v. Thulin.** 00 NCA No. 37. Affirmed as modified, and cause remanded with directions. Sievers, Judge.

No. A-99-994: **In re Interest of Tyler P. et al.** 00 NCA No. 37. Affirmed. Moore, Judge.

No. A-99-1000: **Rader v. Jajdelski.** 00 NCA No. 30. Affirmed. Moore, Judge.

No. A-99-1005: **State v. Navarrette.** 00 NCA No. 37. Reversed and remanded with direction. Carlson, Judge.

No. A-99-1008: **State v. Sealing.** 00 NCA No. 25. Affirmed. Irwin, Chief Judge.

No. A-99-1033: **Koppelmann v. Koppelmann.** 00 NCA No. 22. Affirmed. Irwin, Chief Judge.

No. A-99-1034: **State ex rel. Randolph v. Platt.** 00 NCA No. 49. Reversed and remanded with directions. Irwin, Chief Judge.

No. A-99-1049: **Elder v. Parris Trucking, Inc.** 00 NCA No. 50. Reversed and remanded with directions. Carlson, Judge.

No. A-99-1050: **Dixon v. Scott.** 00 NCA No. 43. Reversed and remanded with directions. Carlson, Judge.

No. A-99-1054: **Barlean v. Butler Cty. Rur. Pub. Power Dist.** 00 NCA No. 44. Affirmed. Moore, Judge.

No. A-99-1055: **In re Estate of Trowbridge.** 00 NCA No. 37. Affirmed as modified, and cause remanded for further proceedings. Moore, Judge.

No. A-99-1056: **Rosencrantz v. Rosencrantz.** 00 NCA No. 42. Appeal dismissed. Irwin, Chief Judge.

No. A-99-1060: **State v. Shelby.** 01 NCA No. 4. Affirmed. Irwin, Chief Judge.

No. A-99-1073: **State v. Briggs**. 01 NCA No. 10. Affirmed. Carlson, Judge.

No. A-99-1083: **Stein v. Nider**. 00 NCA No. 42. Reversed and remanded for a new trial. Inbody, Judge.

No. A-99-1084: **Hageman v. BioNebraska, Inc**. 00 NCA No. 37. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-1086: **Trackwell v. Nebraska Dept. of Admin. Servs**. 00 NCA No. 44. Affirmed. Irwin, Chief Judge.

No. A-99-1093: **Vin-El-Pat, Inc. v. Fairchild**. 00 NCA No. 43. Appeal dismissed. Hannon, Judge.

No. A-99-1107: **State v. Smith**. 00 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-99-1111: **Livingston v. Livingston**. 00 NCA No. 40. Affirmed as modified. Moore, Judge.

No. A-99-1113: **Krula v. Krula**. 01 NCA No. 3. Affirmed. Moore, Judge.

No. A-99-1114: **State v. Coker**. 00 NCA No. 28. Affirmed. Sievers, Judge.

No. A-99-1118: **Blizzard v. Chrisman's Cash Register Co**. 00 NCA No. 37. Affirmed. Inbody, Judge.

No. A-99-1128: **State v. Walker**. 00 NCA No. 28. Affirmed. Carlson, Judge.

No. A-99-1135: **State v. Golliday**. 00 NCA No. 37. Affirmed. Sievers, Judge.

No. A-99-1137: **Tolfa v. Tolfa**. 00 NCA No. 33. Affirmed. Irwin, Chief Judge.

No. A-99-1144: **Al-Timimi v. Al-Timimi**. 00 NCA No. 31. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

Nos. A-99-1159, A-99-1160: **State v. Abbink**. 00 NCA No. 26. Affirmed. Inbody, Judge.

No. A-99-1167: **Thille v. Thille**. 00 NCA No. 40. Affirmed as modified. Inbody, Judge.

No. A-99-1175: **State v. Jesseph**. 00 NCA No. 37. Reversed and remanded for a new trial. Irwin, Chief Judge.

No. A-99-1178: **Aldrich v. Aldrich**. 01 NCA No. 10. Affirmed. Irwin, Chief Judge.

No. A-99-1182: **Johnson Bros. Liq. Co. v. Nebraska Liq. Cont. Comm.** 00 NCA No. 47. Reversed. Hannon, Judge.

No. A-99-1191: **Lux v. Lux.** 00 NCA No. 37. Affirmed. Sievers, Judge.

No. A-99-1194: **State v. Welch.** 00 NCA No. 38. Affirmed in part, and in part reversed and remanded with directions. Irwin, Chief Judge.

No. A-99-1201: **In re Interest of Jessica M. et al.** 00 NCA No. 40. Affirmed. Inbody, Judge.

No. A-99-1205: **Simmons v. Hayford.** 00 NCA No. 37. Affirmed. Sievers, Judge.

No. A-99-1225: **Penix v. Penix.** 01 NCA No. 4. Affirmed in part, and in part reversed. Inbody, Judge.

No. A-99-1240: **State v. Lea.** 00 NCA No. 28. Affirmed. Carlson, Judge.

No. A-99-1247: **State v. Warburton.** 00 NCA No. 37. Reversed and remanded for a new trial. Inbody, Judge.

No. A-99-1256: **Ambassador Lincoln v. Nebraska Dept. of Health.** 00 NCA No. 42. Affirmed. Irwin, Chief Judge.

No. A-99-1266: **Messman v. Messman.** 00 NCA No. 47. Affirmed. Carlson, Judge.

No. A-99-1268: **State v. Schrum.** 00 NCA No. 28. Affirmed. Hannon, Judge.

No. A-99-1271: **Drake v. Drake.** 00 NCA No. 33. Affirmed. Irwin, Chief Judge.

No. A-99-1301: **Munson v. Munson.** 01 NCA No. 7. Appeal dismissed, and cause remanded with directions. Hannon, Judge.

No. A-99-1303: **Duffy v. Rasmussen.** 01 NCA No. 2. Judgment vacated, and cause remanded with directions. Sievers, Judge.

No. A-99-1306: **Gabel v. Ulch.** 00 NCA No. 43. Affirmed. Moore, Judge.

No. A-99-1317: **State on behalf of Rachel E. v. David R.** 00 NCA No. 37. Affirmed. Hannon, Judge.

No. A-99-1322: **Broberg v. Wal-Mart Stores, Inc.** 00 NCA No. 33. Affirmed. Irwin, Chief Judge.

Nos. A-99-1332, A-99-1333: **City of Omaha v. Nebraska Liquor Control Comm.** 00 NCA No. 37. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-1340: **State v. Scott**. 00 NCA No. 40. Affirmed. Irwin, Chief Judge.

No. A-99-1342: **Thomas v. Lincoln Public Schools**. 00 NCA No. 38. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-99-1353: **Sorge v. IBP, inc**. 00 NCA No. 33. Affirmed. Carlson, Judge.

No. A-99-1358: **Polinski v. Sky Harbor Air Serv**. 01 NCA No. 7. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Chief Judge.

Nos. A-99-1364, A-99-1365: **Olson v. Olson Indus**. 01 NCA No. 3. Affirmed. Irwin, Chief Judge.

No. A-99-1366: **In re Application of Abbott Transport**. 01 NCA No. 9. Affirmed. Carlson, Judge.

No. A-99-1368: **State v. Miller**. 00 NCA No. 43. Affirmed. Carlson, Judge.

No. A-99-1383: **Bean v. Maplewood Care Center**. 00 NCA No. 31. Affirmed. Carlson, Judge.

Nos. A-99-1384, A-99-1385: **Farris Engineering v. Folgers Architects**. 01 NCA No. 3. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-99-1387: **Johnson v. Farm Bureau Ins. Co**. 00 NCA No. 51. Affirmed. Hannon, Judge.

No. A-99-1389: **Gorman v. Dude's Steak House**. 00 NCA No. 37. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-99-1393: **Arnberger v. American Family Ins. Co**. 01 NCA No. 2. Affirmed. Carlson, Judge.

No. A-99-1417: **Schram v. Schram**. 00 NCA No. 43. Affirmed. Irwin, Chief Judge.

No. A-99-1422: **Gottwald v. Gottwald**. 00 NCA No. 47. Affirmed as modified. Moore, Judge.

No. A-99-1431: **State v. Sickles**. 00 NCA No. 45. Affirmed. Carlson, Judge.

No. A-99-1433: **State v. Allen**. 00 NCA No. 41. Affirmed. Sievers, Judge.

No. A-99-1437: **Reida v. Reida**. 00 NCA No. 40. Affirmed. Inbody, Judge.

No. A-99-1438: **In re Interest of Samondre M.** 00 NCA No. 47. Appeal dismissed. Carlson, Judge.

No. A-99-1459: **In re Interest of Nicholas C.** 00 NCA No. 49. Affirmed. Irwin, Chief Judge.

No. A-99-1464: **In re Interest of Jeff T. et al.** 00 NCA No. 43. Affirmed. Sievers, Judge.

No. A-00-004: **Byabato v. Byabato.** 00 NCA No. 49. Affirmed in part, affirmed in part as modified, and in part reversed. Irwin, Chief Judge.

No. A-00-012: **Lakeview Acres Lot Owners v. Central Neb. Pub. Power.** 01 NCA No. 9. Reversed and remanded. Inbody, Judge.

No. A-00-038: **In re Interest of Tomeeka J.** 00 NCA No. 44. Affirmed. Sievers, Judge.

No. A-00-043: **State v. Davis.** 01 NCA No. 10. Affirmed. Carlson, Judge.

No. A-00-048: **State v. Hancock.** 00 NCA No. 21. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-00-049: **State v. Wormstadt.** 00 NCA No. 21. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-00-054: **Wessel v. Sharp Personnel.** 00 NCA No. 40. Affirmed. Hannon, Judge.

No. A-00-067: **Tremain v. Tremain.** 00 NCA No. 45. Affirmed. Inbody, Judge.

No. A-00-083: **Payzant v. Coufal Lumber, Inc.** 00 NCA No. 49. Affirmed in part, and in part reversed and remanded with direction. Sievers, Judge.

No. A-00-095: **Vonderschmidt v. Sur-Gro.** 00 NCA No. 51. Reversed and remanded with direction to dismiss. Carlson, Judge.

No. A-00-102: **State v. Bauer.** 00 NCA No. 50. Affirmed. Sievers, Judge.

No. A-00-145: **State v. Snuttjer.** 00 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-00-151: **Melroy v. Kawasaki Motors Mfg. Corp.** 00 NCA No. 42. Affirmed as modified. Irwin, Chief Judge.

No. A-00-159: **In re Interest of Yeagley.** 01 NCA No. 2. Reversed and remanded with directions. Moore, Judge.

No. A-00-162: **Otero v. Kellogg Company**. 00 NCA No. 40. Affirmed. Sievers, Judge.

No. A-00-168: **State v. Zavala**. 00 NCA No. 40. Motion granted. Hannon, Judge.

No. A-00-177: **State v. Baker**. 01 NCA No. 6. Affirmed. Moore, Judge.

No. A-00-186: **Vesely v. Timpte, Inc.** 00 NCA No. 45. Affirmed in part, and in part reversed. Inbody, Judge.

No. A-00-194: **Tempelmeyer v. Cushman, Inc.** 00 NCA No. 49. Affirmed. Irwin, Chief Judge.

No. A-00-210: **Huber v. Aurora Co-op Elev. Co.** 00 NCA No. 45. Affirmed. Carlson, Judge.

No. A-00-240: **State v. Relford**. 00 NCA No. 31. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-00-260: **Sexton v. Sexton**. 00 NCA No. 49. Affirmed. Inbody, Judge.

No. A-00-261: **In re Interest of Ashley M. et al.** 00 NCA No. 52. Reversed. Sievers, Judge.

No. A-00-276: **In re Interest of Theresa P.** 00 NCA No. 49. Affirmed. Irwin, Chief Judge.

No. A-00-280: **State v. Barry**. 00 NCA No. 30. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-00-292: **In re Interest of Sharlay T. et al.** 00 NCA No. 49. Affirmed. Inbody, Judge.

No. A-00-348: **Swanson v. Swanson**. 01 NCA No. 8. Affirmed. Sievers, Judge.

No. A-00-365: **In re Interest of Latika R. et al.** 00 NCA No. 47. Affirmed. Inbody, Judge.

No. A-00-377: **In re Interest of Cura G. et al.** 00 NCA No. 49. Affirmed. Carlson, Judge.

No. A-00-378: **In re Interest of Mariah W. & Matthew W.** 00 NCA No. 50. Affirmed. Carlson, Judge.

No. A-00-380: **DeHart v. Faith**. 01 NCA No. 6. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-00-382: **Boyd v. City of Lincoln**. 01 NCA No. 4. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-00-386: **In re Guardianship & Conservatorship of Dylan B. et al.** 01 NCA No. 5. Affirmed. Sievers, Judge.

No. A-00-403: **State v. Patton**. 01 NCA No. 2. Affirmed. Irwin, Chief Judge.

No. A-00-413: **Killin v. Sharp Servs**. 00 NCA No. 51. Affirmed. Inbody, Judge.

No. A-00-423: **In re Interest of Christopher B. & Brittani B**. 01 NCA No. 6. Affirmed. Carlson, Judge.

No. A-00-445: **State v. March**. 00 NCA No. 37. Reversed and remanded for further proceedings. Sievers, Judge.

No. A-00-460: **Snyder v. Chandler**. 01 NCA No. 8. Affirmed in part, and in part reversed. Hannon, Judge.

No. A-00-462: **In re Interest of Levanta A. & Leronn A**. 01 NCA No. 2. Affirmed. Irwin, Chief Judge.

No. A-00-473: **State v. Chase**. 01 NCA No. 10. Affirmed. Inbody, Judge.

No. A-00-482: **Kugler v. Kugler**. 01 NCA No. 8. Affirmed. Irwin, Chief Judge.

No. A-00-484: **Ortiz v. IBP, inc**. 00 NCA No. 52. Affirmed. Carlson, Judge.

No. A-00-515: **State v. Hayes**. 00 NCA No. 46. Affirmed. Inbody, Judge.

No. A-00-546: **In re Interest of Charlotte N**. 01 NCA No. 6. Affirmed. Inbody, Judge.

No. A-00-592: **State v. Johnson**. 01 NCA No. 3. Affirmed. Sievers, Judge.

No. A-00-614: **In re Interest of Jesenia M. et al**. 01 NCA No. 5. Affirmed. Inbody, Judge.

No. A-00-643: **State v. Ferebee**. 01 NCA No. 5. Affirmed. Sievers, Judge.

No. A-00-681: **State v. Scott**. 01 NCA No. 8. Reversed and remanded for a new trial. Hannon, Judge.

No. A-00-691: **Carbajal v. DCS Sanitation Management**. 01 NCA No. 10. Affirmed in part, and in part reversed and remanded with direction. Hannon, Judge.

No. A-00-704: **Gomez v. Beef America**. 01 NCA No. 10. Affirmed. Carlson, Judge.

No. A-00-754: **Malik v. Egr**. 01 NCA No. 10. Affirmed. Sievers, Judge.

No. A-00-764: **State v. Tyma**. 00 NCA No. 44. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Judge.

No. A-00-819: **State v. Graves**. 01 NCA No. 9. Affirmed. Carlson, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

VILLAGE OF EXETER, APPELLEE AND CROSS-APPELLANT, V. MICHAEL KAHLER, APPELLEE AND CROSS-APPELLEE, AND MARIAN KAHLER, APPELLANT AND CROSS-APPELLEE.

606 N.W.2d 862

Filed March 7, 2000. No. A-98-1084.

1. **Specific Performance: Equity.** An action for specific performance sounds in equity.
2. **Equity: Appeal and Error.** In appeals from equity actions, an appellate court tries factual questions de novo on the record.
3. **Judgments: Appeal and Error.** As to both questions of fact and questions of law, an appellate court is obligated to reach a conclusion independent of that reached by the trial court when conducting a review de novo on the record.
4. **Equity: Judges: Appeal and Error.** In an equity suit, a trial court's denial of a motion for disqualification of the trial judge can be immaterial on appeal, because the case is tried de novo in the reviewing court.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Steven B. Fillman, of Fillman Law Offices, for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee Village of Exeter.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

PER CURIAM.

I. INTRODUCTION

Marian Kahler appeals from a ruling of the district court ordering specific performance of an agreement to sell real estate. On appeal, Kahler asserts that the trial court erred in denying her motion for recusal and in finding the agreement to be valid and enforceable, and alleges, inter alia, that the agreement was procured by duress. For the reasons stated herein, we reverse, and remand for further proceedings.

II. BACKGROUND

On May 20, 1998, Charles Campbell, as attorney for the village of Exeter (Village), filed a petition in the district court seeking specific performance of an agreement for Kahler and her husband to sell a parcel of real estate to the Village. The petition alleged that an agreement was entered into on March 3 in open court, whereby the Village agreed to pay the Kahlers $3,000, release a lien against the property, and "dismiss actions for civil contempt and criminal contempt which were pending against" the Kahlers and that in exchange, the Kahlers would sell the property to the Village. On April 16, Kahler gave notice to the Village that she would not convey the property as previously agreed.

According to the testimony adduced at trial, the Village brought an action against the Kahlers in 1996, alleging that the property in question was a nuisance. Apparently, the Kahlers failed to comply with an order entered by the court as a result of the nuisance proceeding. The Village then filed a criminal contempt action against the Kahlers. On February 5, 1998, Campbell was appointed as special prosecutor for purposes of pursuing the criminal contempt action against the Kahlers. Campbell filed accusations of criminal contempt against the Kahlers also on February 5.

On February 2, 1998, Campbell sent a letter to an attorney who was representing both of the Kahlers. In the letter, Campbell enclosed a copy of the criminal contempt accusation against the Kahlers. Campbell also reminded the attorney that "the Village has offered to purchase the real estate from the Kahlers for the sum of $3,000.00." Further, Campbell noted that "[i]n addition to this offer, the Village has also agreed to dismiss [a] lien [against the property and] is agreeable to dismissing the criminal and civil contempt proceedings which are pending."

On July 8, 1998, Kahler moved for a continuance of the specific performance trial. Kahler alleged that the action had been pending for less than 60 days and that she needed more time to complete discovery. The trial judge, Orville L. Coady, ruled on the motion by returning a typed note to Kahler's counsel. In the note, Judge Coady stated, "This matter has been pending for years. Your sudden appearance causes me to suspect that your

client's efforts are just another way [to] put off justice for her neighbors. There were so many ways for this matter not to have come to this." The case proceeded to trial on September 15.

At the trial, Kahler moved for the trial judge, Judge Coady, to recuse himself from the case. Kahler's counsel questioned Judge Coady about the note mentioned above, as well as other alleged statements made by Judge Coady about Kahler. Judge Coady stated on the record that he was not going to recuse himself and that he could divorce himself from the prior actions involving Kahler in his courtroom.

Kahler testified at trial that she took Campbell's February 2, 1998, letter as a threat. She testified that she believed if she did not sell the land to the Village, she had to " 'go to court for criminal contempt' " and that if found guilty, that "we would be going to jail." She testified that Campbell's position, as related to her, was that "he could force [the Kahlers] to sell the land or keep the criminal contempt charges against [them]." Kahler testified that she was afraid of her husband's having to go to jail and of losing her children if found guilty of the contempt charge. Kahler testified that she agreed to sell the land because she felt she had no other choice. The attorney who represented Kahler at the contempt hearing testified at trial that the main factor that Kahler considered in deciding whether to agree to sell the land was that "[s]he was concerned about [her husband's] going to jail."

At the contempt hearing, on March 3, 1998, the parties had advised Judge Coady that they had reached an agreement to sell the land. The terms of the agreement were stated in open court. The Village acknowledged that it agreed with the terms of the agreement. Judge Coady further questioned the Kahlers as to whether they understood and accepted the terms of the agreement. Kahler stated that the agreement was "what they've [her attorneys] told me." Judge Coady stated, "Well, you have to — it has to be your agreement, you can't say it's your lawyers." In response, Kahler stated, "We have no other choice," and agreed that it was her agreement.

On September 25, 1998, Judge Coady rendered a ruling. In the ruling, he concluded that the Village "ha[d] proven a valid and legally enforceable contract." He concluded that Kahler

"considered her position, was aware of her options and then made a voluntary and intelligent decision to sell her real estate to the Village." Accordingly, Judge Coady ordered the Kahlers to specifically perform the agreement and sign a deed transferring the property to the Village. Finally, Judge Coady noted that "[t]he court presumes that [the Kahlers] will appeal or refuse to abide by this order" and set a hearing to appoint a receiver. From this ruling, Kahler has filed a timely appeal. We note that although Kahler and her husband were both defendants at trial, Kahler is the only one to file an appeal, and we are concerned here solely with Kahler and her allegations on appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Kahler has assigned four errors. Our discussion requires us to consider only one of these. Kahler asserts that Judge Coady erred in refusing to recuse himself from the case. Because our discussion of this assigned error disposes of the appeal, we specifically make no comment concerning Kahler's assigned errors challenging Judge Coady's ruling on the merits of this case.

The Village has filed a cross-appeal, assigning five errors concerning evidentiary rulings made by Judge Coady. These evidentiary rulings concern sustaining Kahler's objection to various exhibits and sustaining Kahler's objection to various cross-examination questions.

IV. ANALYSIS

1. Standard of Review

[1-3] An action for specific performance sounds in equity. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). In appeals from equity actions, an appellate court tries factual questions de novo on the record. *Marten v. Staab, supra*; *Winberg v. Cimfel, supra*; *Fritsch v. Hilton Land & Cattle Co., supra*. As to both questions of fact and questions of law, an appellate court is obligated to reach a conclusion independent of that reached by the trial court. *Marten v. Staab, supra*.

2. Motion to Recuse

Kahler asserts that Judge Coady erred by refusing to recuse himself from this case. Kahler argues that Judge Coady had personal knowledge of disputed facts, making him a potential witness, and that his comments in the note sent to Kahler's counsel regarding the motion for continuance demonstrated that Judge Coady was biased against her.

[4] The Nebraska Supreme Court has recently noted that in an equity suit, a trial court's denial of a motion for disqualification of the trial judge can be immaterial on appeal, because the case is tried de novo in the reviewing court. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980). See *Garrett v. Garrett*, 3 Neb. App. 384, 527 N.W.2d 213 (1995). In the present case, we conclude that contrary to the situations presented in those Supreme Court cases, the issue is not immaterial.

We first note that in *Poll v. Poll, supra*; *Deacon v. Deacon, supra*; and *Garrett v. Garrett, supra*, the Supreme Court, in each instance, held that the appellant's allegation that the trial court erred in denying a motion for recusal was without merit for additional reasons, beyond the fact that the case was being reviewed de novo. For example, in *Poll v. Poll, supra*, and *Deacon v. Deacon, supra*, the Supreme Court noted that the review was de novo, but further concluded that the decision of the trial judge to deny the motion was not an abuse of discretion. Similarly, in *Garrett v. Garrett, supra*, the appellant failed to properly assign and argue the issue. We have not been cited to any case in Nebraska where the sole reason for affirming a court's denial of a recusal motion was the fact that the review was de novo and the issue, therefore, immaterial.

The primary reason that we decline to extend the holding of *Poll v. Poll, supra*; *Deacon v. Deacon, supra*; and *Garrett v. Garrett, supra*, however, is that in none of those cases was the trial judge in possession of independent knowledge of material facts, such that he was potentially a material witness in the case being brought before him for adjudication. In the present case, Judge Coady was the presiding judge at the proceedings in which Kahler assented to the agreement to sell her land to the Village in exchange for having pending criminal charges

dropped. Judge Coady questioned Kahler during those proceedings as to whether she understood and accepted the terms of the agreement. As such, Judge Coady had independent personal knowledge material to the determination of the primary issue presented in the current proceedings, namely, whether Kahler voluntarily assented to the agreement.

It is clear that Judge Coady was prohibited from testifying in the present case as a witness at the same time he presided over the case. Neb. Rev. Stat. § 27-605 (Reissue 1995) specifically prohibits a judge from acting as both judge and witness in the same proceedings. In *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981), the Supreme Court noted that the federal statutes go further than the Nebraska statutes and prohibit a judge from presiding over a case where a judge has been or is likely to be a material witness or has personal knowledge of disputed evidentiary facts concerning the case. The court noted that Nebraska does not have a similar statute. Nonetheless, we believe that the circumstances of the present case dictate that Judge Coady should have disqualified himself, on the basis of existing Nebraska law.

While Nebraska does not have a statute similar to the federal statute discussed in *Cline v. Franklin Pork, Inc., supra*, Nebraska does have the Nebraska Code of Judicial Conduct, which includes prohibitions substantially similar to the federal statute. Specifically, Canon 3 of the Code of Judicial Conduct mandates that a judge shall perform the duties of the judicial office impartially and diligently. See *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). See, also, *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995) (Caporale, J., concurring). Canon 3E provides that a judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. See *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997). As noted above, in the present case, Judge Coady did have personal knowledge of disputed evidentiary facts concerning the voluntariness of Kahler's assent to the agreement which was the subject of the present proceeding.

Judge Coady's continuing to preside over the present case and reach factual conclusions, while at the same time possessing personal knowledge of the material facts at issue in the case, was in contravention of the spirit and broad meaning of § 27-605. Section 27-605 specifically provides that a judge presiding at trial is not competent to testify in that trial as a witness. Additionally, § 27-605 provides that no objection is necessary to preserve the issue. Although it is true that Judge Coady was not sworn to testify and did not formally take the stand as a witness on the subject of Kahler's assent to the agreement at issue, the record nonetheless establishes that he did have personal knowledge relevant to determining the voluntariness of her assent. In *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), the Supreme Court noted that a judge may assume the role of a witness during a trial even though he is neither called to testify nor voluntarily takes the witness stand. The court concluded that such behavior is at variance with the policy expressed in § 27-605 and should be treated analogously to direct violation of the rule. *State v. Barker, supra.* See, also, *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993).

In the present case, although we are required to conduct a de novo review, we are not privy to all of the evidence that was actually considered by the trial court. Judge Coady presided over the contempt hearing where the parties entered into the agreement which is the subject of the present case. Judge Coady personally observed the circumstances under which the agreement was reached and questioned Kahler personally as to the voluntariness of her assent to the agreement.

In the present case, one of the material issues Judge Coady was called upon to determine was whether Kahler's assent to the agreement was voluntary. On that material issue, Judge Coady possessed personal knowledge. We must examine the particular circumstances of this case to determine whether Kahler was prejudiced by Judge Coady's continuing to preside over the present case. See *State v. Barker, supra.* Under the circumstances presented to us, we are unable to rule out the possibility that Judge Coady placed greater weight on his own observations and opinions than on any other evidence presented. See *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981).

Finally, we note that the record in the present case reveals an appearance of partiality on Judge Coady's part. In addition to the fact that Judge Coady possessed personal knowledge of material facts, several comments by Judge Coady that are in the record of this case suggest at least an appearance of partiality. For example, in ruling on a pretrial motion to suppress, Judge Coady suggested that Kahler's hiring of a new attorney shortly prior to trial was "just another way [to] put off justice for her neighbors." Not only does this statement reflect that Judge Coady questions Kahler's motives for hiring an attorney, but the statement also suggests that Judge Coady may have reached a determination prior to trial as to the eventual outcome that would bring "justice" to Kahler's neighbors.

Additionally, after ruling on the merits of the specific performance action, Judge Coady noted in an order that "[t]he court presumes that [Kahler] will appeal *or refuse to abide by this order.*" (Emphasis supplied.) This statement continues a pattern of comments by Judge Coady in this case suggesting that Judge Coady's personal knowledge and opinions about Kahler may have affected his ruling in this case, in that he has noted on the record that he expects Kahler to "refuse to abide by" his order. These comments add to the impact Judge Coady's possession of personal knowledge about material facts had on the way in which this case proceeded and the decisions that were reached. The record presented to us is colored with evidence that Judge Coady's presiding over the present action was inappropriate.

We conclude that the issue of whether Judge Coady should have granted Kahler's motion for recusal is not immaterial in the present case. We further conclude that Judge Coady abused his discretion in denying her motion where he clearly possessed personal knowledge of material facts critical to the decision to be reached in the present case.

3. Cross-Appeal

On cross-appeal, the Village has raised numerous assigned errors alleging that Judge Coady erred in various evidentiary rulings. Because we have concluded that Judge Coady should have recused himself from presiding over the present action, we must reverse, and remand the case for further proceedings. As a

result, we need not address the merits of the cross-appeal at this time. Without specifically addressing each of the assigned errors, we note that even if we were to consider the evidence excluded by Judge Coady, our result would be the same. The evidence excluded does not change the fact that Judge Coady should have recused himself from the proceedings. As such, the assigned errors on cross-appeal are without merit.

V. CONCLUSION

Finding that Judge Coady abused his discretion in denying Kahler's motion for recusal, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CARLSON, Judge, concurs in the result.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD DAVIDSON, APPELLANT.
607 N.W.2d 221

Filed March 7, 2000. No. A-99-076.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Judgments: Appeal and Error.** An appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Investigative Stops: Probable Cause: Appeal and Error.** Ultimate determinations of reasonable suspicion and probable cause are reviewed de novo.
4. **Constitutional Law: Arrests: Search and Seizure: Probable Cause.** The Fourth Amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure.
5. **Motions to Suppress: Search and Seizure: Search Warrants: Proof.** A defendant who seeks suppression of evidence obtained pursuant to a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.

6. ___: ___: ___: ___. If a search is pursuant to a warrant, the burden is on the defendant to establish the illegality of the search; if the search is not pursuant to a warrant, the burden is on the State to establish the legality of the search.
7. **Search Warrants: Probable Cause: Appeal and Error.** In evaluating the validity of a warrant, the duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.
8. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In assessing whether an affidavit in support of issuing a search warrant establishes probable cause, the Nebraska Supreme Court has adopted a "totality of the circumstances" rule, under which the question becomes whether the issuing magistrate, considering the totality of circumstances, had a substantial basis for finding that the affidavit established probable cause.
9. **Constitutional Law: Warrants.** For purposes of constitutional scrutiny, there is no substantial difference between an arrest warrant and a capias.
10. **Warrants: Affidavits: Evidence.** The lack of an affidavit may be overcome by other competent evidence in the record upon which the validity of the warrant may be judged.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded with directions.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Richard Davidson appeals from his conviction for possession of a controlled substance, a Class IV felony offense under Neb. Rev. Stat. § 28-416(3) (Reissue 1995). Davidson challenges the district court's ruling on his motion to suppress physical evidence and the subsequent admission of the evidence at trial. Because the State failed to produce any supporting affidavit for the arrest warrant which led to the search or any other evidence upon which the validity of the warrant could be assessed, we conclude that the evidence should have been suppressed, and we reverse, and remand the case.

II. BACKGROUND

On May 4, 1998, Investigator David Waskowiak, of the Hall County Sheriff's Department, arrested Davidson pursuant to an

active arrest warrant which had been issued as a result of a nonrelated matter. According to the warrant, the warrant was issued because Davidson failed to pay the full amount of a judgment and costs pursuant to a prior conviction. As Waskowiak handcuffed Davidson, he noticed that Davidson's left hand was clenched shut. Waskowiak instructed Davidson to unclench the hand, at which time, a cellophane package containing a white powder was discovered. The substance ultimately tested positive for methamphetamine.

On June 25, 1998, the State filed an information charging Davidson with possession of methamphetamine. Davidson pled not guilty at his arraignment on July 7. On July 31, Davidson filed a motion to suppress the fruits of the May 4 search by Waskowiak. In the motion, Davidson alleged that the search was without probable cause or a valid warrant. At the hearing on the motion to suppress, the State offered the arrest warrant, but did not offer any supporting affidavit. On September 14, the court made a journal entry ruling on the motion to suppress. The court found that the arrest warrant was valid on its face and that Waskowiak acted in good faith when relying on the warrant. As a result, the court overruled the motion to suppress.

On November 23, 1998, a trial was conducted on a stipulation of facts. Davidson preserved his objection to the introduction of the evidence, on the basis of his motion to suppress. The court found Davidson guilty of possession of a controlled substance, methamphetamine. On January 5, 1999, the court determined that Davidson was not a proper candidate for probation and sentenced Davidson to 6 months in the county jail. Davidson filed this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Davidson has assigned two errors. Davidson asserts that the court erred in overruling his motion to suppress and in admitting the evidence at trial.

IV. ANALYSIS

1. Standard of Review

[1,2] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct an investiga-

tory stop and probable cause to perform a warrantless search, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999); *State v. Matthews*, 8 Neb. App. 167, 590 N.W.2d 402 (1999). In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Johnson, supra*; *State v. Matthews, supra*.

[3] Ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). To the extent questions of law are involved, an appellate court is obliged to reach conclusions independent of the decisions reached by the courts below. *State v. Johnson, supra*.

2. Failure to Provide Affidavit

On appeal, Davidson asserts primarily that the State's failure to introduce an affidavit to support the arrest warrant which led to the discovery of the evidence in the present case renders the warrant invalid and the search impermissible. Our review of Nebraska cases indicates that this is a question of first impression.

[4] We initially note that it has been observed that the Fourth Amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure. *State v. Hayes*, 3 Neb. App. 919, 535 N.W.2d 715 (1995). As such, we consider propositions of law surrounding search warrants as analogous to the situation in the present case, where the search was incident to an arrest warrant.

[5,6] It is firmly established in Nebraska that a defendant who seeks suppression of evidence obtained pursuant to a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). In *State v. Vrtiska*, the Supreme Court made it very clear that the burden of going forward with the evidence depends on whether the search is pursuant to a warrant or is a

warrantless search. If a search is pursuant to a warrant, the burden is on the defendant to establish the illegality of the search; if the search is not pursuant to a warrant, the burden is on the State to establish the legality of the search. *State v. Vrtiska, supra.*

[7,8] In the present case, we are presented primarily with a question as to the validity of the warrant itself. In evaluating the validity of a warrant, the duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *State v. Beeken*, 7 Neb. App. 438, 585 N.W.2d 865 (1998). To be valid, the warrant obtained must have been supported by an affidavit establishing probable cause. See *State v. Johnson, supra.* In assessing whether an affidavit in support of issuing a search warrant establishes probable cause, the Nebraska Supreme Court has adopted a "totality of the circumstances" rule, under which the question becomes whether the issuing magistrate, considering the totality of circumstances, had a substantial basis for finding that the affidavit established probable cause. *Id.*

In the present case, Davidson asserted in his motion to suppress that there was not a valid warrant. At the hearing on the motion, the State offered the arrest warrant, but made no effort to introduce the supporting affidavit. Although the arguments of counsel were not recorded, it is apparent from the judge's comments at the conclusion of the hearing that Davidson's counsel argued that the affidavit was necessary for the court to make a proper determination as to the validity of the warrant.

Under Nebraska jurisprudence, the validity of the warrant itself is intricately dependent upon the allegations made in the supporting affidavit. In the present case, there is no way to adequately judge the legality of the warrant, as the State failed to present the affidavit. We are cognizant of the fact that this case is, in some ways, different from a typical warrant case. The warrant issued in the present case is an arrest warrant issued for Davidson's failure to pay a previous judgment and costs and failure to appear to show cause why he should be excused from paying the judgment and costs. The State argued during argument that warrants for failure to appear are generally issued by the court on its own motion without any instigating action by the

State. As such, the State argued that we should not impose the same affidavit requirement in this scenario as we do in other situations, such as search warrant cases.

[9] We note that other jurisdictions have addressed situations similar to the present case, in the context of warrants issued for failure to appear, or capias warrants. See, e.g., *Atkins v. State*, 984 S.W.2d 780 (Tex. App. 1999); *Summers v. State*, No. 05-96-01839-CR, 1998 WL 665639 (Tex. App. 1998); *Myles v. State*, 946 S.W.2d 630 (Tex. App. 1997); *State v. Williams*, No. 95CA93, 1996 WL 753216 (Ohio App. 1996); *State v. Seal*, 138 Or. App. 693, 910 P.2d 394 (1996). The Texas appellate court has noted that for purposes of constitutional scrutiny, there is no substantial difference between an arrest warrant and a capias. *Sharp v. State*, 677 S.W.2d 513 (Tex. Crim. App. 1984). Accord *Myles v. State, supra* (court applying same standards in context of capias as in context of any other arrest warrant case).

[10] Other jurisdictions addressing the issue have, however, recognized that the lack of an affidavit may be overcome by other competent evidence in the record upon which the validity of the warrant may be judged. For example, if the face of the warrant reflects the fact that it was issued based upon the personal knowledge of the issuing magistrate or judge, or has a complaint attached which sets forth in sworn form the facts upon which the allegation of the defendant's failure to appear is based, the warrant's validity may be judged without an available affidavit. See *Atkins v. State, supra*. Additionally, if the face of the warrant reflects the fact that the failure to appear occurred in the presence of the issuing magistrate or judge, such that personal knowledge of the issuing magistrate or judge is reflected in the warrant, the validity of the warrant may be adequately scrutinized. See *State v. Seal, supra*. The failure to produce an affidavit may be overcome if the State produces some other evidence showing that the warrant was supported by a reasonable belief that probable cause existed for the arrest. See *Miller v. State*, 736 S.W.2d 643 (Tex. Crim. App. 1987).

In the present case, there is simply no evidence in the record upon which we can assess the validity of the warrant at issue. The face of the warrant does not include any statements which indicate that the warrant was issued upon the personal knowl-

edge of the issuing judge or that the issuing judge was the same judge whom Davidson failed to appear in front of. There is no supporting affidavit or any other sworn testimony upon which we can assess whether there was probable cause for issuing the warrant. Although we recognize that in these cases where warrants are issued for failure to appear or pay a judgment and costs, the lack of an affidavit may be overcome by the presence of some evidence upon which we can adjudge the validity of the warrant; no such evidence exists in the present case. As a result, we conclude that the State failed to establish that the search in the present case was the result of a valid legally issued warrant.

3. Probable Cause

Our inquiry does not end with our finding that there was not a valid warrant however. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures. *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994); *State v. Kinney*, 6 Neb. App. 102, 572 N.W.2d 383 (1997). However, as noted above, if there is no valid warrant, the burden is on the State to establish that the search was conducted under circumstances substantiating the reasonableness of the search. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

On the record before us, the State did not present any evidence which would demonstrate the reasonableness of the search, aside from the arrest warrant. The State, accordingly, did not satisfy its burden of establishing the legality of the warrantless search.

4. Good Faith

We note that the trial court concluded that the lack of an affidavit could be rectified by the investigating officer's "good faith" reliance upon the warrant. The good faith exception espoused by the U.S. Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), provides that even if the affidavit is insufficient to support a warrant, evidence seized pursuant thereto need not be suppressed where police act in objectively reasonable good faith in reliance upon the warrant. The Nebraska Supreme Court has recognized

that in regard to an officer's reasonable reliance on an invalid warrant, the test for reasonable reliance is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), *cert. denied* 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397. See, also, *State v. Johnson, supra.*

It is apparent that in order to determine whether the good faith exception applies, it is necessary to be able to assess the allegations set forth in the affidavit. Without the affidavit, there is no way to determine whether the allegations therein are sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. As such, where, as in the present case, the State fails to produce an affidavit at all, the good faith exception cannot be properly applied. For this reason, we conclude that the district court was wrong to apply the good faith exception.

5. Resolution

On the record presented to us, we conclude that the State failed to satisfy the burden of proof at the hearing on the motion to suppress. The State failed to produce the affidavit upon which the arrest warrant was issued and, therefore, failed to demonstrate the validity of the warrant. As such, we consider the search of Davidson to have been conducted without a valid warrant. The State failed to offer any evidence to justify a warrantless search of Davidson. As such, the district court erred in overruling the motion to suppress and in accepting the evidence at trial.

V. CONCLUSION

Finding the court erred in overruling the motion to suppress and in accepting the evidence at trial, we reverse, and remand with directions to grant the motion to suppress and conduct further proceedings consistent with this opinion.

Reversed and remanded with directions.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF THE ESTATE OF LETTIE TUCKER, AN INCAPACITATED PERSON. DAWN MUFF AND ALICIA LAURIDSEN, APPELLANTS, V. RAYMOND CALKINS, APPELLEE.

606 N.W.2d 868

Filed March 7, 2000. No. A-99-511.

1. **Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Attorney Fees: Contracts.** Ordinarily, the right of an attorney to compensation for his or her services depends upon a contract of employment, express or implied.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

William G. Line for appellants.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee.

IRWIN, Chief Judge, and CARLSON, Judge, and HOWARD, District Judge, Retired.

CARLSON, Judge.

Dawn Muff and Alicia Lauridsen, coguardians and coconservators of the estate of Lettie Tucker, appeal from a judgment of the county court for Dodge County, objecting to the court's award of attorney fees and costs to Thomas Thomsen in the amount of $798. For the reasons set forth below, we affirm.

BACKGROUND

On March 3, 1999, Thomsen filed a petition at the request of Raymond Calkins (Calkins). The record is unclear regarding Calkin's exact relationship to Tucker, although the record shows that Calkins is either Tucker's brother or her son. In the petition, Calkins alleged that Tucker is incapacitated and that the appointment of a guardian and a conservator for Tucker is necessary and desirable as a means for providing for Tucker's continuing care and supervision. Calkins alleged that at the time the

petition was filed, Tucker resided at Arbor Manor, a skilled-care nursing facility, and was 87 years old, Tucker's date of birth being October 31, 1911. Calkins requested that the court appoint Nebraska Trust Company as Tucker's conservator and Muff and Walter Calkins, two of Tucker's grandchildren, as coguardians.

Calkins also alleged that it was necessary for the court to appoint a temporary guardian and a temporary conservator for Tucker. Specifically, Calkins stated that Tucker had granted Muff a power of attorney and that Muff indicated her intention to move Tucker from Arbor Manor to an apartment or assisted living arrangement. Calkins stated that Tucker needs to be in a nursing home in order to receive 24-hour care and supervision and that removing Tucker from the nursing home would be detrimental to Tucker's health. Calkins stated that the court should appoint either a visitor, physician, guardian ad litem, or attorney to represent Tucker's interests. Calkins stated that he believed that Tucker has an interest in certificates of deposit totaling $41,000, $6,000 or $7,000 in cash, a coin collection, and a house in O'Neill, Nebraska. Calkins alleged that the court's appointment of a temporary conservator for Tucker is necessary to avoid the unnecessary wasting of Tucker's assets.

In an order filed on March 3, 1999, the court appointed Nebraska Trust Company as temporary conservator, Walter Calkins and Muff as temporary guardians, and Leta Fornoff as Tucker's guardian ad litem. The court ordered that Dr. Virgil Ottun, Tucker's physician, examine Tucker and that Ottun submit a written report to the court. The court noted that Tucker did not appear to have counsel of her own choice at that time.

In an amendment filed March 5, 1999, the court removed Muff as temporary guardian because Muff refused to sign the acceptance of appointment. On the same date, letters of temporary conservatorship and temporary guardianship were filed with the court.

A hearing on Calkins' petition was held on March 25, 1999. Tucker was represented by counsel of her own at this hearing, and Tucker, Tucker's counsel, Calkins, Thomsen, and Fornoff were present. At this hearing, Calkins offered into evidence Ottun's report. Tucker's attorney objected to this exhibit, and although the court stated that it would make a ruling upon fur-

ther presentation of evidence, the trial court never ruled on Tucker's objection and the admission of Ottun's report.

Fornoff testified without objection that she talked to Ottun and that Ottun stated that because of various medical conditions, Tucker was in need of a guardian and that it was in Tucker's best interests to have a conservator. Fornoff testified that Ottun stated that Tucker had the mental competency to choose her own guardian and conservator. Fornoff also testified that Ottun expressed the opinion that Tucker could be transferred from Arbor Manor to an assisted living facility and that this new facility would meet Tucker's needs.

Fornoff also stated that she had spoken to Tucker and that Tucker stated that she had appointed Muff as her attorney in fact. Fornoff stated that Tucker thought that Muff was serving in the same capacity as a guardian and conservator and that Tucker told Fornoff that she wants a guardian and conservator to take care of her medical needs, to generally assist her, and to help her with her finances. Fornoff testified that Tucker had consistently expressed the desire that Muff and Lauridsen serve as her coguardians and coconservators. Fornoff recommended that the court appoint Muff and Lauridsen as coguardians and that Fornoff would not be opposed to the appointment of Muff and Lauridsen as coconservators, as long as both Muff and Lauridsen were required to sign any checks or financial documents.

In an order filed March 30, 1999, the court stated that Tucker had indicated a desire for the appointment of a guardian and conservator and that the appointment of both was the least restrictive alternative available. The court stated that the appointment of a guardian and conservator is necessary to provide Tucker with continuing care and supervision and to preserve her assets. The court appointed Muff and Lauridsen as coguardians and coconservators.

On April 15, 1999, Thomsen moved for an order "directing the payment of his attorney's fees by the Conservator herein for services rendered to the estate of Lettie Tucker."

On April 19, 1999, Muff and Lauridsen filed an objection to Thomsen's motion for attorney fees, stating that Thomsen did

not represent Tucker, but at all times acted as counsel for Calkins, Walter Calkins, and Reena Stoffer.

A hearing was held on Thomsen's motion for attorney fees on April 26, 1999. At this hearing, Thomsen testified that he filed a petition on Calkin's behalf as an interested person, seeking the appointment of a guardian and conservator for Tucker. Thomsen testified that he prepared all of the court orders, applications, motions, notices in the file, and letters of guardianship and conservatorship. Thomsen testified that he also formalized the court's order appointing coguardians and coconservators for Tucker.

Thomsen testified that he filed a motion for attorney fees and attached a statement to his motion, stating that he spent 8.6 hours on the appointment of a guardian and conservator for Tucker and that he performed those services at a rate of $90 per hour. Thomsen also testified that he advanced expenses to the Dodge County Court in the amount of $24. Thomsen testified that the services he performed were to benefit Tucker, specifically to protect Tucker's assets and her person. On cross-examination, Thomsen testified that he did not have any conferences with Tucker and that Calkins, not Tucker, retained his services.

In an order filed April 26, 1999, the court ordered that Muff and Lauridsen pay Thomsen $798 in attorney fees and costs.

Muff and Lauridsen appeal.

ASSIGNMENTS OF ERROR

On appeal, Muff and Lauridsen contend that the county court erred in granting Thomsen attorney fees and costs in the amount of $798. Specifically, Muff and Lauridsen argue that the county court erred in awarding Thomsen fees because (1) there is no such office as an attorney for an estate and (2) at all times Thomsen was proceeding contrary to Tucker's expressed desires and wishes.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Stull*, 8 Neb. App. 301, 593 N.W.2d 18 (1999), citing *In re Estate of*

Stephenson, 243 Neb. 890, 503 N.W.2d 540 (1993). In reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Estate of Stull, supra*, citing *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999).

ANALYSIS

On appeal, Muff and Lauridsen argue that the county court erred in awarding Thomsen fees because there is no such office as an attorney for an estate and, secondly, because at all times Thomsen was proceeding contrary to Tucker's expressed desires and wishes.

[3] Ordinarily, the right of an attorney to compensation for his or her services depends upon a contract of employment, express or implied. *In re Estate of Stull, supra.* See, also, *Doyle v. Union Ins. Co.*, 209 Neb. 385, 308 N.W.2d 322 (1981) (holding that attorney's claim for professional services against person sui juris, or against property of such person, must rest upon contract of employment, express or implied, made with person sought to be charged or with his agent).

In *Doyle v. Union Ins. Co., supra*, the Nebraska Supreme Court held that a law firm, engaged by the directors of a mutual insurance company, was not entitled to attorney fees from the trustee of a trust created for the benefit of the policyholders during the transition from a mutual company to a stock company merely because the law firm claimed to have benefited the beneficiaries of the trust by its actions. In so holding, the Supreme Court noted that during the time period for which the law firm sought payment, the law firm was actively opposing the interests of the policyholders. Additionally, the Supreme Court cited *In re Estate of Kierstead*, 121 Neb. 423, 426, 237 N.W. 299, 300 (1931), in which the Supreme Court stated:

> "An attorney's claim for professional services against persons *sui juris*, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. No one can legally claim compensation for voluntary services to another, however beneficial they may be, especially where rendered without his knowledge or con-

> sent, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed. . . . So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees."

In the instant case, Muff and Lauridsen argue that the court should not have awarded Thomsen attorney fees, because at all times Thomsen was proceeding contrary to Tucker's expressed desires and wishes. Muff and Lauridsen's claim is not supported by the evidence. The record shows that Tucker thought that Muff, whom Tucker had previously appointed as her attorney in fact, served in the same capacity as guardian and conservator and that Tucker told Fornoff that she wanted a conservator and guardian to take care of her medical needs, to generally assist her, and to help her with her finances. The record shows that Tucker was aware Calkins was attempting to appoint a guardian and conservator for her and that Tucker agreed that she needed both a guardian and a conservator. The issue of whether the court erred in appointing both a guardian and a conservator for Tucker has not been appealed. Clearly, on this record, Thomsen was not actively opposing Tucker's interests during the time for which Thomsen requests payment for his services.

Additionally, 7A C.J.S. *Attorney & Client* § 288 at 534 (1980) states:

> Unless the circumstances show that the services were intended to be gratuitous, where services are rendered by an attorney at the request of another, or where the benefits of such services are knowingly accepted, a promise to pay therefor will be presumed, particularly where it would be inequitable for the party benefited to share the benefit without contributing to the expense. Thus, where there is even slight proof of an employment of the attorney by the client, the fact that the latter stood by without objection and allowed the attorney to render valuable services in his

behalf will estop him to deny the fact of employment. The acquiescence must be such as presumes volition on the part of the person sought to be charged, however, and there is no acquiescence where he has no choice but to avail himself of the efforts made by the attorney.

In the instant case, the record shows that Thomsen rendered valuable services on Tucker's behalf and that Tucker knowingly accepted the benefits of Thomsen's services.

CONCLUSION

Therefore, we conclude that the trial court did not err in ordering Muff and Lauridsen to pay Thomsen $798 in attorney fees and costs.

AFFIRMED.

KARLA J. CARRAHER, APPELLEE, V.
DENNIS M. CARRAHER, APPELLANT.
607 N.W.2d 547

Filed March 14, 2000. No. A-98-1176.

1. **Child Custody: Appeal and Error.** In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the trial judge's reasons or rulings are clearly untenable such as to unfairly deprive a litigant of a substantial right and a just result.
3. **Child Custody.** An award of custody of a child to a parent should not be interpreted as a sentence of immobilization.
4. **Child Custody: Proof.** The custodial parent has the burden of proving to the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent, before a court will permit the removal of a child from the jurisdiction.
5. **Child Custody.** In the context of determining the best interests of a child in a case where the custodial parent petitions to move out of the jurisdiction with the minor child, there are three broad considerations: (1) each parent's reasons or motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent.
6. ___. If a trial court finds the custodial parent's motives for leaving the jurisdiction are legitimate, the court should go on to consider the motives of each parent, in proposing and resisting the move, in its analysis of the child's best interests.

7. ___. Job-related changes are legitimate reasons for moving a child out of the jurisdiction when there is a reasonable expectation of improvement in the career or occupation of the custodial parent.
8. ___. There are a number of factors that may be used to assess whether moving a child out of the jurisdiction holds the potential for enhancing the quality of life for the child and custodial parent. These include (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent.
9. **Child Custody: Visitation.** The factor regarding the impact of a move out of the jurisdiction on the contact between the child and the noncustodial parent, when viewed in light of reasonable visitation arrangements, focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship. Courts typically view this factor in the light of the potential to establish and maintain a reasonable visitation schedule.
10. ___: ___. A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
11. **Child Custody: Proof.** Custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action.
12. ___: ___. The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred.
13. **Child Custody: Visitation.** In determining a child's best interests for purposes of custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Reissue 1998) provides that the factors to be considered shall include, but not be limited to, the relationship of the child to each parent; the desires and wishes of the child; the general health, welfare, and social behavior of the child; and credible evidence of abuse inflicted on any family or household member.
14. **Child Custody.** A court may consider such factors in determining a child's best interests in custody matters as the moral fitness of the child's parents and the parents' sexual conduct, the attitude and stability of each parent's character, and the parental capacity to provide physical care and satisfy educational needs of the child.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, District Judge, Retired, and ALAN G. GLESS, Judge. Affirmed as modified.

Jeanelle Kleveland, of Kleveland Law Offices, for appellant.

John H. Sohl, of Edstrom, Bromm, Lindahl, Sohl & Skokan, for appellee.

HANNON and SIEVERS, Judges, and BLUE, District Judge, Retired.

SIEVERS, Judge.

This appeal involves the removal of a child from Nebraska to Colorado by his mother, Karla J. Carraher, the custodial parent. The father, Dennis M. Carraher, appeals the decision of the district court for Saunders County, which denied his application for modification of the parties' divorce decree to grant him sole custody of the child, as well as the court's order granting Karla's application to remove their child from Nebraska to Colorado.

I. BACKGROUND

Dennis and Karla were married in May 1989. One child, Thomas, was born to the couple on November 1, 1989. The parties were divorced pursuant to a decree filed July 31, 1992. The parties had joint legal custody, with Karla having physical custody of Thomas. Dennis was granted visitation every other weekend, one evening during the week, 2 weeks each summer, and various holidays. The decree incorporates the parties' property settlement agreement, which includes a provision regarding the removal of Thomas from Nebraska, which said that "if in the future the wife, as parent having physical possession of the minor child, decides to move from Nebraska, the wife shall make application to the Saunders County District Court prior to the time of such move."

Karla and Thomas resided in an apartment in Wahoo, Nebraska, for the first 6 months after the parties' divorce, until she bought a house in Weston, Nebraska. They lived in the house for 5 years and then moved to Wahoo where they lived with her boyfriend, Manual Brazil, for 3 months before moving to Colorado in September 1997.

Karla worked at several part-time jobs over the years. Prior to moving to Colorado, she worked at M.E. Collins Contracting, earning approximately $100 per week. She also received $500 a month from renting out the house she owned in Weston. In addition, Karla received approximately $250 per month in child support from Dennis. Karla testified that she was able to live adequately on her sources of income while in Nebraska.

Thomas attended school in Weston and briefly in Wahoo at the start of the 1997 school year, and he was involved in other activities, including swimming and baseball. Karla is not abusive toward Thomas, and for punishment, she deprives him of something or sends him to his room. Dennis testified that Karla was very capable with Thomas and keeps him clean and healthy. It appears that Karla and Thomas have a loving, stable relationship.

Karla had a son, John, in 1985 from a prior marriage. John lived with Karla and Thomas until 1996, when John wanted to move to his father's farm near Spalding, Nebraska. Karla and Thomas see John about once a month.

Dennis lives near Wahoo on a farm and is employed by the State of Nebraska as an electrical inspector. Dennis often takes Thomas to see relatives in Spalding during his visits. Other activities that Dennis and Thomas do include hunting, riding motorcycles, camping, fishing, swimming, going to car races, and playing games. The evidence shows that Dennis and Thomas have a very good relationship. Dennis is not abusive toward Thomas.

Over Labor Day weekend in 1997, Karla, John, and Thomas went to the Estes Park area to visit Karla's sister. They returned on Monday, and on Tuesday, Karla made the decision to move to Colorado. She testified that she had been considering moving there for some time, but did not think that the move would actually occur. On September 4, 1997, Karla moved to Estes Park and took Thomas with her without the court's or Dennis' approval. Although Karla testified that she tried to contact Dennis to let him know where she and Thomas were going, she was unable to locate him, as he was on vacation in Colorado. Therefore, she wrote him a letter. On September 6, Dennis returned from his vacation and attempted to contact Thomas at Brazil's house. The next day, he became concerned and began making telephone calls. He found out on September 8 that Karla had taken Thomas to Colorado.

Dennis filed an application to modify the decree on September 8, 1997, and requested that he be awarded sole custody of Thomas. Also on September 8, Dennis filed a motion for ex parte temporary custody to allow him to obtain custody dur-

ing the pendency of the application to determine Thomas' custody. On September 9, the court awarded Dennis temporary custody. On September 10, Karla filed a motion to quash the temporary custody order together with an application for leave to remove Thomas from Nebraska. The court granted Karla's motion to quash, vacated the temporary ex parte custody order it had entered the day before in favor of Dennis, and allowed Karla to remove Thomas to Colorado pending the final determination of the case. A trial was not held on Dennis' application to modify and Karla's application to remove until April 16, 1998, and the trial court did not decide the case until October 9, 1998, over 1 year after Karla had taken Thomas and moved to Colorado.

Karla testified that she moved to Colorado in order to end her relationship with Brazil. She stated that Brazil was not abusive toward her or Thomas, but their arguments had grown more frequent and intense. Karla said that she feared the situation would worsen and violence would develop and that she did not want Thomas exposed to this situation. Both she and Brazil testified that if Karla had stayed in Nebraska, Brazil would have followed her. Therefore, Karla decided that in order to permanently end their relationship, she and Thomas should move to Colorado.

Karla began working as a waitress at Ed's Cantina in Estes Park on September 16, 1997, and currently earns about $350 per week. This is approximately twice the amount she made waitressing in Wahoo at previous jobs. However, she no longer receives the $500 a month rental income from the house she owned in Weston. She and Thomas rent a two-bedroom house for $600 per month in Estes Park. Karla stated that living in Estes Park is better than living in Nebraska because the area is more beautiful, there are more job opportunities, and there are more activities for children. In addition, she considers the schools to be better, and Thomas has been performing very well in school in Colorado. Karla has a sister who lives in Allenspark, Colorado, which is about 20 miles from Estes Park.

Dennis stated that since Karla's move to Colorado, visitations with Thomas have deteriorated due to the long drive involved in order to see Thomas. He has been able to see him approximately

once a month, and the travel impacts on the time and quality of their visits. Dennis and Karla have been meeting halfway between Wahoo and Estes Park near North Platte, Nebraska. Each parent drives approximately 4 hours each way, and the trips cost Dennis about $60 round trip for gas and food. Dennis is worried about the driving time, road conditions, and traffic on the interstate and the impact of these things on Thomas.

Dennis testified that he has concerns regarding Karla's parenting of Thomas, although they are not related to her actual care giving to Thomas. Karla has moved several times and has held various jobs since the parties divorced. Dennis asserts that this is evidence of Karla's instability and impulsive decision-making. Aside from an attempted reconciliation with Dennis, Karla has had only the one relationship with Brazil since the parties' divorce. Dennis admitted that his application for modification had nothing to do with Karla's relationship with Brazil. Dennis is concerned about Thomas' safety in Estes Park because she lives on one of the main roads in Estes Park and there are many visitors to the area. In addition, Dennis thinks Estes Park is too far away from relatives in Nebraska.

The trial court granted Karla's request to move Thomas to Colorado and denied Dennis' request for sole custody of Thomas.

II. ASSIGNMENTS OF ERROR

Dennis assigns as error that the district court (1) allowed Karla to remain temporarily outside the jurisdiction with Thomas during the pendency of the case, (2) allowed Karla to move Thomas from Nebraska, and (3) failed to change sole custody of Thomas to Dennis.

III. STANDARD OF REVIEW

[1,2] In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal. *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989). A judicial abuse of discretion exists when the trial judge's reasons or rulings are clearly untenable such as to unfairly deprive a litigant of a substantial right and a just

result. *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996). See *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

IV. ANALYSIS

1. Temporary Custody

Dennis argues that the district court abused its discretion in allowing Thomas to reside with Karla in Colorado during the pendency of the custody litigation under a "temporary order." While there is a jurisdictional issue as to whether Dennis has timely appealed this issue, we need not decide this issue because of the result we reach. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

2. Granting Karla Permission to Move Thomas to Colorado

[3,4] An award of custody of a child to a parent should not be interpreted as a sentence of immobilization. *Vanderzee v. Vanderzee*, 221 Neb. 738, 380 N.W.2d 310 (1986). However, the custodial parent has the burden of proving to the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent, before a court will permit the removal of a child from the jurisdiction. See, *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Harder, supra.*

[5] In the context of determining the best interests of a child in a case where the custodial parent petitions to move out of the jurisdiction with the minor child, there are three broad considerations: (1) each parent's reasons or motives for seeking or opposing the move, (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent. See *Farnsworth, supra.*

(a) Each Parent's Motives

[6] In *Farnsworth*, the court wrote:

> As stated earlier, the legitimacy of the custodial parent's motive for moving is already a threshold question in our

> state. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). However, we recognize the wisdom in having both parents' motives play a further role in ascertaining a child's best interests. Thus, if a trial court finds the custodial parent's motives for moving are legitimate, the court should go on to consider the motives of each parent, in proposing and resisting the move, in its analysis of the child's best interests. While some legitimate motives might seem less compelling than others—for example, meeting the demands of a second marriage as compared to accommodating a specific health concern—none should be summarily rejected at this stage of the analysis without weighing the other considerations and how they all come to bear on the overall impact on the child.

257 Neb. at 250, 597 N.W.2d at 598.

[7] The Nebraska Supreme Court has found that job-related changes are legitimate reasons for moving a child out of the jurisdiction when there is a "reasonable expectation of improvement in the career or occupation of the custodial parent." *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987). See, also, *Farnsworth, supra*; *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979) (custodial parent's new job included small increase in salary and increased potential for salary advancement).

We first note that despite the established law of this state and an express provision of the decree and property settlement so reminding Karla, she left the state with Thomas without prior court approval. She was also, without the benefit of an evidentiary hearing, able to secure a district court order allowing her to stay in Colorado with Thomas during the pendency of the matter. Finally, it appears that the matter was pending an unusually long time between the filing of Karla's request for permission to remove and Dennis' opposition thereto, and the district court's decision. This delay spanned more than 13 months. Being allowed to stay in Colorado enabled Karla to accumulate evidence of Thomas' satisfactory adjustment to the move, which would not ordinarily have been available to her.

Except for an affirmative answer to one leading question from her counsel directly suggesting to Karla that her move was in

part motivated by improved job opportunities, the credible evidence establishes only one reason for the move. That reason was to get away from a boyfriend, because that relationship was not going well. There was no history of or threat of violence on Brazil's part, and the record shows that Karla was living with Brazil when she decided in a matter of 3 or 4 days to pack up and move to Colorado. At the time she moved to Colorado, Karla had no job, no car, and no housing. In short, the record establishes an impulsive act which had the effect of removing Thomas from this jurisdiction, placing him 547 miles from Dennis and all other members of his large extended family, except Karla's sister who lives 20 miles from Estes Park. There was no evidence that Brazil posed any physical threat to Thomas or Karla or that she had tried to solve the "Brazil problem" by a less drastic tactic, like simply moving out of his house. The evidence does show that Brazil was deeply involved with Karla, and Brazil said that he might have followed her had she moved elsewhere in Nebraska and that he even thought about following her to Colorado, but he acknowledged that "it's over." We must presume that the law would have protected Karla from Brazil if there was really a need or danger. Given these facts, we conclude that Karla had no legitimate reason for leaving Nebraska.

Dennis resisted the move on the basis of the reduction in the quality and frequency of his visits with Thomas, as well as the higher costs and dangers associated with the traveling involved in visitation after the move. He also feels that the environment in Estes Park is not as good for Thomas as his previous environment in Nebraska. Dennis' resistance to Thomas' removal is neither in bad faith nor for manipulative purposes. As stated earlier, Dennis desires to maintain frequent and regular contact with Thomas and is also concerned for Thomas' safety. We find Dennis' motive for resisting the move to be legitimate. The first factor from *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), clearly militates against the move.

(b) Quality of Life

[8] The second consideration is whether the move holds the potential for enhancing the quality of life for the child and custodial parent. In *Farnsworth, supra*, the Nebraska Supreme

Court stated that there are a number of factors that may be used to assess this second consideration. These include (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent because the best interests of the child are interwoven with the well-being of the custodial parent.

As for the quality of the relationship between Thomas and each parent, the record suggests that both Karla and Dennis have a close, nurturing relationship with Thomas. Both spend quality time with Thomas, and each involves him in appropriate activities when they are together. For example, Dennis takes Thomas hunting, fishing, camping, and to church and ensures that Thomas spends time with Dennis' large extended family. Karla takes Thomas to his sports activities, takes him on vacations, and regularly attends church with him.

Karla's income has increased from $100 per week from her part-time employment in Wahoo, which was apparently all she needed in order to meet her obligations, to $350 per week from waitressing at Ed's Cantina in Estes Park. It is difficult to conclude that this economic change enhances the quality of life for Thomas and Karla to the point that it justifies allowing her to move. The increased income appears to be of minor consequence since Karla now pays $600 per month in rent and formerly lived with Brazil, apparently at little or no cost, and rented out the home she owned in Weston for $500 per month. The evidence was that she did not have a job at the time of the move, she had not looked for a job in Colorado, and she had not looked for a better job in Nebraska before moving. This is consistent with her testimony that she moved to escape Brazil, with whom she could no longer get along. Moreover, when the employment

consequence of the move is waitressing at Ed's Cantina in Estes Park, without any evidence that similar work is unavailable in the Wahoo and eastern Nebraska area, Karla is displaying a disconcerting degree of impulsiveness, with little regard for the relationship of Thomas and Dennis. At best, on this record, Karla's job in Estes Park is an after-the-fact nominal justification. We cannot conclude that Thomas' life has been enhanced by Karla's waitressing job, particularly given the complete absence of any attempt by Karla to improve her economic circumstances within the Wahoo and eastern Nebraska area where she lived.

Furthermore, in considering enhancement of life, the record shows that Thomas has a half-brother in the eastern Nebraska area with whom he had lived for the first 10 years of his life. John has resided on a farm near Spalding with his father for the past 2 years. Although there were normal "brotherly difficulties" between the two boys, they bonded together in the same household and continued to visit after John went to live with his father. This relationship is obviously adversely impacted by Karla's move to Colorado. Additionally, Dennis has a large family in the Spalding and eastern Nebraska area, including five sisters, four brothers, and his parents, plus Karla's mother lives in Spalding. Karla acknowledged the obvious: Continued contact and relationships with extended family are important. While Karla has a sister living 20 miles away from her in Colorado, all of the rest of Thomas' family is in Wahoo and Spalding.

An attempt was made to justify the move on the ground of after-the-fact excellent performance by Thomas in school in Estes Park. But, from this record, Thomas appears to be a child who would adjust to, adapt to, and do well in most any place. In short, he was a good student in Wahoo at the parochial school and is a good student at the public school in Estes Park. While Karla also attempts to justify the move on the ground of the enhanced recreational opportunities for Thomas such as skiing, mountain climbing, and hiking in Colorado, a finding of enhancement by this court because of those things would put this court's "Chamber of Commerce" seal of approval on residing in the mountains. The reality is that a child relegated to growing up on the plains of Nebraska, rather than the mountains

of Colorado, is in a good or bad place because of the love, support, and nurturing of his family and friends, not because of differing geography. While the mountains of Colorado are admittedly quite beautiful and offer abundant recreational opportunities, the mountainous environment hardly justifies the damage to the father-son relationship that this move engenders. Estes Park and Wahoo are undoubtedly different places; however, we are unprepared to say that one is better than the other. The record provides no evidence that Thomas' life has been enhanced except in the most superficial of ways by the move to Colorado.

Of the nine components in this category from *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), Karla has failed to prove a change in any real way to enable us to conclude that Thomas' or Karla's life is enhanced to the point where the move can be justified.

(c) Impact on Noncustodial Parent's Visitation

[9,10] The third factor is the impact of the move on the contact between the child and the noncustodial parent, when viewed in light of reasonable visitation arrangements. In *Farnsworth*, the court said of this final factor:

> [T]his consideration focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship. *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). When looking at this consideration, courts typically view it in the light of the potential to establish and maintain a reasonable visitation schedule. See, e.g., *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984).
>
> Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id.* Of course, the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness. *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993). Indications of the custodial parent's willingness to comply with a modified visitation

schedule also have a place in this analysis. *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994).

257 Neb. at 251, 597 N.W.2d at 599.

Under the original decree, Dennis had substantial visitation which was readily exercised when Dennis, Karla, and Thomas were in the same community. That visitation included every other weekend, one weeknight a week, 2 weeks in the summer, and various holidays. Dennis testified that he has seen Thomas approximately one weekend a month since Karla moved to Colorado. The distance between Wahoo and Estes Park is 547 miles, and the parties meet halfway in the North Platte area. Thus, the exercise of visitation involves lots of "windshield time" for Thomas. In short, Karla's move to escape Brazil puts Thomas "on the road" for 1,100 miles for weekend visitation. Because of time, distance, and the cost of exercising visitation, Dennis no longer sees Thomas every other weekend or for the one weeknight that was previously provided for in the decree. The trial judge added two additional weeks in the summer to help account for some lost time during the rest of the year. Dennis testified that the quality of the visitation has decreased due to the traveling involved to see Thomas.

Karla testified that she did not intend for the move to have an impact on Dennis' relationship with Thomas and has been voluntarily meeting Dennis halfway between Estes Park and Wahoo in order for Dennis to see Thomas. It appears that Karla is willing to comply with any reasonable visitation schedule ordered by a court.

While we recognize that *Farnsworth* does not really weigh one factor over another, there is obviously some balancing which must go on in the mind of any judge who must decide these most difficult questions. That balancing inherently seems to require the weighing of the legitimacy of the move against the impact on the noncustodial parent. This case emphasizes that such a balancing process is valid and important. As recounted above, the record shows a move for superficial, impulsive, and self-centered reasons by Karla. Any nominal proof of enhancement of Thomas' life was generated after the fact. Given that there was no evidence that Thomas was doing poorly in his school or homelife in Wahoo, the fact that he has done well in

Estes Park is really not determinative. In short, he was a good boy in Wahoo, as he is in Estes Park. What is more meaningful, on this record, is that he had a significant, constant, loving, and life-enhancing relationship with Dennis when they resided in the same community. At a time when divorce is commonplace, with the resulting separations of parents and children, our legal system should encourage and support those fathers who shoulder their responsibilities and want to be a positive force in their children's lives. Dennis has not missed any child support, has consistently exercised visitation, and has a healthy and normal relationship with Thomas, and that should not be lightly cast aside in favor of an arrangement which requires him to undertake a 10-hour round trip to meet Karla in the North Platte area to get Thomas. There is then essentially a day of visitation followed by another 10-hour journey to return Thomas. Thus, Thomas is subjected to the hazards (and boredom) of continual long-distance travel while the quality of the time between Dennis and Thomas deteriorates. The current arrangement is highly detrimental to Dennis' visitation rights and his relationship with Thomas.

(d) Conclusion as to Three *Farnsworth* Factors

Karla's proposition to the district court was more or less: "I have no car, no job or housing in Colorado, my boyfriend has never hurt me or my child, but I want to get away from him. While my son does well in school and at home, has extensive family and a good and loving father in Wahoo, I still want to take him 547 miles away from his father. Can I do that?" We do not hesitate to say that the trial judge should have denied this request and that there was an abuse of discretion in failing to do so. The request was shallow and self-centered, but unfortunately, it was not revealed as such until an evidentiary hearing occurred 13 months after the fact—and then the trial court's predominant reasoning seemed to be that it was then too late to say no. However, Karla should not be rewarded for her violation of the law; nor should we let manufactured and superficial justification stand in the way of the correct result.

In conclusion, Karla's reason for moving had nothing to do with job opportunities or career, or even avoidance of a violent

relationship with Brazil. They had stopped getting along, and it was easiest to simply leave—irrespective of damage to Dennis and Thomas' relationship. It was an impulsive but convenient way to put some distance between Karla and Brazil because the relationship had soured. But, it was at the core a selfish act because it removed Thomas from Dennis, his extended family, his school, and his friends upon the thinnest justification imaginable. The record is bereft of evidence of life enhancement for Thomas or Karla by virtue of being in Colorado other than superficial things such as the presence of the mountains and hiking. The move has substantially interfered with Dennis' relationship with Thomas. Thomas is also harmed by being removed from an extensive and involved extended family, including a half-brother. While we acknowledge the concern of making things worse by dragging Thomas back to Nebraska, Karla's impulsive behavior, which violated Nebraska law at the outset, should not dictate the outcome. The district court abused its discretion in granting Karla permission to remove Thomas from Nebraska.

3. Denying Dennis' Application to Modify

[11,12] Dennis argues that the district court erred in not modifying the decree to grant him sole custody of Thomas. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996); *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996); *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986). The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred. *Sullivan, supra*; *Smith-Helstrom, supra*; *Kennedy, supra.*

Dennis does not allege that Karla is an unfit parent to Thomas. Therefore, we must assess whether Dennis has shown that there has been a material change of circumstances and that giving Dennis sole custody is in Thomas' best interests. The primary "material change" that Dennis advocates is Karla's move to Colorado. At trial, Dennis attempted to show that Estes Park

was not as safe as the Wahoo area, that the traveling associated with exercising visitation involves risks and fatigue, and that the reduction in visitation deprives Thomas of meaningful time with Dennis.

Dennis also argues that there was a lack of stability in Karla's household which warrants a change in custody. He attempted to show this by offering evidence of Karla's various jobs she has held over the years, her moves, her relationship with Brazil, and the move to Colorado. We agree with Dennis that the unjustified and impulsive move to Colorado constituted a material change. We now address Thomas' best interests.

[13] In determining a child's best interests for purposes of custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Reissue 1998) provides that the factors to be considered shall include, but not be limited to, the following:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child; and
>
> (d) Credible evidence of abuse inflicted on any family or household member. . . .

[14] Additionally, a court may consider other factors in determining a child's best interests in custody matters, including the moral fitness of the child's parents and the parents' sexual conduct, the attitude and stability of each parent's character, and the parental capacity to provide physical care and satisfy the educational needs of the child. See, *Smith-Helstrom, supra*; *Hoins v. Hoins*, 7 Neb. App. 564, 584 N.W.2d 480 (1998).

Thomas' relationship with both Dennis and Karla is and has been good. There has been no allegation of abuse, nor has Thomas expressed a preference to live with one parent rather than the other. Karla has had one relationship, with Brazil, since the parties' divorce. Karla testified that she and Brazil lived

together on two different occasions; however, Karla and Brazil are no longer together. Dennis does not claim that Karla is unable to care for Thomas, and it was shown at trial that Karla is able to satisfy Thomas' educational and other needs. Thomas is a healthy, happy boy, who has lived with Karla since the parties' divorce over 7 years ago.

While we have determined that Thomas should return to Nebraska, Dennis has not made the requisite showing that Karla's retention of custody of Thomas is not in Thomas' best interests. The evidence shows that Thomas is a healthy, smart, happy, normal, outgoing boy, and we must give some credit for that to Karla's care, which is not to say that he would not do equally well with Dennis. A change in custody is not in Thomas' best interests, unless Karla determines that she will not return to Nebraska. Therefore, assuming that she returns to Nebraska, Karla should maintain the physical custody of Thomas. We find that the district court did not abuse its discretion in denying Dennis' request for modification to place custody with him.

V. CONCLUSION

While we find that Karla can retain physical custody of Thomas, we find that it is not in Thomas' best interests to remain in Colorado. Karla testified that she would return to Nebraska in order to retain custody of Thomas. Therefore, in accord with our conclusion that the district court abused its discretion in allowing Karla to remove Thomas to Colorado, but that it is in his best interests to remain in Karla's custody, we find that physical custody shall remain with Karla, unless she refuses to move Thomas back to Nebraska no later than June 15, 2000. We select that date as it is after the completion of the present school year and we wish to avoid any further disruption in Thomas' life. Should Karla fail to return to Nebraska by that date, a matter which the district court should oversee as necessary in accordance with our opinion, then the district court shall order physical custody of Thomas to be placed with Dennis, who the record reveals is also a fit and proper person to have physical custody of Thomas.

AFFIRMED AS MODIFIED.

HANNON, Judge, dissenting.

I must respectfully dissent. If I were the trial judge, I would not have allowed Karla to move to Colorado with Thomas. However, the applicable standard of review is as follows:

> Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999). A judicial abuse of discretion requires that the *reasons or rulings of a trial judge be clearly untenable* insofar as they unfairly deprive a litigant of a substantial right and just result. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

(Emphasis supplied.) *Farnsworth v. Farnsworth*, 257 Neb. 242, 248, 597 N.W.2d 592, 597 (1999).

Untenable is defined as "incapable of being defended, as an argument, thesis, etc.; indefensible." Webster's Encyclopedic Unabridged Dictionary of the English Language 1567 (1989). I do not think one can say the trial judge's reasons are "untenable," let alone "clearly untenable." I do not think we can say the trial judge abused his discretion in this case. Therefore, I would reluctantly affirm.

NEBRASKA BEEF, LTD., APPELLANT, V. UNIVERSAL SURETY COMPANY, APPELLEE.

607 N.W.2d 227

Filed March 14, 2000. No. A-98-1373.

1. **Judgments: Demurrer: Appeal and Error.** On appeal, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
2. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
3. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.

4. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
5. **Demurrer: Pleadings.** If a petition, liberally construed, states a cause of action, a demurrer based on the failure to state a cause of action will be overruled.
6. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
7. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
8. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
9. ___: ___. In determining whether a cause of action has been stated, a 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 must be overruled.
10. **Demurrer: Pleadings: Principal and Surety: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. This includes an attached surety bond.
11. **Contracts: Principal and Surety.** A surety cannot be held beyond the precise terms of its contract.
12. **Contracts: Parties: Intent.** In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them.
13. **Contracts: Torts: Negligence.** Generally, one may sue in tort where there has been negligence in performance of a contract.
14. **Negligence: Damages.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
15. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
16. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, the court must allow the plaintiff to amend the petition unless there is no reasonable possibility that an amendment will correct the defect.
17. **Pleadings: Subrogation.** Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises.
18. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.

19. ___: ___. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
20. **Subrogation.** Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property.
21. **Equity: Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed and remanded with direction.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek and Cavanagh, P.C., for appellant.

David A. Hecker, of Woods & Aitken, for appellee.

IRWIN, Chief Judge, and CARLSON, Judge, and HOWARD, District Judge, Retired.

CARLSON, Judge.

INTRODUCTION

Nebraska Beef, Ltd., appeals from the trial court's sustaining of a demurrer upon its breach of contract and negligence claims against Universal Surety Company, and the subsequent dismissal of its petition. For the reasons set forth below, we affirm in part, and in part reverse and remand with direction.

BACKGROUND

According to the petition filed by Nebraska Beef, on or about April 28, 1995, Nebraska Beef entered into an oral agreement with a general contractor, J.B. Contracting Services, Inc. (JBC), pursuant to which JBC would provide construction management and general contractor services relating to the construction of an addition to the Omaha meatpacking facilities of Nebraska Beef. Also on or about April 28, JBC entered into a subcontract with ABC Electric, Inc. (ABC), for certain electrical work associated with the Nebraska Beef project. At ABC's request, on or about May 16, Universal Surety executed and delivered a performance bond naming ABC as principal and JBC as the sole obligee, in the amount of $880,000. The bond further provided that "[n]o

right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein or the heirs, executors, administrators or successors of the Obligee." On May 22, a dual obligee rider was executed, naming Norwest of Nebraska N.A. as an additional obligee. That rider provided, inter alia, that "ABC Electric, Inc., as Contractor entered into a written agreement with J B Contracting Services, Inc. as Owner . . . ."

Nebraska Beef alleged that ABC defaulted on its contractual obligations. Nebraska Beef asserted two causes of action against JBC, alleging breach of contract and negligence. With regard to the breach of contract claim, Nebraska Beef alleged that Universal Surety intended its "duties and obligations under the Performance Bond . . . to be performed for the benefit of" Nebraska Beef. It further alleged that JBC performed all its contractual obligations, but that ABC had failed to perform certain labor and failed to furnish certain materials required for the installation and completion of the required electrical work. The petition further alleged that ABC and Universal Surety, after notice, failed to remedy the defaults of ABC, that "arrangements were made for the performance of ABC's obligations under the Subcontract," and that Nebraska Beef was entitled to recover $880,000.

With regard to the negligence claim, Nebraska Beef, having incorporated the previous allegations, further alleged that Universal Surety negligently arranged for performance of ABC's contractual obligations, resulting in unspecified damages to Nebraska Beef. The petition also alleged that ABC and Universal Surety were informed of the deficiencies of ABC's performance.

Universal Surety demurred to both causes of action on January 28, 1998, asserting that each count failed to state a valid cause of action. On May 27, the district court sustained the demurrer by Universal Surety. With regard to the breach of contract claim, the court found that Nebraska Beef was neither a party to the bond nor a third-party beneficiary of the bond and, accordingly, not a proper party to bring a cause of action based upon breach of that bond. With regard to the negligence cause of action, the court found that this was an action based upon

contract and that the "statements regarding the negligence cause of action must be considered surplusage." The district court further found that no possibility existed for an amendment that would correct the defects in the petition and, accordingly, denied leave to amend.

Nebraska Beef moved for a new trial. That motion was heard on August 14, 1998, and the motion was denied on November 24. The instant notice of appeal was filed on December 23.

ASSIGNMENTS OF ERROR

Nebraska Beef asserts that the district court erred in sustaining the demurrer by Universal Surety and in subsequently dismissing its petition. Nebraska Beef also asserts that the district court erred in overruling its motion for new trial.

STANDARD OF REVIEW

[1] On appeal, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

[2,3] When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), *overruled on other grounds, Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

[4,5] Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998). If a petition, liberally construed, states a cause of action, a demurrer based on the failure to state a cause of action will be overruled. *Id.*

[6] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an

abuse of that discretion. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998).

ANALYSIS

Demurrers.

[7] When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Giese, supra*; *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997).

[8] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Giese, supra*; *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996).

[9,10] In determining whether a cause of action has been stated, a 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 must be overruled. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997); *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996). A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996). This includes an attached surety bond. See *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977).

Contractual Cause of Action.

[11] The surety bond at issue here listed ABC as principal, Universal Surety as surety, and JBC as obligee. It expressly excluded all other parties, stating that "[n]o right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein or the heirs, executors,

administrators or successors of the Obligee." The law, in Nebraska and elsewhere, has long been as follows:

> "A surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract."

Farmers Union Co-op Assn. v. Mid-States Constr. Co., 212 Neb. 147, 153, 322 N.W.2d 373, 377 (1982) (quoting *Rawleigh Co. v. Smith*, 142 Neb. 529, 9 N.W.2d 286 (1943)). See *Young v. General Insurance Co. of America*, 33 Ill. App. 3d 119, 121, 337 N.E.2d 739, 741 (1975) ("[i]n order for a third person to recover on a performance bond which on its face is for the use of other parties, the primary object and purpose of the bond must be for the benefit of the third party and it must have been made for the direct benefit of the third party"). See, generally, Restatement of Security § 165, comment *c.* at 459 (1941) ("[t]he surety is not liable to laborers and materialmen, even if he guarantees to . . . a private owner that the contractor will pay for labor and materials, if the surety in terms provides in his contract that his liability is only to the creditor with whom he contracts. *The surety in general is bound only on the contract he makes, and if he excludes any purpose to benefit those outside the contract, there will be no third party beneficiaries*, assuming that the surety's provision is valid" (emphasis supplied)).

Nebraska Beef nonetheless asserts that it is entitled to bring a breach of contract claim because it has sufficiently alleged that it was an intended third-party beneficiary of the performance bond. We disagree.

[12] In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was made for them. *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996); *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686

(1992). Nebraska Beef first argues that several references to the phrase "owner" within the subcontract between ABC and JBC constitute a "reasonable intendment" that the bond was intended for the benefit of Nebraska Beef, in its role as "owner" of the project. However, none of the clauses within the subcontract relate to Universal Surety's obligations under the bond. Moreover, the dual obligation rider expressly refers to JBC as owner of the performance bond. This argument is accordingly without merit.

Nebraska Beef next argues that its allegation that JBC and Nebraska Beef took actions together to enforce the terms of the performance bond demonstrates that Universal Surety intended to perform its duties and obligations under the performance bond for the benefit of Nebraska Beef. We disagree. The mere allegation of cooperative action by these parties hardly rises to the level of "express stipulation," and, without more, does not support a finding that the parties intended Nebraska Beef to be a third-party beneficiary. Similarly, we find nothing in these pleadings supporting Nebraska Beef's arguments that it could be deemed a third-party beneficiary on the grounds of novation or assignment.

In sum, Nebraska Beef has failed to allege facts sufficient to support an inference that it was meant to be a third-party beneficiary of the surety bond. Accordingly, the district court properly sustained Universal Surety's demurrer to Nebraska Beef's cause of action premised upon a breach of contract theory.

Negligence Cause of Action.

[13-15] Nebraska Beef next argues that the district court erred in sustaining Universal Surety's demurrer to its negligence cause of action. Generally, one may sue in tort where there has been negligence in performance of a contract. *Thomas v. Countryside of Hastings*, 246 Neb. 907, 524 N.W.2d 311 (1994). However, for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). The question of whether a legal duty exists for actionable negli-

gence is a question of law dependent on the facts in a particular situation. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

The duty of Universal Surety toward Nebraska Beef, if any, is defined by the contractual relationship between the two entities.

> Although an aggrieved party may choose a tort action rather than a contract action to remedy alleged negligence in the performance of a contract, nevertheless, the contract may control the scope of a duty undertaken by the defendant. . . . While Nebraska law allows a party to base a claim for nonperformance of a contractual duty on either a contract or tort theory, in both cases the contract may determine the duty which has been breached with resultant liability.

Getzschman v. Miller Chemical Co., 232 Neb. 885, 899, 443 N.W.2d 260, 270 (1989). In this case, as explained above, there was no contractual relationship between Universal Surety and Nebraska Beef. Accordingly, there can be no cause of action for negligence in the performance of that contract. The district court properly sustained Universal Surety's demurrer to this cause of action.

In sum, because Nebraska Beef is not a direct beneficiary under the surety and cannot claim to be a third-party beneficiary for purposes of its breach of contract claim, it has failed to state a cause of action for breach of contract. Because Nebraska Beef's purported negligence cause of action rests upon a duty discerned from its breach of contract claim, it necessarily cannot bring a cause of action premised upon negligence.

Right to Amend.

[16] However, our holding that the demurrer was properly sustained does not necessarily end our inquiry. When a demurrer to a petition is sustained, the court must allow the plaintiff to amend the petition unless there is no reasonable possibility that an amendment will correct the defect. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). Neb. Rev. Stat. § 25-854 (Reissue 1995) provides that if a demurrer is sustained, "the adverse party may amend, if the defect can be remedied by way of amendment." This statute,

however, does not provide an absolute right of amendment, nor is it without limitation. *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 724, 508 N.W.2d 907, 914 (1993) (amendment not permitted where record "does not support a reasonable possibility that the plaintiff could allege additional facts so that the petition would state a cause of action").

Nebraska Beef asserts that it could, if permitted, plead facts in an amended petition that would state one or more valid causes of action. Specifically, Nebraska Beef suggests that it should be permitted to amend to allege a cause of action based on the doctrine of subrogation, citing *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). We agree. In *Cagle, Inc.*, a general contractor had sued a subcontractor and its surety on a breach of contract theory. The surety demurred, and the trial court sustained the demurrer, on the ground that the general contractor " 'does not qualify as a "claimant" under the bond as set forth in the petition . . . .' " *Id.* at 598, 254 N.W.2d at 401. The Supreme Court held that the trial court properly sustained the demurrer, reiterating "[t]he general rule . . . that the 'surety is bound in the manner and to the extent provided in the obligation.' " *Id.* at 600, 254 N.W.2d at 402. The Supreme Court then concluded that the general contractor had accordingly failed to state a cause of action.

However, the Supreme Court held that it was error to deny the general contractor an opportunity to amend its petition to state a cause of action under the doctrine of subrogation. The Supreme Court first noted that the appellant had alleged in its petition that the surety had refused to reimburse it for costs it had or was obligated to pay. The court observed that while "this allegation is not specific, it *could very well* include payment to persons who provided Sammons materials or labor before Sammons withdrew from the job." (Emphasis supplied.) 198 Neb. at 601-02, 254 N.W.2d at 403. The court went on to hold:

> [I]t may well be possible for Cagle to state a cause of action on the bond under the doctrine of subrogation if it limits its claim to the value of payments it made to persons who supplied labor or materials to Sammons under a direct contract before Sammons withdrew from the job. Although Cagle's petition . . . did not state such a cause of action . . .

> it should be given an opportunity to amend its petition and plead subrogation and the facts out of which the alleged right of subrogation arises. We note that [the surety] complains that Cagle tendered no proposed amendment in connection with its request to amend; however, in light of the trial court's finding that no amendment could state a cause of action, we agree with Cagle that the tendering of an amendment would have been a futile and useless gesture.

Id. at 603-04, 254 N.W.2d at 404.

[17-19] We believe that *Cagle, Inc.* compels a similar result in this case. Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises. *Cagle, Inc., supra.* Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. *Id.*

[20,21] Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property. *Horton v. Ford Life Ins. Co.*, 246 Neb. 171, 518 N.W.2d 88 (1994); *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982); *Cagle, Inc., supra.* The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Rawson, supra.* It does not rest on contract, and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable. *Id.* It should be noted that as in *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977), Nebraska Beef has alleged that other subcontractors were retained to perform ABC's obligations, resulting in payment being made to those other subcontractors.

To state its right of subrogation, Nebraska Beef must plead facts sufficient to show the following material elements: (1) It was compelled to hire subcontractors to replace ABC, out of a legal or moral obligation to do so or to protect its own rights or interests; (2) the cost of those subcontractors should have been paid by Universal Surety pursuant to the performance bond issued by Universal Surety to ABC; (3) Universal Surety failed to pay that cost; and (4) Nebraska Beef paid the debt otherwise owed by Universal Surety to those subcontractors. Compare *Horton, supra.*

Nebraska Beef further asserts that it could, in an amended petition, allege facts sufficient to establish those elements and that it is entitled to an opportunity to do so. We believe that under the standard in *Cagle, Inc.*, it is entitled to try. "It 'generally constitutes an abuse of discretion to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.'" *Cagle, Inc.*, 198 Neb. at 604, 254 N.W.2d at 404. We accordingly conclude that the trial court abused its discretion in denying Nebraska Beef an opportunity to amend its petition, and we remand this matter to the trial court with direction to give Nebraska Beef leave to file an amended petition alleging a cause of action based upon the doctrine of subrogation. It may also be the case that Nebraska Beef can plead additional facts, absent from the initial petition, that would allow it to bring a breach of contract action based on the theory that it was an intended third-party beneficiary.

Our holding that Nebraska Beef is entitled to file an amended petition obviously makes it unnecessary to address Nebraska Beef's final assignment of error regarding its right to a new trial.

CONCLUSION

For the reasons set forth above, the decision by the district court is affirmed in part and in part reversed, and remanded with direction.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. HEATHER TORWIRT, APPELLANT.

607 N.W.2d 541

Filed March 14, 2000. No. A-99-507.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Convictions: Proof.** To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt.
3. **Criminal Law: Words and Phrases.** The corpus delicti is the body or substance of a crime, the fact that a crime has been committed without regard to the identity of the person committing it.
4. **Confessions: Evidence: Proof.** Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti and guilty participation of the defendant.
5. **Confessions: Proof.** Where a crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur and that some person was criminally culpable. In such a case, there need be no link, outside the confession, between the injury and the accused who admits having inflicted it.
6. **Convictions: Sexual Assault: Confessions: Evidence.** When the only evidence of a sexual assault is the defendant's own statements, the evidence is insufficient to sustain a conviction for sexual assault.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with direction to dismiss.

James R. Mowbray and Kelly S. Breen, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS and INBODY, Judges, and HOWARD, District Judge, Retired.

HOWARD, District Judge, Retired.

INTRODUCTION

After a trial on stipulated facts, Heather Torwirt was found guilty on January 28, 1999, of first degree sexual assault on a

child under Neb. Rev. Stat. § 28-319 (Reissue 1995). On April 6, 1999, she was sentenced to probation for a period of 3 years and was ordered to serve a period of 90 days, minus time served, in the Lancaster County Corrections facility. Furthermore, pursuant to Nebraska's Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 1998), Torwirt was ordered to register within 5 days of her release with the sheriff of the county in which she resides. Torwirt appeals.

BACKGROUND

Torwirt and the State submitted her case to the court based upon the following stipulated facts: The mother of P.N., date of birth October 14, 1993, and Torwirt were friends and would often babysit one another's children. There were occasions when P.N. would spend the night at Torwirt's residence.

On March 16, 1997, Det. Sgt. Gregory Sorensen of the Lincoln Police Department was investigating an alleged sexual assault of another child, M.P., who is not the victim in this case. During the late afternoon or early evening, Detective Sorensen contacted Me.P. regarding a telephone conversation that Me.P. had had with Torwirt relating to the alleged sexual assault. Me.P. was concerned that her child could have been a victim of a sexual assault and agreed to assist Detective Sorensen. Me.P. agreed to call Torwirt, who was at that time at a motel in Illinois.

On March 16, 1997, Me.P. called Torwirt at the motel where she was staying, and the conversation was taped by Detective Sorensen through a device installed by him. Detective Sorensen was not present during the telephone call. During that conversation, the following exchange took place between Me.P. and Torwirt:

> Q: Huh, so it was just, uhm, [P.N. and another child he sexually assaulted]?
>
> A: And then [with yet another child] he, when she was sleeping, uhm, he just pulled her panties aside a little bit and touched her clitoris and that was, and then that was is [sic]. But see, those, those he told me about and I saw him do it with [P.N.], I was in the room. And I think he thought it was going to turn me on and it made [sic] really uncomfortable and I did say we have to stop this, we can't do this.

Q: Who did you touch?

A: I touched [P.N.] cause he asked, he says will you touch is [sic] and I started to but I couldn't finish through, finish it. I didn't, it was like I didn't even find, you know, I touched the outside of her.

Q: Uh huh (Yes).

A: And I, and it was, it was just like well, it didn't even do anything for me and so I just said, we can't do this. And so we stopped and I picked her up and I put her on her bed and she was still asleep.

Detective Sorensen returned later that evening to retrieve the tape of the conversation from Me.P. He listened to the tape of the conversation and then took the tape to the Lincoln police station and logged it into property.

Detective Sorensen then made a telephone call to Torwirt, whom he considered to be a suspect in the sexual assault investigation. During the telephone call, Detective Sorensen discussed the sexual assault investigation with Torwirt. This conversation was also taped by Detective Sorensen. He identified himself as a police officer at the beginning of their conversation. A partial transcript of that conversation was entered into evidence. Torwirt stated that she sometimes babysat 3-year-old P.N. She then began to describe an incident which occurred between April and October 1996 or possibly between July and October 1996 involving herself, her husband, and P.N. when P.N. was spending the night.

A: And uhm, I walked into the bedroom one night after she was asleep and he was touching her vagina again and he asked me to touch her vagina and I did reach over to touch her and I touch the surface of her vagina.

Q: Uh huh (Yes).

A: And I said we can't do this and he stopped and I, uhm, I then picked her up and put her down onto the little bed I had made on the floor.

Q: Okay, was she sleeping at the time too?

A: Yes.

Later in the conversation, the following exchange took place:

Q: Okay. So, was she, was the little girl spending the night with you that night?

A: Yeah, yeah. I babysit her uhm, frequently I'll watch her overnight uhm, for even on the weekends or something and then she watches my son. We uhm, trade babysitting cause I have a four year old son.

Q: Okay. So she was watching[.]

A: I was babysitting.

Q: Okay and that was at his address or at the address you were living at then on Prescott sometime...

A: Yes.

Q: Between July and October.

A: Right.

Q: And if I understand this right he had gone into the bedroom.

A: Uh huh (Yes).

Q: Where she was sleeping and he was touching her vagina when you walked in and saw this.

A: Right.

Q: And then he wanted you to touch it also so, you did and then you said no, we can't do this and stopped it.

A: Right.

Q: Okay, did he ever do anything else with her?

A: No.

During their conversation, Detective Sorensen also became aware that Torwirt was attending an outpatient treatment center in Illinois.

Officer Kerry Crosby, also with the Lincoln Police Department, was involved in the investigation of the same sexual assault on a child case. Shortly after Detective Sorensen's conversation with Torwirt on March 16, 1997, Officer Crosby called and spoke with one of Torwirt's counselors in Illinois. The counselor advised him that an interview would not interfere with Torwirt's treatment. Officer Crosby then contacted Torwirt. Torwirt agreed to speak with him if he traveled to Illinois to interview her.

Officer Crosby traveled to Illinois to interview Torwirt. He arrived at the motel where Torwirt was staying on March 19, 1997, and he interviewed her that evening. Torwirt agreed to go to Officer Crosby's room at the same motel in which she was staying for the interview; the two had an unrecorded conversa-

tion for approximately 10 to 15 minutes, followed by a 2-hour tape-recorded interview.

A: He asked me to touch her.

Q: And you did?

A: Yes.

Q: Describe how you touched her?

A: I put my mouth down to her and uhm, I put my tongue out and I did touch her but I didn't, I couldn't do anymore. I mean I didn't, I don't know what I touched but I did put my tongue out but I didn't, I don't know what I touched. I know it was there in the genital area but I didn't and I couldn't do it and I stopped and I said we can't do this.

Q: He's licking her in the genitals. What are you doing?

A: I'm sitting there.

Q: You're watching it?

A: Yes.

Q: When he got done licking her genitals, he told you to?

A: He didn't tell me.

Q: Well what did he do?

A: He said do, do you want to or try or something like that. I don't know.

Q: But you're not sure what he said?

A: No.

Q: So let me understand this you was . . . was [P.N.] on her back?

A: Yes.

Q: Now did you crawl up between [P.N.]'s leg or did you bend over her?

A: I bent over her. He was bent over her too because, you know, she's little.

Q: Did he touch her with his hands too?

A: No.

Q: Did you touch her with your hands?

A: No.

Q: So somewhere in between her legs your tongue touched her skin?

A: Yes.
Q: For how long?
A: Two or three seconds may be.
Q: And you decide what?
A: I didn't like it.
Q: Why did you feel compelled to do this?
A: I don't know.
Q: What happened after that?
A: I said we have to stop she might wake up and this isn't right. And he said, yeah you're right. And uhm, so I picked her up and uhm, I had a little uhm, bed that I had made on the floor because I didn't want her to be afraid if she woke up during the night so I put her on the bed on the floor and covered her up.

Later the same evening, Torwirt returned to Crosby's motel room to make a recorded telephone call to her husband. Although a transcript of that conversation was entered into evidence, the parties stipulated that statements therein made by Torwirt's husband were inadmissible hearsay and could not be considered to prove the truth of the matters asserted. While that conversation contains what might be an admission of remorse by Torwirt's involving P.N., it nonetheless suffers from the same deficiency as the confession. Thus, the transcript does not carry the State's burden of proof either. Other than the above excerpts from the recorded conversations on March 16 and 19, 1997, and the stipulation, the State offered no other evidence.

Within the stipulation, Torwirt reserved her objections to the admissibility of her statements and renewed her motion to suppress those statements. The parties further stipulated that Torwirt did not waive the constitutional grounds for her objections by entering into the stipulation.

Torwirt waived her right to be present in the courtroom when the verdict was rendered. The matter was taken under advisement. On January 28, 1999, the district court filed a written order finding Torwirt guilty of first degree sexual assault on a child. Following a presentence investigation, Torwirt was sentenced on April 6 to 3 years' probation, which included 90 days in the Lancaster County Corrections facility.

ASSIGNMENTS OF ERROR

Torwirt alleges that the district court erred in failing to suppress statements made and erred in finding her guilty without any evidence to corroborate her statements.

STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

DISCUSSION

[2] To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949).

[3] The corpus delicti is the body or substance of a crime, the fact that a crime has been committed without regard to the identity of the person committing it. *Reyes, supra.*

The corpus delicti may be proved by circumstantial evidence. *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

[4] Extrajudicial admissions or a voluntary confession is insufficient to prove that a crime has been committed, but either or both are competent evidence of the fact and may, with corroborative evidence of facts and circumstances, establish the corpus delicti and guilty participation of the defendant. *Hoffman v. State*, 160 Neb. 375, 70 N.W.2d 314 (1955). See *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978). In *Scott*, the court stated that the corroboration need only be slight.

The State concedes that a confession alone is insufficient to sustain a conviction without corroborating circumstances. However, the State argues that first degree sexual assault quali-

fies as a physical injury crime, and that the prosecution need only prove that the injury occurred and that someone was criminally responsible for it in order to establish corpus delicti. According to the State, it proved that the actual assault occurred because the police investigated sexual assaults relating to another child, M.P.

[5] It is true that where a crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur and that some person was criminally culpable. *Scott, supra.* In such a case, there need be no link, outside the confession, between the injury and the accused who admits having inflicted it. *Id.*

[6] However, in this case, the only evidence showing that a sexual assault occurred are the statements made by Torwirt. The fact that the police had investigated a possible sexual assault relating to another child is wholly irrelevant to establishing that P.N. was sexually assaulted. When the only evidence of a sexual assault is the defendant's own statements, the evidence is insufficient to sustain a conviction for sexual assault. Nothing outside of the statements made by Torwirt suggests that a sexual assault occurred. As a result, the evidence presented was insufficient to sustain Torwirt's conviction for first degree sexual assault on a child.

As this court has determined that the State has failed to present sufficient evidence to sustain Torwirt's conviction even assuming the statements made by Torwirt were properly admitted, it is unnecessary for us to address whether the court's decision to permit those statements into evidence was proper. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

Because the only evidence that a crime was committed was the statements made by Torwirt, we conclude, as a matter of law, that the evidence is insufficient to sustain her conviction for first degree sexual assault on a child. The judgment of conviction

the sentence are therefore reversed, and the cause is remanded with direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V.
ALANDUS O. WARREN, APPELLANT.
608 N.W.2d 617

Filed March 21, 2000. No. A-99-440.

1. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.
2. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and evidence.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
4. **Jury Instructions.** A jury instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
5. **Trial: Evidence: Proof.** The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense.
6. ___: ___: ___. When a defendant has produced sufficient evidence to raise an affirmative defense, the issue is then one which the State must disprove.
7. **Self-Defense: Jury Instructions: Evidence.** A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense.
8. **Self-Defense: Juries.** A defendant's claim of self-defense is a question of fact for the jury.
9. **Jury Instructions.** As long as there is a Nebraska pattern jury instruction that accurately states the law and applies to the case, it is the instruction which should be given.
10. **Criminal Law: Jury Instructions.** Disproof of an affirmative defense must be listed as the final element in an elements instruction of a criminal case when an affirmative defense instruction is an issue.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Michael Anderson for appellant.

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

IRWIN, Chief Judge, and CARLSON, Judge, and HOWARD, District Judge, Retired.

IRWIN, Chief Judge.

I. INTRODUCTION

Alandus O. Warren appeals from his conviction for second degree murder and use of a weapon in the commission of a felony. On appeal, Warren challenges the instructions given to the jury, specifically alleging that the court improperly instructed on the defense of justification. Finding reversible error in the court's instructions, we reverse, and remand for a new trial.

II. BACKGROUND

On November 19, 1997, Warren was charged by information with second degree murder and use of a weapon in the commission of a felony. The information alleged that Warren, intentionally, with malice, but without premeditation, shot and killed Randall Blake on or about October 17, 1997. Warren pled not guilty to the charges.

At trial, Warren testified on his own behalf. Warren testified that on October 17, 1997, he got up around 8 or 9 o'clock in the morning. He met with a friend, James Bush, and the two of them smoked some marijuana. Warren and Bush then got a ride from Brandon Metcalf to try to find some more marijuana. The three proceeded to a house near 39th and Bedford Streets. When they found no one at home, they traveled down 39th Street to Bedford Street. As they crossed the intersection of 40th and Bedford Streets, they saw Blake and two other individuals. According to Warren's testimony, Blake "start[ed] throwing up gang signs and reach[ed] and pull[ed] out a gun." Warren testified that Blake was less than 15 feet from the car when he pulled a gun. Warren testified as follows: "I just closed my eyes and started shooting because I was scared, man." "Shit, to me, I didn't have no choice. I was scared. It was either me or him the way it looked to me. And I didn't know what to do. And I just closed my eyes and started shooting . . . ."

At the conclusion of the trial, the court instructed the jury, including an instruction on the elements of second degree murder and an instruction defining self-defense. The jury found Warren guilty on both charges, and Warren was sentenced to 20 to 25 years' imprisonment on the second degree murder conviction and 5 to 10 years' imprisonment on the conviction for use of a deadly weapon to commit a felony. This timely appeal followed.

III. ASSIGNMENT OF ERROR

On appeal, Warren has assigned one error. Warren alleges that the court erred in improperly instructing the jury on the defense of justification, or self-defense.

IV. ANALYSIS

1. Instructions Given

Relevant to our discussion are jury instructions Nos. 8 and 10 given by the trial court in this case. In pertinent part, instruction No. 8 given by the trial court provides as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant Alandus O. Warren of the crime of second-degree murder, as charged in Count I of the information, are as follows:
>
> 1. That the defendant, on or about October 17, 1997, did kill Randall Blake;
>
> 2. That he did so in Douglas County, Nebraska; and
>
> 3. That the defendant did so intentionally but without premeditation.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree in order to convict the defendant of the crime of murder in the second degree.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements in this Section I is true, then it is your duty to find the defendant guilty of the crime of murder in the second degree done intentionally but without premeditation and you shall so indicate by your verdict.

If, on the other hand, you find that the State has failed to prove any one or more of the material elements in section I, then it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter as set out in Section II below.

Instruction No. 10 given by the trial court provides as follows:

The defendant acted in self-defense if:

(1) Randall Blake threatened death or serious bodily harm; and

(2) The defendant Alandus O. Warren did not provoke any such threat against him with the intent of using deadly force in response; and

(3) Under the circumstances as they existed at the time, the defendant Alandus O. Warren reasonably believed that his use of deadly force was immediately necessary to protect him against death or serious bodily injury; and

(4) Before using deadly force the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety.

The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably in response to that belief.

Warren asserts on appeal that instruction No. 8 should have also included, as an element of the crime of second degree murder, that the State had the additional burden of disproving that the shooting was justified and done in self-defense as described in instruction No. 10.

2. Pertinent Law

(a) Jury Instructions

[1,2] Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). However, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and

evidence. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

[3,4] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *State v. Malcom*, 7 Neb. App. 286, 583 N.W.2d 45 (1998). A jury instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

(b) Self-Defense

[5,6] The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. *State v. Urbano, supra.* When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove. *Id.*

[7] A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. *Id.*; *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). To successfully assert a claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *State v. Urbano, supra*; *State v. Kinser, supra.*

[8] A defendant's claim of self-defense is a question of fact for the jury. *State v. Kinser, supra.* A jury, and not the trial court, must resolve the many factual questions concerning whether the defendant acted in self-defense within the meaning of the law. See *id.*

3. Application and Resolution

In the present case, it is apparent that the trial court concluded that Warren met his initial burden of going forward with evidence sufficient to raise the issue of self-defense. We say this because the court gave a self-defense instruction contained in instruction No. 10, set out above. We agree that a proper self-

defense instruction was warranted. As noted above, Warren testified that Blake flashed gang signs and pulled a gun while less than 15 feet from the car in which Warren was riding. Warren testified that he was afraid and that he felt like "it was either me or him." Additionally, because Warren sustained his initial burden of going forward with evidence, the issue of self-defense became one which the State was required to disprove. See *State v. Urbano, supra.*

Although the trial court correctly concluded that a self-defense instruction was warranted, based on Nebraska case law, the instructions actually given by the trial court, when read together and taken as a whole, do not correctly state the law and are misleading and likely to confuse the jury. As given, instruction No. 8 correctly instructs the jury that if the State proves, beyond a reasonable doubt, that Warren killed Blake on or about October 17, 1997, in Douglas County, Nebraska, intentionally but without premeditation, then the jury has a duty to find Warren guilty of murder in the second degree. As given, the instruction does not inform the jury that it is the State's burden to disprove self-defense in the event the jury finds Warren has met his initial burden of going forward with sufficient evidence of self-defense.

Similarly, instruction No. 10, while informing the jury of the definition of self-defense and informing the jury under what circumstances Warren could be found to have acted in self-defense, does not indicate what the jury should do with such a finding. The instruction does not instruct the jury that if it finds Warren acted in self-defense, the State must disprove that Warren acted in self-defense. Nor does the instruction inform the jury that the State must disprove the theory of self-defense beyond a reasonable doubt. See *State v. Archbold*, 178 Neb. 433, 133 N.W.2d 601 (1965).

As the instructions were given, it is reasonable that a jury might have proceeded through instruction No. 8, found that the State met its burden of proof on each of the statutory elements of second degree murder, and discovered that the jury had a duty to find Warren guilty of second degree murder. Proceeding through the instructions, the jury would have come upon instruction No. 10 and might have found that Warren acted in

self-defense. However, at this point, the jury was not instructed what to do with a finding of self-defense. The jury was left having been instructed that it was its duty to find Warren guilty, and the jury was not informed that a finding of self-defense negates such a guilty finding unless the State disproves self-defense beyond a reasonable doubt. See *State v. Archbold, supra.*

[9] We recognize that the Nebraska pattern jury instructions serve as a helpful guidepost in formulating proper instructions to be given to juries in this jurisdiction. In fact, we have noted before that as long as there is a Nebraska pattern jury instruction that accurately states the law and applies to the case, it is the instruction which should be given. *State v. Hiemstra*, 6 Neb. App. 940, 579 N.W.2d 550 (1998). In the present case, instruction No. 10 is substantially identical to NJI2d Crim. 7.3. The State notes that "[n]either [NJI2d Crim. 7.3] nor the comments to it . . . suggest when that instruction is given that a negation of a self defense claim must be added to the elements instruction." Brief for appellee at 9. While we agree with that factual observation, we do not find this argument persuasive or dispositive.

[10] We note that the comment found at the beginning of chapter 7 of NJI2d Crim. indicates that for all affirmative defenses except insanity and entrapment, "disproof of an affirmative defense must be listed as the final element in an elements instruction when an affirmative defense is an issue." Additionally, in the comment to NJI2d Crim. 7.1, which is the instruction for self-defense when no deadly force is used, the drafters note that "whenever self defense is at issue, the last element of the elements instruction will be 'that the defendant did not act in self defense.' " We note that this comment recommends an additional element instruction be given *whenever* self-defense is at issue, and is not, by its own terms, limited to nondeadly force cases. Indeed, we are at a loss as to any persuasive reason why such would be the case in nondeadly force cases, but not in deadly force cases.

The fact that disproof of self-defense should have been included as an element in the second degree murder elements instruction in this case is further supported by the fact that Nebraska case law firmly establishes that when the defendant has produced sufficient evidence to raise the defense, the issue

is one which the State *must* disprove. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). The instructions as given did not adequately instruct on the issue of self-defense and were misleading and confusing to the jury. As a result, we reverse, and remand the case for a new trial.

4. Neder v. United States

In the present case, the State asserts that we should find the omission of an element in the jury instructions to be harmless error, pursuant to the U.S. Supreme Court's holding in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In *Neder*, the Court applied the harmless error test and determined that a trial court's failure to instruct on a particular element of the crime did not require reversal. We first note that the proposition of law from *Neder* cited by the State is not of recent vintage. As the *Neder* Court noted, harmless error analysis has been applied to misdescriptions and omissions in jury instructions in several cases in the past. See, *California v. Roy*, 519 U.S. 2, 117 S. Ct. 337, 136 L. Ed. 2d 266 (1996); *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989); *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987). We do not find that *Neder* dictates the same result in the present case.

In *Neder*, the Court noted that the test for determining whether harmless error results from the failure to instruct on an element in a criminal case is as follows: It appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. On the specific facts of the *Neder* case, application of that test resulted in a majority of the U.S. Supreme Court concluding that it did appear beyond a reasonable doubt that the error did not contribute to the guilty verdict.

The present case is significantly distinguishable from *Neder*. In *Neder*, the U.S. Supreme Court concluded that the harmless error test was satisfied because, on the facts presented, no jury could reasonably have found in the defendant's favor on the element that was omitted from the instructions. Additionally, the

Court noted that the defendant never contested the issue which was omitted, either at trial or on appeal. As a result, on those facts, the Court was able to find the error harmless beyond a reasonable doubt.

In the present case, however, the facts do not support such a finding. As noted above, Warren presented testimony which, if believed, would suggest he acted in self-defense. Warren contested the issue to the point that he raised sufficient evidence to warrant an instruction to the jury, and the issue became one which the State was required to disprove beyond a reasonable doubt. He also raised this issue to the trial court and on appeal, unlike the defendant in *Neder*. Because the instructions as presented to the jury were confusing and misleading, it cannot be concluded that the error was harmless beyond a reasonable doubt. Likewise, it cannot be concluded beyond a reasonable doubt that the failure to include the complained of instructions did not contribute to the guilty verdict.

V. CONCLUSION

Because the trial court failed to properly instruct the jury on the affirmative defense of justification or self-defense, we reverse, and remand the case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE ESTATE OF SHIRLEY SAMPSON STEPHENS, DECEASED. RONALD KEITH STEPHENS, APPELLANT, V. ELEANORE FREEZE, PERSONAL REPRESENTATIVE OF THE ESTATE OF SHIRLEY SAMPSON STEPHENS, DECEASED, APPELLEE.

608 N.W.2d 201

Filed March 28, 2000. No. A-98-1233.

This opinion has been ordered permanently published by order of the Court of Appeals dated February 4, 2000.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Wills: Executors and Administrators: Proof: Presumptions.** In order to prevail, a personal representative as proponent of a will is required to prove by a preponderance of the evidence not only the lawful execution of the will, but also the testamentary capacity of the testator at the time when the will was made. If the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and adduce sufficient competent evidence to overcome the presumption arising therefrom.
4. **Wills: Proof.** The contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.
5. ___: ___. The purpose of the self-proved provision in Neb. Rev. Stat. § 30-2430 (Reissue 1995) is to expedite formal testacy proceedings.
6. **Wills: Affidavits: Proof.** A self-proved will may not be contested in regard to signature requirements, but the formal requisites for execution of the will must appear, either preceding the self-proving affidavit or as supplemental in the affidavit.
7. **Wills: Undue Influence.** Undue influence such as to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator.
8. **Undue Influence: Proof.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence.
9. **Wills: Undue Influence: Proof: Intent.** To establish undue influence, the party asserting that theory has the burden to prove that the person who executed the challenged instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was an intent to exercise undue influence for improper purpose, and that the result was clearly a product of undue influence.
10. **Wills: Proof.** Prima facie proof of a testator's testamentary capacity is established by the introduction of a self-proved will. Such prima facie proof is rebuttable with competent evidence to the contrary.

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

Kent E. Person, of Person Law Office, and Susan Buettner, of Buettner Law Office, for appellant.

William J. Ross and Vikki S. Stamm, of Ross, Schroeder, & Romatzke, for appellee.

IRWIN, Chief Judge, and HANNON and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Ronald Keith Stephens (Stephens) appeals the order of the district court for Buffalo County granting summary judgment in

favor of Eleanore Freeze, the personal representative of the estate of the decedent, Shirley Samson Stephens (Shirley), and denying Stephens' motion for summary judgment. For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

Shirley died on January 25, 1998. On April 14, 1997, Shirley executed her last will and testament. After Shirley's death, Freeze filed a petition for formal probate of the will dated April 14, 1997, in the county court for Buffalo County. Objections to the formal probate of the will were filed by Shirley's daughter and Stephens. We note that Shirley's daughter is not involved in the appeal before us. The objections alleged that the will had not been properly executed and had been procured through fraud, duress, or coercion, or as a result of a failure of testamentary capacity. In particular, Stephens alleged that the will was the result of duress, coercion, fraud, and undue influence practiced on Shirley by Charles and Jan Nelson.

Upon Stephens' request, the matter was transferred to district court. On June 22, 1998, Stephens filed a motion for summary judgment requesting a judgment that the will had not been properly executed and was therefore void. On June 25, Freeze filed a motion for summary judgment in which she sought a judgment admitting the April 14, 1997, will into probate.

On July 7, 1998, a hearing was held on the motions. Both parties offered the following evidence in support of their respective motions: the depositions of the two people who had witnessed the signing of Shirley's will; the deposition of the attorney who had drafted Shirley's will and was present during its execution; and the documents, including Shirley's will, used as exhibits at the depositions and the documents contained in the attorney's file. Stephens offered his affidavit to which a timeliness objection was sustained. Therefore, Stephens' affidavit was not received in evidence.

The evidence generally shows as follows: In May 1996, Shirley contacted an attorney for the purpose of having a will prepared. Thereafter, they had a meeting at Shirley's home in Kearney, Nebraska. They discussed changes Shirley wished to make to a draft of a will that had been previously prepared.

According to the attorney, Shirley wanted to leave one parcel of land to the Nebraska Boys Ranch and another parcel of land to the Nebraska Arbor Day Foundation; Shirley told the attorney that most of her other assets would be distributed through joint accounts at her death, and Shirley expressed her desire that her daughter not participate in her estate. The attorney prepared a will according to Shirley's directives and forwarded a copy to Shirley. The attorney believed that Shirley executed the will at a commercial banking institution.

In 1997, Shirley again contacted the attorney regarding her will. Shirley expressed her concern regarding her bequest to the Nebraska Arbor Day Foundation. According to the attorney, Shirley wanted to ensure that the entity to whom she bequeathed this land concentrated its efforts in Nebraska. At Shirley's request, the attorney made some inquiries of another charitable institution. In early April 1997, Shirley informed the attorney that she had decided to bequest this parcel of land to the Nelsons "because they would take care of the trees." The attorney drew up a new will as requested by Shirley.

The attorney and Shirley arranged to execute the will at Shirley's home on April 14, 1997. Shirley called Dr. Lawrence Bauer, a longtime neighbor, and Lynn Bedke, a longtime friend, to act as witnesses. It appears that Charles Nelson may also have been present during the signing of the will.

Prior to the execution of the will, the attorney and Shirley discussed the contents of the will. The attorney believed that Shirley understood the nature of her estate and of her bequests and that Shirley was acting of her own free will. At that time, Shirley again expressed her desire not to make any provision for her daughter. According to the attorney, Shirley executed the will in the attorney's presence and the presence of both witnesses: Shirley signed and initialed each page in the presence of the attorney, Bauer, and Bedke.

Bauer testified that Shirley had called him and asked him to witness her signature on her will. When Bauer went to Shirley's home at the time requested, Shirley was "her usual self." According to Bauer, "at the appropriate time I was asked to witness Shirley's signature." He did not recall the number of pages of the document and only saw the page that he signed. Bauer

stated that he and Bedke were both in the room when they each signed the document. When asked whether he had observed Shirley signing her name, Bauer stated, "I can't honestly say, but I'm sure that it appeared to me that everything was in order at the time, but I can't honestly say." When asked whether he had seen Shirley initial other pages of the will, Bauer stated, "No, I don't recall seeing that, but it could have happened without me noticing it."

Bedke testified that Shirley had told her that Shirley had a paper for her to sign. According to Bedke, Shirley appeared "[g]ood" and there was nothing "out of the ordinary." Bedke acknowledged that her signature on the acknowledgment page was in fact her signature. Bedke remembered the attorney pulling a paper out of a file and asking that Bedke sign the paper. According to Bedke, the attorney stated, "[T]his is just saying that Shirley was in her right state of mind that, you know, what was in her will, and just asked for you to sign it." Bedke testified that she did not see Shirley sign the will or initial the pages of the will.

On October 5, 1998, the district court entered an order granting Freeze's motion for summary judgment and denying Stephens' motion for summary judgment. The district court found no issues of material fact on the issues of fraud, coercion, undue influence, and lack of testamentary capacity. The court also concluded that under the evidence presented, the will was conclusively presumed to be properly executed and there was no evidence to rebut the presumption. Therefore, the district court dismissed the objections to admitting the will to probate and ordered that the will should be received into probate. The district court remanded the case to the county court. After the district court overruled Stephens' motion for new trial, he timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Stephens' assignments of error may be summarized as follows: The district court erred in (1) granting summary judgment in favor of Freeze after concluding that there were no genuine issues of fact as to fraud, coercion, undue influence, and lack of testamentary capacity; (2) finding that the will at issue was

conclusively presumed to have been properly executed despite deposition testimony of the witnesses to the will; and (3) not sustaining Stephens' motion for summary judgment.

IV. ANALYSIS

1. Personal Representative's Motion

[1,2] We address whether the district court properly sustained Freeze's motion for summary judgment. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999); *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999).

[3,4] In order to prevail, a personal representative as proponent of a will is required to prove by a preponderance of the evidence not only the lawful execution of the will, but also the testamentary capacity of the testator at the time when the will was made. *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982). If the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and adduce sufficient competent evidence to overcome the presumption arising therefrom. *Id.* The contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. *Id.*

(a) Signature Requirements

Stephens contends that the evidence raised a genuine issue of material fact of whether the will was properly executed. He argues that the depositions of Bauer and Bedke rebut the presumption that the signature requirements were complied with.

As relevant to the case before us, Neb. Rev. Stat. § 30-2327 (Reissue 1995) provides that a will must be signed by the testator and signed by two individuals "each of whom witnessed

either the signing or the testator's acknowledgment of the signature or of the will."

We note that the will before us has an acknowledgment signed by Shirley and the witnesses, which acknowledgment complies with Neb. Rev. Stat. § 30-2329 (Reissue 1995). Therefore, it is considered a self-proved will. Section 30-2329 provides in relevant part: "The execution of the acknowledgment by the testator and the affidavits of the witnesses as provided for in this section shall be sufficient to satisfy the requirements of the signing of the will by the testator and the witnesses under section 30-2327." Neb. Rev. Stat. § 30-2430(b) (Reissue 1995) describes the effect to be given a self-proved will:

> If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

In the case before us, the acknowledgment section of Shirley's will bears the signatures of Shirley, Bauer, and Bedke. We note that the acknowledgment section states, in part, that the witnesses "declare . . . that the Testatrix signs and executes this instrument as her Last Will." The deposition testimony of Bauer and Bedke establish that the signatures on the acknowledgment section are in fact their signatures but that they did not recall witnessing Shirley's signature. The attorney testified in her deposition that Shirley executed the will in the presence of the attorney, Bauer, and Bedke and that Shirley signed her signature at the conclusion of the will and initialed the pages of the will in the attorney's presence and the presence of Bauer and Bedke.

[5,6] The purpose of the self-proved provision in § 30-2430 is to expedite formal testacy proceedings. *In re Estate of Flider*, 213 Neb. 153, 328 N.W.2d 197 (1982). The Nebraska Supreme Court has stated that a self-proved will may not be contested in regard to signature requirements but that the formal requisites for execution of the will must appear, either preceding the self-proving affidavit or as supplemental in the affidavit. *Id.* See, also, *Matter of Estate of Mackaben*, 126 Ariz. 599, 617 P.2d 765

(Ariz. App. 1980). Section 30-2430 was adopted from the Uniform Probate Code. The comment in the Uniform Probate Code provides that the " 'conclusive presumption' described here would foreclose questions like whether the witnesses signed in the presence of the testator. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document." 8, pt. II, Uniform Laws Annotated § 3-406 at 85 (1998). A conclusive presumption is defined as a "presumption that cannot be overcome by any additional evidence or argument." Black's Law Dictionary 1204 (7th ed. 1999).

The record in this case shows that the will complies with the requirements of § 30-2329 and that the formal requisites for execution appear. Therefore, pursuant to § 30-2430, the signature requirements for execution are conclusively presumed, notwithstanding the poor memories of Bauer and Bedke. As a result, a conclusive presumption exists as to the signature requirements of § 30-2327, which may not now be challenged. The evidence also does not raise a genuine issue of material fact regarding fraud, forgery, or other proof that Shirley was unaware of the contents of the document.

(b) Undue Influence

On appeal, Stephens contends that the evidence raised a genuine issue of material fact regarding the issue of undue influence. As discussed above, the conclusive presumption that the signature requirements were complied with as established by a self-proved will does not preclude proof of undue influence or lack of testamentary capacity.

[7-9] Undue influence such as to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence. *Id.* To establish undue influence, the party asserting that theory has the burden to prove that the person who executed the challenged instrument was subject to undue influence, that there was an opportunity to exercise

undue influence, that there was an intent to exercise undue influence for improper purpose, and that the result was clearly a product of undue influence. *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994).

The only facts regarding the Nelsons established by the evidence presented at the summary judgment hearing are that Charles Nelson was present at Shirley's home at the time her will was executed and that Shirley left a parcel of her land to the Nelsons which apparently had been bequeathed to Stephens in some prior will. There was no evidence to suggest that Shirley was subject to undue influence. To the contrary, the evidence shows that Shirley had strong convictions regarding the disposition of her estate. Stephens also failed to present any evidence concerning whether the Nelsons were disposed to exercise undue influence for an improper purpose. That Shirley chose to leave the Nelsons a parcel of her land does not raise an issue of fact regarding undue influence.

(c) Testamentary Capacity

[10] In order to be entitled to summary judgment, Freeze also had to establish Shirley's testamentary capacity as a matter of law. Prima facie proof of a testator's testamentary capacity is established by the introduction of a self-proved will. *In re Estate of Wagner, supra*; *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982). Such prima facie proof is rebuttable with competent evidence to the contrary. *Id.*

In the present case, Freeze successfully established prima facie proof of Shirley's testamentary capacity through the offer of the self-proved will. Freeze also offered the testimony of the attorney, Bauer, and Bedke regarding Shirley's condition on the day that the will was executed. The attorney described Shirley as a "determined individual" who was acting voluntarily and of her own free will. According to Bauer, Shirley was her "usual self." Bedke stated that Shirley appeared "[g]ood" and that there was nothing "out of the ordinary" about Shirley on the day that the will was executed. No testimony was received that raises a question regarding Shirley's testamentary capacity. Therefore, we conclude that there exists no issue of material fact regarding Shirley's testamentary capacity.

(d) Resolution

Given that the evidence raised no issues of material fact regarding the existence of undue influence, the proper execution of the will, and Shirley's testamentary capacity, Freeze was entitled to judgment as a matter of law.

2. Stephens' Motion for Summary Judgment

Stephens also assigns that the district court erred in failing to grant his motion for summary judgment. As we concluded above that Freeze was entitled to judgment as a matter of law, we conclude that this assigned error is without merit.

V. CONCLUSION

As discussed above, the evidence establishes as a matter of law Shirley's testamentary capacity and that the proffered will was properly executed. The evidence raises no issue of fact regarding undue influence. Therefore, we conclude that Freeze was entitled to a judgment as a matter of law. The district court properly granted Freeze's motion for summary judgment and denied Stephens' motion for summary judgment.

Affirmed.

Robert A. Byrne and William G. Line, appellants, v. Hauptman, O'Brien, Wolf & Lathrop, P.C., appellee.

608 N.W.2d 208

Filed March 28, 2000. No. A-99-190.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **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 all 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 further proceedings as it deems just.

4. **Contracts: Pleadings.** A plaintiff is permitted to plead both express contract and quasi-contract in the same petition.
5. **Contracts: Quantum Meruit: Actions.** Where the facts arise out of the same transaction, an action on an express contract and an action for quantum meruit constitute a single cause of action seeking recovery under alternate theories.
6. **Attorney Fees: Statutes.** Attorney fees are recoverable only where provided for by statute or when a recognized and accepted uniform course of procedure allows recovery of attorney fees.
7. **Contracts: Attorney and Client: Attorney Fees: Statutes.** An attorney and client are free to contract for reasonable attorney fees rather than statutory attorney fees.
8. **Contracts: Words and Phrases.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
9. **Summary Judgment: Proof.** A party moving for summary judgment has the burden of showing 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.
10. **Contracts: Attorney Fees: Proof.** Only those attorney fees which are reasonable will be allowed under a contract which provides for attorney fees, and the attorney requesting fees bears the burden of presenting sufficient evidence to establish the reasonableness of the fees.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Reversed and remanded for further proceedings.

William G. Line for appellants.

Gordon R. Hauptman for appellee.

IRWIN, Chief Judge, and CARLSON, Judge, and HOWARD, District Judge, Retired.

IRWIN, Chief Judge.

I. INTRODUCTION

Robert A. Byrne and William G. Line (collectively the plaintiffs) appeal the order of the district court for Dodge County granting summary judgment to the defendant, Hauptman, O'Brien, Wolff & Lathrop, P.C. (Hauptman law firm), and denying the plaintiffs' motion for summary judgment. For the rea-

sons stated below, we reverse, and remand for further proceedings.

II. FACTUAL BACKGROUND

On August 14, 1997, the plaintiffs filed a petition for declaratory judgment. According to the petition, Line had represented Byrne in a lawsuit, reached a settlement, and received a settlement draft in the amount of $1,852.70 payable to Byrne, Line, and Gordon R. Hauptman (Hauptman). Hauptman was included on the draft due to his claim of an attorney lien for services rendered to Byrne by the Hauptman law firm pursuant to a contract for legal services. In the petition, the plaintiffs contended that the contract was unenforceable and that the Hauptman law firm was not entitled to an attorney fee. The plaintiffs sought a declaratory judgment that the Hauptman law firm did not have an attorney lien or an interest in the draft.

In the Hauptman law firm's answer, it contended that its contract was enforceable and that it was entitled to the fee. It also counterclaimed, seeking a money judgment in the amount of $1,852.70 against the plaintiffs on the basis of a contract between Byrne and the Hauptman law firm or, in the alternative, on a quantum meruit theory.

Both parties moved for summary judgment. On January 13, 1999, a hearing was held on the motions. The evidence offered included the contingent fee agreement entered between Byrne and the Hauptman law firm, the notice of attorney lien, the settlement draft, and the affidavit of Hauptman.

Regarding the termination of the agreement and the subsequent payment for legal services, the contingent fee agreement provides as follows:

> In the event of termination of Attorney's representative as specified, Attorney shall have a lien for fees and expenses as are specified in this Agreement, which lien will be imposed upon any sums recovered by, for, or on behalf of Client. For purposes of computing the contingent fee to which Attorney is entitled, the applicable percentage shall be computed based upon the last settlement offer received by Attorney from defendant's representatives. If no such settlement offer has been tendered, Attorney shall be

> allowed fees in an amount equivalent to his standard hourly rate for the hours expended on Client's behalf.

The agreement provided that regardless of whether there was a recovery for or on behalf of Byrne, Byrne was obligated to pay all disbursements and expenses incurred by the Hauptman law firm in pursuing Byrne's claim. The agreement also provided that the Hauptman law firm could employ assistance, including paralegals, at its discretion.

The settlement draft was issued in the amount of $1,852.70 in favor of Byrne, Line, and Hauptman. In Hauptman's affidavit, he stated that his standard billing rate on an hourly basis was $125 per hour, that he had entered a contingency fee agreement with Byrne, and that he had proceeded to represent Byrne in his personal injury lawsuit resulting from injuries sustained in an automobile collision. He stated that his representation of Byrne included

> counseling and advising of [Byrne] with regard to his ongoing medical care, knowledge and advise [sic] on the applicable law and legal issues involved in his case, wage loss and lost earning capacity issues, the general direction in which the claim should proceed, and answering any questions that [Byrne] or his family submitted. In addition, [Hauptman] corresponded with, and maintained telephone contact with Allstate Insurance Company, the third party liability carrier, and State Farm Insurance Company, [Byrne's] personal insurance carrier with regard to subrogation issues. [The Hauptman law firm] gathered medical records and reports . . . and maintained ongoing schedules of medical expenses.

According to Hauptman, he expended between 10 and 10½ hours in the representation of Byrne for the sum of $1,275 and supervised a paralegal who expended between 5 and 5½ hours at an hourly rate of $45 per hour in the sum of $246 for a total fee of $1,521. Hauptman stated that the Hauptman law firm had advanced costs to Byrne in the sum of $331.99. Hauptman further stated that after being discharged by Byrne, the Hauptman law firm served a notice of attorney lien on Byrne, Line, Allstate Insurance Company, and State Farm Insurance Company.

After taking the matter under advisement, the district court found that there was no genuine issue as to any material fact and that the Hauptman law firm was entitled to judgment as a matter of law. The court sustained the Hauptman law firm's motion for summary judgment for judgment on the counterclaim in the amount of $1,852.70 and dismissed the plaintiffs' action for declaratory judgment. Thereafter, the plaintiffs timely appealed.

III. ASSIGNMENTS OF ERROR

In reviewing the plaintiffs' brief, we note that the plaintiffs failed to argue several of their assigned errors. See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999) (alleged error must be specifically assigned and specifically argued in order to be considered by appellate court). We address only those errors that are assigned and argued. Therefore, we address those assigned errors regarding whether the district court erred in granting the Hauptman law firm's motion for summary judgment and in failing to grant the plaintiffs' motion for summary judgment. The plaintiffs' arguments in support of these assigned errors are set out below in particularity.

IV. ANALYSIS

1. 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 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. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999); *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999).

[3] 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 all 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 further proceedings as it deems just. *Shivvers, supra*; *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

2. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs contend on appeal that the district court should have granted their motion for summary judgment. They contend in their assignments of error that they were entitled to a summary judgment because the Hauptman law firm could not seek to recover "by contract and also under quantum mer[u]it." They also appear to be arguing that the agreement was unenforceable.

(a) Quantum Meruit and Express Contract

[4,5] The plaintiffs argue that it was improper for the district court to allow the Hauptman law firm to seek recovery on the basis of an express contract and under quantum meruit. However, the Nebraska Supreme Court has repeatedly held that a plaintiff is permitted to plead both express contract and quasi-contract in the same petition. See, *Professional Recruiters v. Oliver*, 235 Neb. 508, 456 N.W.2d 103 (1990); *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988); *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976). The Nebraska Supreme Court concluded that where the facts arise out of the same transaction, an action on an express contract and an action for quantum meruit constitute a single cause of action seeking recovery under alternate theories. See *Professional Recruiters, supra*.

The plaintiffs cite *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 326 N.W.2d 182 (1982), to support their argument that the Hauptman law firm could not proceed on the basis of express contract and under quantum meruit. *Siebler Heating & Air Conditioning* does not stand for this proposition. In *Siebler Heating & Air Conditioning*, the Nebraska Supreme Court held only that a plaintiff may not allege an express agreement and then seek at trial or on appeal to recover based on quantum meruit. *Siebler Heating & Air Conditioning* involved a

pleading and proof problem. In the case before us, the Hauptman law firm's pleading, however inartful, seeks recovery on the basis of the existence of an express contract with Byrne and on the basis of quantum meruit. Therefore, the problem arising in the *Siebler Heating & Air Conditioning* case is not presented in this case.

(b) Enforceability of Agreement

The plaintiffs also argue that the agreement was unenforceable as a matter of law. According to the plaintiffs, "attorney's fees are only allowed by statute or a uniform course of conduct authorizing the allowance. They cannot be allowed by agreement in a collection matter." Brief for appellants at 7.

[6] It is true that attorney fees are recoverable only where provided for by statute or when a recognized and accepted uniform course of procedure allows recovery of attorney fees. See *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998). However, the above proposition of law only applies when a party to litigation is seeking to recover attorney fees from the other party in the very case being litigated. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). To iterate, the above proposition of law provides when a court is authorized to award fees as costs. See *Winter v. Department of Motor Vehicles*, 257 Neb. 28, 594 N.W.2d 642 (1999).

[7] The above proposition of law does not apply in the case before us. In the Hauptman law firm's counterclaim, it is seeking a judgment to recover its fee pursuant to a contract for services rendered as a result of representation of Byrne in a separate matter. It is axiomatic that an attorney and client are free to contract for reasonable attorney fees rather than statutory attorney fees. See, generally, 7 Am. Jur. 2d *Attorneys at Law* § 262 (1997). We note that attorney fee agreements are evaluated at the time of their making and must be fair, reasonable, and fully explained to the client, and are strictly construed against the attorney. *Id.* We conclude that the plaintiffs' argument is without merit.

(c) Resolution

For the above-stated reasons, we conclude that the plaintiffs failed to prove they were entitled to a judgment in their favor as

a matter of law. Therefore, the district court properly refused to grant summary judgment in their favor.

3. HAUPTMAN LAW FIRM'S MOTION FOR SUMMARY JUDGMENT

[8] The plaintiffs also contend that the district court erred in granting the Hauptman law firm summary judgment. They first argue that the Hauptman law firm was not entitled to summary judgment because the agreement between Byrne and the Hauptman law firm was ambiguous. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Johnson Lakes Dev. v. Central Neb. Pub. Power,* 254 Neb. 418, 576 N.W.2d 806 (1998); *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Johnson Lakes Dev., supra*; *Daehnke, supra.* The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language. *Johnson Lakes Dev., supra*; *Daehnke, supra.* The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Johnson Lakes Dev., supra*; *Daehnke, supra.*

Giving the terms of the agreement before us their plain and ordinary meaning, we conclude as a matter of law that the agreement between Byrne and the Hauptman law firm is not ambiguous. The agreement clearly sets forth the nature of the relationship, the claim for which the Hauptman law firm is representing Byrne, and the method by which the Hauptman law firm's fee would be determined.

[9] Next, we turn to whether the Hauptman law firm sufficiently proved that it was entitled to recover on the basis of the agreement as a matter of law. A party moving for summary judgment has the burden of showing 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. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Holt Cty. Sch. Dist. No. 0025 v. Dixon*, 8 Neb. App. 390, 594 N.W.2d 659 (1999).

In *Baker v. Zikas*, 176 Neb. 290, 293, 125 N.W.2d 715, 717 (1964), the Nebraska Supreme Court quoted with approval a decision of the Minnesota Supreme Court discussing the distinction between liability regarding an ordinary contract and one for legal services and the reasons therefor:

> " '[I]t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. As we have seen, despite the agreement but as an incident to the relationship, a client has full power to discharge his attorney without cause at any time, being liable only in such event for the reasonable value of the services rendered.' "

The issue before the *Baker* court was whether a law firm was entitled to recover under a contingent fee agreement when the law firm's services were terminated by the client prior to any recovery. The *Baker* contract was a basic contingent fee agreement providing a contingent fee of 40 percent of the amount recovered. The *Baker* court held that the original contingent fee contract was no longer in effect following the client's termination of the law firm's services and, therefore, "the maximum reach of [the law firm's] right to fees [was] the reasonable value of its services actually rendered to date of discharge." *Id.* at 294, 125 N.W.2d at 718. The *Baker* court determined the reasonable value of the services rendered.

The agreement before us is also a contingent fee agreement. However, it is distinguishable from the *Baker* contract. The agreement before us provides a method to determine the Hauptman law firm's fee in the event that the attorney-client relationship is terminated prior to any offer of settlement or any recovery on Byrne's behalf.

Although the contract in the present case is distinguishable from that in *Baker, supra*, we conclude that Hauptman does bear the burden of proving the reasonableness of his fee as did the attorney in *Baker*. But see *Mecham v. Colby*, 156 Neb. 386, 56

N.W.2d 299 (1953) (holding that in suit to recover attorney fee where contract provided fee of $2,000, attorney need not establish reasonable value of fee). Our application of a reasonableness requirement is consistent with other jurisdictions.

[10] It is generally accepted that only those attorney fees which are reasonable will be allowed under a contract which provides for attorney fees, and the attorney requesting fees bears the burden of presenting sufficient evidence to establish the reasonableness of the fee. See, *Bizar & Martin v. U.S. Ice Cream Corp.*, 228 A.D.2d 588, 644 N.Y.S.2d 753 (1996); *Chicago Title & Tr. v. Chicago Title & Tr.*, 248 Ill. App. 3d 1065, 618 N.E.2d 949, 188 Ill. Dec. 379 (1993); *McFillen Rent-A-Car, Inc. v. Brierty*, 625 So. 2d 364 (La. App. 1993); *In re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986); *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986); *Terzis v. Estate of Whalen*, 126 N.H. 88, 489 A.2d 608 (1985); *In re Kennedy*, 472 A.2d 1317 (Del. Super. 1984), *cert. denied* 467 U.S. 1205, 104 S. Ct. 2388, 81 L. Ed. 2d 346; *Harmon v. Pugh*, 38 N.C. App. 438, 248 S.E.2d 421 (1978); *The Florida Bar v. Moriber*, 314 So. 2d 145 (Fla. 1975); *In re Stafford*, 36 Wash. 2d 108, 216 P.2d 746 (1950). But see, *Berk v. Twentynine Palms Ranchos, Inc.*, 201 Cal. App. 2d 625, 20 Cal. Rptr. 144 (1962) (where suit is brought upon contract for agreed fee, attorney is not required to prove reasonable value of services); *Mecham, supra*. When applying the above proposition to contracts for attorney fees where the contract sets forth an hourly rate for services, it has been held that the attorney must establish the reasonableness of that part of his or her fee which is not for an agreed amount, meaning that the attorney must prove the reasonableness of the number of hours expended. See, *Alexander v. Inman*, 903 S.W.2d 686 (Tenn. App. 1995); *Skidmore & Assoc. Co. v. Southerland*, 89 Ohio App. 3d 177, 623 N.E.2d 1259 (1993); *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, Inc.*, 115 N.M. 152, 848 P.2d 1079 (1993). See, also, 7A C.J.S. *Attorney & Client* § 345 (1980); 2 Robert L. Rossi, Attorneys' Fees § 13.13 (2d ed. 1995). In cases involving summary judgment, courts have generally held that where the attorney-client contract sets forth the hourly rate, the attorney has the burden of establishing the rea-

sonableness of the time spent on the cases; that the reasonableness of the time spent is a question of fact; and that the failure to present evidence regarding the reasonableness of the time spent prevents summary judgment. See, *Climaco, Seminatore, Etc. v. Carter*, 100 Ohio App. 3d 313, 653 N.E.2d 1245 (1995); *Hinkle, Cox, Eaton, Coffield & Hensley, supra*; *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144 (Tex. App. 1986); *Jacobs v. Holston*, 70 Ohio App. 2d 55, 434 N.E.2d 738 (1980).

In support of the proposition of law that an attorney must prove the reasonableness of his or her fee, courts note that as a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients and that the reasonableness of attorney fees is always subject to court scrutiny. See, *Bizar & Martin, supra*; *In re Cooper, supra*. Application of the proposition that an attorney must prove the reasonableness of his or her fee is supported by the above-discussed Nebraska case law recognizing that contracts between attorneys and clients are different from conventional commercial contracts. See *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964). We further note that Canon 2, EC 2-17, of the Code of Professional Responsibility provides that a "lawyer should not charge more than a reasonable fee."

In making our decision, we are aware that Nebraska jurisprudence provides that trial courts and appellate courts are regarded as experts on the value of legal services. See, *Junker v. Junker*, 188 Neb. 555, 198 N.W.2d 189 (1972); *Specht v. Specht*, 148 Neb. 325, 27 N.W.2d 390 (1947). Nebraska jurisprudence further provides that a trial court's determination as to the allowance of an attorney fee is largely within the discretion of the court. See *Lippincott v. Lippincott*, 152 Neb. 374, 41 N.W.2d 232 (1950). We do not read the above authority to allow a court to decide as a matter of law in a summary judgment proceeding the reasonableness of an attorney fee as provided in a contract between attorney and client where the attorney has not presented evidence to establish the reasonableness of his or her fee.

In the case before us, the contract between Byrne and the Hauptman law firm does not explicitly set forth the hourly rate or the number of hours to be expended. Under the agreement, the Hauptman law firm was entitled to a fee "in an amount

equivalent to [its] standard hourly rate for the hours expended" on Byrne's behalf. Therefore, based upon the propositions of law discussed above, we conclude that the Hauptman law firm had the burden of establishing the reasonableness of the hourly rate and the number of hours expended, both of which were not explicitly set forth in the contract.

Our review of the record shows that Hauptman's affidavit merely sets forth his standard hourly rate, the number of hours expended, and a cursory summary of services performed. Hauptman does not state in his affidavit that his standard hourly rate or the number of hours expended were reasonable. The information set forth in Hauptman's affidavit creates a factual issue regarding the reasonableness of Hauptman's fee. Therefore, we conclude that Hauptman's affidavit is insufficient to establish that the fee sought by the Hauptman law firm was reasonable as a matter of law. Because the Hauptman law firm, as movant, had the burden to prove it was entitled to judgment as a matter of law and failed to present sufficient evidence to meet this burden, we conclude that the district court erred in granting summary judgment in the Hauptman law firm's favor.

V. CONCLUSION

In conclusion, the district court did not err in failing to grant the plaintiffs' motion for summary judgment. However, the district court erred in granting the Hauptman law firm's motion for summary judgment. On the record presented, we cannot determine as a matter of law the reasonableness of the Hauptman law firm's fee. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. HARVEY A. HOBBY, APPELLANT.

607 N.W.2d 869

Filed March 28, 2000. No. A-99-399.

1. **Rules of Evidence.** In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
4. **Rules of Evidence.** Evidence which is not relevant is not admissible.
5. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
7. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
8. **Evidence.** Relevance is a relational concept and carries meaning only in context. A right to introduce evidence depends upon there being an issue of fact that is of consequence to the determination of an action. First, evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. Second, if the evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.
9. **Rules of Evidence: Hearsay.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rule.
10. ___: ___. For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
11. **Rules of Evidence: Hearsay: Time.** For hearsay to be admissible under the excited utterance exception, statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.
12. ___: ___ : ___. The key requirement to the excited utterance exception is spontaneity, which requires a showing that the statement was made without time for conscious reflection.

13. ___: ___: ___. The time interval between a startling event and the statements in question is not of itself dispositive of the spontaneity issue. The permissible length of time between the statement and the startling event is determined on the unique facts of each case.
14. ___: ___: ___. While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation, the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed as modified.

Stephanie L. Clark, Gage County Deputy Public Defender, for appellant.

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

HANNON and SIEVERS, Judges, and BLUE, District Judge, Retired.

SIEVERS, Judge.

The defendant, Harvey A. Hobby, was charged on November 30, 1998, with one count of sexual assault of a child under Neb. Rev. Stat. § 28-320.01 (Reissue 1995), a Class IV felony, and one count of first degree sexual assault under Neb. Rev. Stat. § 28-319 (Reissue 1995), a Class II felony. The charges specified, on count I, that Hobby, being 34 years of age, had subjected a minor female to sexual contact on or about June 18, 1998, and, on count II, had subjected another minor female to sexual penetration on the same date. After a jury trial in February 1999 in the Gage County District Court, Hobby was convicted of both counts and sentenced to 3 to 4 years' imprisonment on count I and 12 to 16 years' imprisonment on count II, with sentences to run consecutively. Hobby now appeals to this court.

BACKGROUND

On June 17, 1998, J.M. and D.M. were spending the night together while babysitting several younger siblings at D.M.'s

residence in Gage County, Nebraska. At the time, both J.M. and D.M. were 14 years of age. During that evening, Hobby came to the residence to see D.M.'s mother. When Hobby learned that D.M.'s mother was not home, he indicated he would return later.

Hobby returned later that night after the children had fallen asleep. J.M. stated that she woke in the middle of the night when she felt someone touching her breast and attempting to get into bed with her. When J.M. asked who was in her bed, the person responded by saying, " 'Harvey.' " J.M. identified Hobby as the man who had fondled her. J.M. "scooted off the bottom of the bed" saying that she needed to use the bathroom. J.M. then went into the living room and sat in a chair. Hobby followed J.M. into the living room and asked her where he could find D.M. When Hobby left the room, J.M. awakened two of the children she and D.M. had been babysitting and went to the home of a neighbor.

D.M. stated that she woke up when she felt someone penetrating her vagina with his finger. D.M. stated that her shorts and underwear had been pulled down to her knees and that her shirt and bra had been pulled above her breast. She stated that she started pushing the man off of her and that he rolled off onto the floor. She then pulled herself into the corner of her bed, which was next to the wall in the corner of the room. D.M. identified Hobby as the man who had assaulted her.

The neighbor stated that J.M. and two younger girls came to her door looking for help because a man was in D.M.'s house. She indicated that the girls were frightened. The neighbor then drove to D.M.'s residence and found D.M. crying and "curled up in a ball" in a chair in the living room. The neighbor then took D.M. and the remaining children to her home and notified the authorities. Gage County Deputy Sheriff Kent Harlan responded to the call and spoke with both J.M. and D.M. after he arrived.

ASSIGNMENTS OF ERROR

Hobby alleges that the district court erred (1) in granting the State's motion in limine which prevented Hobby from testifying that he had originally gone to D.M.'s home to purchase marijuana from D.M.'s mother, (2) in overruling his objection to hearsay testimony offered at trial, and (3) in imposing excessive sentences.

STANDARD OF REVIEW

[1,2] In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

[3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Wells, supra*; *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Wells, supra*; *State v. White, supra.*

ANALYSIS

State's Motion in Limine.

[4-7] Hobby first asserts the trial court erred when it sustained the State's motion in limine prohibiting Hobby from eliciting testimony which would indicate that he came to D.M.'s residence in order to purchase marijuana. "Evidence which is not relevant is not admissible." Neb. Rev. Stat. § 27-402 (Reissue 1995). See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1995). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998). A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[8] In *State v. Harrold*, 256 Neb. 829, 852, 593 N.W.2d 299, 316-17 (1999), the Supreme Court stated:

> Relevance is a relational concept and carries meaning only in context. A right to introduce evidence depends upon there being an issue of fact that is of consequence to the determination of an action. See § 27-401. First, evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. [Citation omitted.] Second, if the evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.

Hobby argues that the trial court prohibited him from eliciting testimony that his purpose for being in D.M.'s home was to purchase marijuana. Hobby asserts that "this aspect of the case should have been introduced to the jury because it demonstrates that Mr. Hobby's reason for being present at [D.M.'s] residence had a purpose other than to have sexual contact with" the victims. Brief for appellant at 5.

With Hobby's intention in mind, we consider the elements the State must prove in order to convict Hobby of the crimes charged. In order to convict Hobby of sexual assault of a child, the State must show that Hobby subjected a person 14 years of age or younger to sexual contact and that Hobby was at least 19 years of age or older at the time. See § 28-320.01. On the count of first degree sexual assault, the State must show that Hobby subjected another person to sexual penetration without consent, or that Hobby was 19 years of age or older and his victim was under the age of 16. See § 28-319. Given the statutory elements of the State's case, Hobby's purpose for being in D.M.'s home has no bearing and thus no relevance to any of the elements of the crimes. Whether he was at the residence to deliver cookies or to buy drugs, the only question remains whether he committed the sexual assaults after he got there. Hobby's purpose for being in D.M.'s home fails to alter in any way the facts in issue—what he did after he got there. The excluded evidence was irrelevant, and the trial court properly sustained the motion in limine.

Excited Utterance Hearsay Exception.

Hobby next asserts that the trial court erred in overruling his objection on hearsay grounds to Harlan's testimony about what

J.M. and D.M. told him shortly after they were assaulted by Hobby. Harlan stated that the Gage County Sheriff's Department first received a burglary call at 2:44 a.m. on June 18, 1998, and that he arrived on the scene at 3:09 a.m. Harlan first spoke with the neighbor for approximately 5 minutes. Harlan then interviewed J.M. in his squad car for approximately 15 minutes. After interviewing J.M., he then interviewed D.M. Harlan estimated that he concluded talking to both victims within 45 minutes of the original call and that the entire evolution happened within 1 hour.

Harlan also stated that at the time he talked to J.M., "[s]he appeared to be fairly upset." When asked if she appeared to have been crying, Harlan stated that she had. She was not crying at the time she entered his squad car, but she did cry during the interview. Although J.M. appeared excited to Harlan, he agreed that J.M. did answer his questions coherently. The trial court overruled Hobby's hearsay objection and allowed Harlan to testify as to what J.M. told him had happened. Harlan stated that J.M. said she was sleeping and felt someone next to her with his hand under her shirt. He stated that J.M. said the man was kissing her neck and the side of her face and that when she asked who it was, the man said, "'It's Harvey.'" Harlan then stated that J.M. told the man she had to use the bathroom and that "she crawled down to the foot of the bed, got off the bed and left the room." J.M. told Harlan that Hobby followed her into the living room. She then told Harlan that after Hobby left the room, she awakened two of the other children in the house and went to the neighbor's home.

The State next questioned Harlan concerning his conversation with D.M. Harlan said that D.M. appeared upset, nervous, withdrawn, and uncomfortable and that the things D.M. told him had happened recently. The trial court overruled Hobby's hearsay objection and allowed Harlan to testify as to what D.M. told him had happened. He stated the D.M. told him she was sleeping when she felt something in her vagina. When she woke, her shirt and bra were over her breast and her shorts and underwear were down to her knees. Harlan stated that D.M. said she pushed the man away and told him to leave her alone or she would scream. D.M. told Harlan that as the man left, she could see that it was

Hobby. D.M. told Harlan that she waited a few minutes and then went out into the living room where Hobby was still sitting in a chair. A short time later, Hobby left and the neighbor arrived.

[9,10] "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Reissue 1995). For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994).

Here, the first two elements of the exception are met in that the victims experienced a startling event, being sexually assaulted as they slept, and their statements to Harlan related to the event. Thus, the issue is whether the statements were made while under the stress of the event.

[11-13] For hearsay to be admissible under the excited utterance exception, "[s]tatements need not be made contemporaneously with the exciting cause but 'may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.' " *State v. Jacob*, 242 Neb. 176, 188, 494 N.W.2d 109, 118 (1993) (quoting 6 John H. Wigmore, Evidence in Trials at Common Law § 1750 (James H. Chadbourn rev. 1976)). "[T]he key requirement is spontaneity, a showing that the statement was made without time for conscious reflection." *State v. Boppre*, 243 Neb. 908, 927, 503 N.W.2d 526, 538 (1993). However, the time interval between the startling event and the statements in question is not "of itself dispositive of the spontaneity issue." *Id.* The permissible length of time between the statement and the startling event is determined on the unique facts of each case. *Id.*; *State v. Jacob, supra.*

[14] In *State v. Tlamka*, 244 Neb. 670, 677, 508 N.W.2d 846, 851 (1993), the Nebraska Supreme Court indicated:

> As stated in *State v. Plant*, 236 Neb. 317, 329, 461 N.W.2d 253, 264 (1990): "While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, [citations

> omitted], a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event." "'"[T]he true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue . . . ."'" *State v. Jacob*, 242 Neb. 176, 188, 494 N.W.2d 109, 118 (1993) (quoting 6 Wigmore, supra, § 1745).

Harlan arrived at the neighbor's home and interviewed both J.M. and D.M. within 1 hour of the assaults. Both J.M. and D.M. testified that they awakened to find themselves being assaulted by Hobby. Harlan stated that J.M. had been crying, appeared excited, and cried during the interview. He also stated that D.M. appeared upset, nervous, withdrawn, and uncomfortable and that the things D.M. told him had happened recently. Under the facts of this case, the trial court could readily conclude that J.M. and D.M. were speaking under the stress of nervous excitement and shock produced by the assaults perpetrated by Hobby. Accordingly, we conclude that the statements from J.M. and D.M. come within the "excited utterance" exception to the hearsay rule and that their admission was not error.

Excessive Sentences.

Hobby next asserts that the trial court erred in imposing excessive sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Earl, supra*; *State v. Cook, supra.*

Count I, sexual assault of a child, see § 28-320.01, was a Class IV felony when the crime was committed, but has subsequently been reclassified as a Class IIIA felony by 1997 Neb. Laws, L.B. 364 § 6, operative July 1, 1998. A Class IIIA felony carries a penalty of a maximum of 5 years' imprisonment, with

no maximum minimum. Neb. Rev. Stat. § 28-105 (Cum. Supp. 1998). This reclassification increases the severity of the penalty, which cannot be constitutionally done, given the crime was committed before the effective date of the amendment and the judgment is not final pending appeal. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). Thus, Hobby's crime of sexual assault of a child is properly treated as a Class IV felony. However, the district court imposed an improper sentence by imposing a sentence of 3 to 4 years' imprisonment. Because of a legislative amendment, fully discussed in *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), the minimum portion of the sentence cannot exceed one-third of the maximum allowed by the legislative amendment to the sentencing statute. Thus, the low end of Hobby's sentence for the crime of sexual assault of a child cannot be more than 20 months' imprisonment. Thus, we affirm the sentence for the crime except that it shall be modified to 20 months' to 4 years' imprisonment. Due to the consecutive nature of the sentences for the two crimes, our modification will have little or no practical effect, but the sentences should be correct.

First degree sexual assault is a Class II felony punishable by a maximum term of 50 years' imprisonment and a mandatory minimum of 3 years' imprisonment. § 28-105 (Reissue 1995). The trial court sentenced Hobby to 12 to 16 years' imprisonment on count II. The sentence was within statutory limits, was not untenable, and did not deprive Hobby of a substantial right or a just result. Accordingly, Hobby's assertion that the trial court abused its discretion by imposing excessive sentences is without merit.

AFFIRMED AS MODIFIED.

HANNON, Judge, dissenting.

I must respectfully dissent, because I do not think Harlan's testimony relating the statements made to him by J.M. and D.M. qualifies as an exception to the hearsay rule, as an excited utterance under § 27-803(1). The victims' age, the absence of significant force by Hobby toward them, and the time that elapsed between the alleged crime and Harlan's interview of the victims are considerations which make an excited utterance improbable. Under such circumstances, Harlan's testimony that one of the

victims appeared to be fairly upset and the other excited is not sufficient in my opinion to show the statements were made under the stress of the alleged crime. Most importantly, the victims' statements to Harlan were made in answer to questions he put to them in an interview after they were in the company of the neighbor and after both victims had had time to reflect. Such statements cannot be said to be spontaneous as required by the authority quoted in the majority's opinion.

IN RE ESTATE OF LILLIAN M. TVRZ, DECEASED. SANDRA TVRZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF LILLIAN M. TVRZ, DECEASED, APPELLANT, V. AUGUST T. "TED" TVRZ ET AL., APPELLEES.

608 N.W.2d 226

Filed April 4, 2000. No. A-98-1127.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. ___: ___. An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law, and, further, that in reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. ___: ___. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
5. **Statutes: Governmental Subdivisions: Public Assistance: Decedents' Estates.** Giving the statutory language its plain and ordinary meaning, a claim by the Department of Health and Human Services Finance and Support for reimbursement of medical assistance benefits pursuant to Neb. Rev. Stat. § 68-1036.02 (Reissue 1996) is one that necessarily falls within the provisions of Neb. Rev. Stat. § 30-2485(b) (Reissue 1995) as arising at or after the death of the decedent who is a recipient of those benefits.

Appeal from the County Court for Lancaster County: LAURIE J. YARDLEY, Judge. Reversed and remanded with direction.

Douglas W. Hand, of Frey & Hand Law Offices, for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and Gerald W. Pankonin, Special Assistant Attorney General, for appellee State.

HANNON, MUES, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Sandra Tvrz (Tvrz), the personal representative of the estate of Lillian M. Tvrz (Lillian), appeals the decision of the Lancaster County Court allowing a claim of the State of Nebraska, Department of Health and Human Services Finance and Support (the Department), for reimbursement of medical payments. Tvrz alleges that the trial court erred in determining that the claim was timely filed. For the reasons stated below, we reverse, and remand with direction to disallow the claim as untimely.

BACKGROUND

Pursuant to Neb. Rev. Stat. § 68-1036.02 (Reissue 1996), Lillian received medical assistance payments from August 1, 1993, to February 28, 1997, at which time she received an inheritance and no longer qualified for medical assistance. Lillian passed away on January 2, 1998. Tvrz filed an application for informal probate of will and informal appointment of personal representative in Lancaster County Court on February 6. Tvrz was appointed personal representative for Lillian's estate. Creditors were required to file their claims with the court on or before April 17. Notice was published in The Daily Reporter on February 17 and 24, and March 3. On February 19, notice was sent to seven interested parties and seven creditors, including doctors and hospitals. The affidavit of mailing notice stated that after diligent investigation and inquiry, Tvrz was unable to ascertain and did not know the post office address of any other party appearing to have a direct legal interest in the estate other than those to whom notice was mailed. No notice was mailed to the Department.

On July 21, 1998, the Department filed a petition for allowance of claim. An amended petition was filed on July 27. The amended petition alleged that the Department was a credi-

tor of the estate pursuant to § 68-1036.02 as Lillian had received medical assistance from the Department from 1993 to 1997. It further alleged, inter alia, that a claim had been mailed by the Department on or about April 14, to the Lancaster County Court and that the estate's attorney had received a copy of the same. The petition also alleged that no notice of the date for filing claims had been mailed to the Department as required by Neb. Rev. Stat. § 25-520.01 (Reissue 1995), even though Tvrz had actual or constructive knowledge of the debt to the Department because she had dealt with the Department on Lillian's behalf pursuant to a power of attorney for purposes of medical assistance benefits. Thus, the Department asserted it had 3 years to file a claim under § 25-520.01(a)(2). A copy of a claim in the amount of $79,955.01 and dated April 14, 1998, is attached to the petition.

In Tvrz' answer to the Department's amended petition filed on July 31, 1998, she denied knowledge that the Department had a claim against the estate for medical payments and asserted that the claim was barred as it was filed out of time. Tvrz also filed a notice of disallowance of the Department's claim on that same date.

A hearing was held on August 24, 1998. Sharon Butts, a Department estate recovery specialist since November 1997, testified that she is responsible for filing claims for reimbursement for medical assistance benefits from estates. She explained that the Department seeks reimbursement from estates which have assets and where the decedent is over 55, has received medical payments, has no surviving spouse, and has no minor or handicapped surviving children. Butts testified that she received notice of the date for filing claims in Lillian's estate by reading The Daily Record. Butts identified exhibit 1, which is an exact copy of the claim attached to the Department's amended petition, as a copy of the Department's original claim as prepared by her for filing in this estate, which claim she mailed on April 14, 1998.

Butts identified a letter dated July 9, 1998, from Tvrz to the Department in which Tvrz stated that no claim was in the county court file and that thus, the estate would be unable to pay the alleged claim. Butts testified that she received this letter on July 13 and then called the court to verify that there was no claim in

the file. The court informed her there was no claim filed. She testified that the estate's attorney had acknowledged receipt of a copy of the claim in the mail. Once she determined that no claim was on file in the county court, Butts filed the Department's petition for allowance.

Jean Nolte, a Department social service worker, testified that Lillian was her client and that Tvrz had a power of attorney for her. Nolte stated that she performed an annual eligibility review with Tvrz by telephone from 1994 until the case was closed in February 1997. Nolte explained that income, resources, and general information, such as address, were discussed in the annual reviews. Nolte testified that the case was closed because Tvrz informed the Department that Lillian had received an inheritance. She explained that the extent of her contact with Tvrz was the annual reviews by telephone followed by applications for review and signature sent to Tvrz after the telephone conversations.

The county court found that Neb. Rev. Stat. § 30-2485 (Reissue 1995) was controlling, that Tvrz knew the Department was a creditor of the estate, that the act of publication without mailing notice to the Department was not in compliance with § 25-520.01 and Neb. Rev. Stat. § 30-2483 (Reissue 1995), and that thus, the claim could be filed within 3 years. The court allowed the claim as timely. Tvrz appeals.

ASSIGNMENT OF ERROR

Tvrz alleges that the trial court erred in determining that the estate claim for reimbursement of medical payments by the Department was timely filed under § 30-2485.

STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998). An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law, and, further, that in reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party. *In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76

(1997). See, also, *In re Estate of Krichau*, 1 Neb. App. 398, 501 N.W.2d 722 (1992).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

DISCUSSION

Section 30-2485 provides, in pertinent part:

> (a) All claims against a decedent's estate which arose *before the death* of the decedent, including claims of the state and any subdivision thereof, *whether due or to become due* . . . are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) Within two months after the date of the first publication of notice to creditors if notice is given in compliance with sections 25-520.01 and 30-2483 . . . . If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, upon good cause shown, may allow further time not to exceed thirty days;
>
> (2) *Within three years after the decedent's death if notice to creditors has not been given in compliance with sections 25-520.01 and 30-2483.*
>
> (b) All claims, other than for administration expenses, against a decedent's estate which *arise at or after the death* of the decedent, including claims of the state and any subdivision thereof . . . are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;
>
> (2) *Any other claim, within four months after it arises.*

(Emphasis supplied.)

Although Tvrz' assignment of error is broad, she focuses her argument on subsection (b) of § 30-2485. Tvrz asserts that the Department's claim under § 68-1036.02 for reimbursement of medical payments did not arise until Lillian's death on January 2, 1998. We have reviewed the statutes and can find no statutes that refer to the liability of a recipient during his or her lifetime. Tvrz contends that the Department's claim falls under § 30-2485(b)(2), giving the Department 4 months after Lillian's death to present its claim. Because the Department's claim was filed more than 4 months after Lillian's death, Tvrz concludes that it should have been disallowed as untimely. The Department contends that the claim arose *before* the death of Lillian and that Tvrz did not comply with §§ 25-520.01 and 30-2483. Therefore, it contends that the trial court correctly found that § 30-2485(a)(2) allowed the Department up to 3 years after Lillian's death to present a claim, thus making its claim timely.

[3,4] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Id.*

The terms of § 30-2485 are plain and unambiguous. The claim for reimbursement was presented more than 4 months after Lillian's death, and if the claim arose *at or after* her death, it is barred by § 30-2485(b)(2). However, if it arose *before* her death, and notice was not properly mailed, the claim was timely as it was filed within 3 years. We conclude that the claim arose at or after the time of Lillian's death.

Section 68-1036.02 provides, in pertinent part:

> The *estate of a decedent* who has received medical assistance benefits under the medical assistance program established under section 68-1018 *shall be indebted* to the Department of Health and Human Services Finance and

> Support for the total amount paid for medical assistance on behalf of the decedent[.]

(Emphasis supplied.)

[5] It is not the recipient who is indebted to the Department, but, rather, the recipient's estate. Obviously, before there can be a recipient's estate, the recipient must die. Thus, there is no indebtedness so long as the recipient is alive. Giving the statutory language its plain and ordinary meaning, a claim by the Department for reimbursement of medical assistance benefits pursuant to § 68-1036.02 is one that necessarily falls within the provisions of § 30-2485(b) as arising "at or after" the death of the decedent who is a recipient of those benefits.

In the present case, there is no allegation of a contract with the personal representative which would make subsection (1) of § 30-2485(b) pertinent. Therefore, only subsection (2) of § 30-2485(b) is applicable. Thus, the claim was barred unless filed within 4 months after the recipient's death. Lillian died on January 2, 1998, and the Department's amended claim for reimbursement of medical assistance benefits was filed on July 27, 1998. The Department did not present a claim within 4 months of January 2, 1998. Under the unambiguous language of §§ 30-2485 and 68-1036.02, the Department's claim was barred as untimely because it was not timely filed.

CONCLUSION

The Department's claim arose at or after Lillian's death; therefore, the claim is clearly barred by § 30-2485(b)(2) as untimely. As such, the judgment of the trial court is reversed, and the matter is remanded with direction to disallow the claim as untimely.

REVERSED AND REMANDED WITH DIRECTION.

MUES, Judge, concurring.

I concur in the majority's conclusion that the Department's claim was untimely. But I reach that result without deciding whether the claim arose "before" as opposed to "at or after" Lillian's death.

I believe that under either § 30-2485(a) or (b), the Department's claim in the present case is barred. Of course, as

the majority concludes, if the claim arose at or after Lillian's death, subsection (b)(2) clearly bars it as untimely. But, even if it was deemed to have arisen before Lillian's death, the claim was still not presented in a timely manner under subsection (b) *unless* one first concludes that Tvrz failed to comply with §§ 25-520.01 and 30-2483. Only then would the Department get the benefit of the inordinately long 3-year period to file a claim under subsection (a)(2), presumably as retribution because Tvrz failed to give notice to one "appearing to have a direct legal interest in the estate." See § 25-520.01. "Appearing" as used in the statute can mean only as of the time the notice is to be mailed to creditors. I fail to see any evidence to support the finding of the county court that Tvrz knew of this debt to the Department or in any way transgressed the mailing-of-notice provision of the aforementioned statute. Accordingly, in my view, even if this was viewed as a claim that arose *before* Lillian's death, the Department was left with only the provisions of § 30-2485(a)(1), which granted it 2 months after publication of notice to creditors to file its claim, a time period even shorter than that of subsection (b)(2), which the majority concludes is applicable.

KRISTIN J. GRIESS, NOW KNOWN AS KRISTIN J. SWANSON, APPELLEE, V. BRYAN GRIESS, APPELLANT.
608 N.W.2d 217

Filed April 4, 2000. No. A-98-1259.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Child Support.** Whether overpayments of child support should be credited against future child support is a question of law.
3. **Equity: Jurisdiction: Appeal and Error.** The correct standard of review for a trial court's exercise of equity jurisdiction is de novo on the record with independent conclusions of fact and law.
4. **Child Support: Stipulations: Rules of the Supreme Court.** All stipulated agreements for child support must be reviewed against the Nebraska Child Support

Guidelines, and, if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made.

5. **Modification of Decree: Equity: Jurisdiction: Time.** A litigant seeking the vacation or modification of a prior decree or judgment after the term may take one of two routes: under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 1998) or under the district court's independent equity jurisdiction.
6. **Courts: Judgments: Time.** A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.
7. ___: ___: ___. The irregularity provision of Neb. Rev. Stat. § 25-2001 (Cum. Supp. 1998) does not apply to errors of law or judicial acts.
8. **Divorce: Modification of Decree: Equity.** Dissolution of marriage cases and proceedings for modification of the decree are equitable in nature.
9. **Equity: Jurisdiction.** A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
10. **Divorce: Child Support.** Child support payments become a vested right of the payee in a dissolution action as they accrue.
11. **Courts: Modification of Decree: Child Support.** A future payment of child support is not accrued and vested, and therefore a court may modify the amount of child support due in the future but may generally not forgive or modify past-due child support.
12. **Child Support.** The general rule is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required.
13. **Equity.** Equitable relief is not available when the party seeking relief has an adequate remedy at law.
14. **Equity: Jurisdiction.** Equity jurisdiction is not precluded by a legal remedy unless the latter is clear and certain, and the remedy at law, in order to be considered adequate, must be obtainable as of right. The mere existence of a possible remedy at law is not sufficient to warrant the denial of equitable relief.
15. **Equity.** Equitable remedies are a special blend of what is necessary, what is fair, and what is workable.
16. ___. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Douglas Pauley, of Conway, Pauley & Johnson, P.C., for appellant.

Gregory C. Damman and Joseph H. Murray, of Germer, Murray & Johnson, for appellee.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

SIEVERS, Judge.

This case stems from a child support order entered by the district court for Fillmore County in August 1996, which was admittedly incorrect and substantially so. Bryan Griess paid child support pursuant to this order until April 1998, and it is essentially undisputed that he has paid $18,922 more in child support than the Nebraska Child Support Guidelines would have required during those 20 months. Bryan filed an application to modify the child support order and to secure credit for the overpayment. Although finding that the amount of child support ordered in 1996 was incorrect by over $900 per month, the trial court denied his request for a credit. Bryan has appealed.

BACKGROUND

Bryan and Kristin J. Griess were divorced pursuant to a decree filed in the district court for Fillmore County on July 23, 1986. The Greisses had four children: Jami, Zachary, Cajun, and Nick. The original decree provided that Kristin would have the custody of the children and that Bryan would pay $300 per month in child support. In 1993, Jami's physical custody was changed from Kristin to Bryan, and Bryan's child support obligation was increased to $410 per month due to his increased income.

Zachary also began living with Bryan in August 1995. An order was entered on September 3, 1996, "officially" allowing Zachary to reside with Bryan. At the hearing on that matter, the parties stipulated on the record that "child support will be based under the guidelines promulgated by the Supreme Court on the basis of each of these parties having two minor children living with them." The parties agreed to reduce the calculations and sums to a written stipulation and order. Kristin's former attorney originally miscalculated the child support amount included in the modification order in 1996. At trial, Kristin testified that when she reviewed the draft stipulation with her former attorney and asked why the support had increased so much, he responded that the parties' "incomes had gone up, that the Supreme Court guidelines had increased, and that that was the calculation." Kristin's former attorney forwarded the proposed stipulation and calculation to Bryan's former attorney, who was to approve

it. Kristin's former attorney, apparently after no response from Bryan's former attorney, sent the proposed order to the district judge, Orville L. Coady, who signed and entered it without checking the accuracy of the child support calculations against the child support guidelines.

Pursuant to this "stipulation," the court increased Bryan's child support to $1,348 per month for the support of Cajun and Nick commencing on September 1, 1996. Also pursuant to a stipulation by the parties, the court granted Bryan a $136 per month credit from September 1, 1996, to June 1997, for the time that Zachary had already lived with Bryan, making Bryan's child support payments for those months $1,212. He was ordered to pay $1,288 in both July and August 1997, then $1,424 per month thereafter. Bryan did not learn of the increased amount of child support until 2 months later, when he saw it deducted from his paychecks through wage withholding. The calculation was erroneous because it was not based on each parent's having custody of two children; instead, it was calculated as if Kristin had custody of all four of the parties' children. Bryan did contact his former attorney at that time to question the high amount. His former attorney "recalculated" the amount and informed Bryan that it was correct, and Bryan continued to pay the amount ordered by the court.

In October 1997, Bryan contacted another attorney, who recalculated the amount and determined that Bryan had been paying much more than what the guidelines would require. Bryan filed an application for modification shortly thereafter on November 27, 1997. On April 14, 1998, a hearing was held regarding Bryan's application to modify. The district court reduced Bryan's child support obligation from $1,424 to $517 per month commencing May 1, 1998. The court also specifically found that the child support calculation made in August 1996 was incorrect and did not conform to the guidelines, but declined to rule further on the issue of credit at that time.

Another hearing was held in June 1998 to address the overpayment issue and Kristin's proposed move to Grandby, Colorado, a matter not at issue here. At that hearing, Kristin testified as follows regarding her use of the child support money she received from Bryan:

Q. If the Court were to give Mr. Griess a credit against his future child support obligation, and that credit amounted to approximately $318 per month, which would reduce his obligation from the current amount of $517 to approximately $199 . . . would you still be able to provide for yourself, your two boys, after this move to Grandby?

A. Of course.

Q. So as far as the child support amount received from Mr. Griess, that's not real relevant as far as providing for the boys, in your budget plan?

A. We have never budgeted for the child support payment, to help raise the children.

After the June hearing, the court entered a "Memorandum Finding" on October 30, 1998, declining to give Bryan any relief for the overpayments of child support that he had made. Bryan timely appealed.

ASSIGNMENTS OF ERROR

Using a number of legal and equitable theories, Bryan asserts that the district court should have granted him a credit toward his future child support obligation in the amount of $18,922 plus interest, which he asserts is equal to the child support that he has overpaid as a result of an incorrect child support calculation made in August 1996.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990).

[2,3] Whether overpayments of child support should be credited against future child support is a question of law. See *Gress, supra.* To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Id.*; *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). We note that the Supreme Court has recently said that the correct standard of

review for a trial court's exercise of equity jurisdiction is de novo on the record with independent conclusions of fact and law. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

ANALYSIS

A situation involving the substantial overpayment of child support due to an obviously incorrect calculation and court order has not been addressed by the appellate courts of Nebraska. Kristin does not dispute that Bryan was ordered to pay child support in excess of the guidelines. The overpayment is determined as follows:

	Amount Bryan Ordered to Pay	*Amount He Actually Paid	**Amount He Should Have Paid
9/1/96 through 6/1/97	($1,212 x 10) = $12,120	$11,684	($96 x 10) = $960
7/1/97	$1,288	$1,348	$432
***8/1/97	$644	$674	$148
9/1/97	$1,424	$1,348	$432
10/1/97 through 4/1/98	($1,424 x 7) = $9,968	$9,816	($568 x 7) = $3,976
Totals	$25,444	$24,870	$5,948

*Taken from the "Case Transaction History Report" of the Fillmore County District Court.

**Calculated pursuant to the Nebraska Child Support Guidelines based on income stated on 1996 calculation.

***Bryan was required to pay only half of $1,288 for August, because the children were with him for summer visitation.

Thus, the difference between what Bryan should have paid ($5,948) and what he actually paid ($24,870) is $18,922.

[4] The stated principle behind the child support guidelines "is to recognize the equal duty of both parents to contribute to the support of their children." Nebraska Child Support Guidelines, paragraph A. Paragraph C of the guidelines is applied as a rebuttable presumption and provides in part:

> All orders for child support obligations *shall* be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. All stipulated agreements for child support must be reviewed against the guidelines and,

> if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made. (Emphasis supplied.)

The lower court has acknowledged its failure to follow the guidelines and the mandated procedure quoted above. The court stated in its journal entry filed April 28, 1998, that "[t]he Court specifically finds that the split custody calculation as attached to the order dated August 19, 1996 was incorrect in its computation causing an overstatement in the amount of child support due and owing by the Respondent to the Petitioner." At the time of this journal entry, the court declined to rule on the matter of a credit, but after another hearing, the court, in its "Memorandum Finding," filed October 30, 1998, declined to give Bryan any relief, although stating that the trial court "was never aware or attempted to calculate the form as it should have been." We take this as an admission that the court did not check the figures and calculation presented to it by Kristin's former attorney, nor did it do its own child support worksheet.

[5] The overpayment is undisputed, and the trial court's error has been admitted. The question is whether Bryan is entitled to any relief. A litigant seeking the vacation or modification of a prior decree or judgment after the term may take one of two routes: under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 1998) or under the district court's independent equity jurisdiction. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995). See *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000). We first consider § 25-2001.

Applicability of § 25-2001(3).

[6] Section 25-2001 provides that "[a] district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (3) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." The first part of subsection (3) of this section, providing that a judgment may be vacated "for mistake, neglect, or omission of the clerk," clearly has no application here. The second part of subsection (3), dealing with "irregularity in obtaining a judgment or order," refers to judgments or orders rendered contrary to the course of law and the practice of the courts.

[7] *Paine v. United States Nat. Bank of Omaha*, 199 Neb. 248, 257 N.W.2d 826 (1977), considered the scope of § 25-2001 and the concept of "irregularity in obtaining a judgment or order." The court said that even if, as contended by the appellant, the trial court overlooked a provision in the will which would make a difference in the result, a judgment was entered, no appeal was taken, and the judgment was final. Thus, this was not the type of mistake or irregularity embraced within the ambit of § 25-2001. *Paine, supra.* In *State ex rel. Ward v. Pape*, 237 Neb. 283, 465 N.W.2d 760 (1991), a putative father moved to vacate a paternity judgment on the ground that a Supreme Court decision mandating appointment of counsel for indigents in paternity actions should be applied retroactively. The court in *State ex rel. Ward* cited back to *Paine*, saying that it is clear that the "irregularity" provision of § 25-2001 did not apply to errors of law or judicial acts. Therefore, we must conclude that the entry of an order for payment of child support is a judicial act which is excluded from the reach of § 25-2001. We note that fraud of counsel is a basis for relief under subsection (4) of § 25-2001, but there is no claim of fraud by Kristin's former attorney. Thus, Bryan's claim that § 25-2001 should apply is rejected.

Equitable Power of Court.

[8] Bryan argues that even if § 25-2001 does not apply in this case, the district court should have invoked its equitable powers to provide him relief. In Nebraska, dissolution of marriage cases and proceedings for modification of the decree are equitable in nature. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985).

[9] As we said above, the statutory grounds for vacating a judgment after term under § 25-2001 are not exclusive, but exist concurrently with independent equity jurisdiction. Thus, even though the statutory grounds for modifying or vacating a judgment after term are inapplicable to this case, Bryan may seek relief via the court's equity jurisdiction. A court of equity which has obtained jurisdiction for any purpose may retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Daugherty v. Ashton*

Feed and Grain Co., Inc., 208 Neb. 159, 303 N.W.2d 64 (1981); *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976).

[10,11] It has been a longstanding rule in Nebraska that child support payments become a vested right of the payee in a dissolution action as they accrue. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991). While a past-due child support arrearage is already accrued and vested, a future payment is not. *Gress, supra.* A court may, therefore, modify the amount of child support due in the future but may generally not forgive or modify past-due child support. *Id.* However, Nebraska appellate courts have allowed the granting of a credit against a child support arrearage under limited circumstances. For example, in *Berg, supra*, the court held that it was proper to allow the father a credit against his child support arrearage for child-care expenses he incurred while two of the parties' four children for whom he was paying child support were living with him. See, also, *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990); *Redfield v. Redfield*, 6 Neb. App. 274, 572 N.W.2d 422 (1997).

The facts here are analogous to those of *Berg, supra*, because two of the parties' four children were living with Bryan, but he was paying child support to Kristin based on a child support calculation that he pay for all four children. In contrast to *Berg*, Bryan does not have an arrearage against which to set off future payments. Thus, "balancing the books" becomes more complicated, but that is not determinative when equitable relief is under consideration. Bryan asks for a setoff or credit against his future child support payments.

Because there is no reported Nebraska case like this, we proceed by what we see as analogous situations. In *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990), the Supreme Court held that Social Security payments made to a parent's children on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation, in the absence of circumstances making the allowance of such a credit inequitable. The court in *Hanthorn* stated that the Social Security payments may satisfy the parent's court-ordered child support only on a month-to-month basis. Likewise, in *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993), the

court explained that Social Security dependency benefits are not a mere gratuity from the federal government, but, rather, have been earned in part through an employee's payment of Social Security taxes. A request to credit Social Security benefits made on behalf of a deceased parent was deemed only a request for a change in the source of payment, which does not require a modification hearing, but only an opportunity for the custodial parent to adduce evidence of any inequity that might occur as the result of crediting those benefits to court-ordered child support. *Id.*, citing *Board v. Board*, 690 S.W.2d 380 (Ky. 1985) (holding that crediting of Social Security payments is not modification of decree). Our conclusion from these cases is that the baseline consideration is what is equitable or fair.

[12] We recognize that the payments at issue were not "voluntary" or "extra" payments because they were in compliance with the obligation imposed by the court's order, albeit a flawed order. Nonetheless, we think that cases involving voluntary payments above and beyond the court-ordered payments provide some help in this obviously murky situation. The general rule appears to be that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required. The principle behind this rule is that such a credit would be tantamount to allowing one party to unilaterally modify the decree which could result in the deprivation of future support benefits. See, *In re Marriage of Rogers*, 283 Ill. App. 3d 719, 670 N.E.2d 1154, 219 Ill. Dec. 266 (1996); *Finley v. Morrow*, 697 S.W.2d 543 (Mo. App. 1985); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977); *Raczynski v. Raczynski*, 558 P.2d 425 (Okla. App. 1976). See, generally, 24A Am. Jur. 2d *Divorce and Separation* § 1067 (1998); Annot., 47 A.L.R.3d 1031 (1973).

"Voluntary overpayments" have included many items that were not ordered by a court via the parties' decree. See, *Ardizzone v. Bailey*, 542 A.2d 806 (Del. Fam. 1987) (travel expenses); *Onley v. Onley*, 540 So. 2d 880 (Fla. App. 1989) (automobile purchased for child); *Henderson v. Henderson*, 166 Ga. App. 412, 304 S.E.2d 517 (1983) (tuition or educational expenses); *Harner v. Harner*, 105 Ill. App. 3d 430, 434 N.E.2d 465, 61 Ill. Dec. 312 (1982) (continued child support payments

under mistaken belief that payments were required after child reached majority); *Whitman v. Whitman*, 405 N.E.2d 608 (Ind. App. 1980) (clothing, gifts, food, entertainment); *Finley v. Morrow*, 697 S.W.2d 543 (Mo. App. 1985) (erroneous interpretation or recollection of terms of contract for child support approved by court). But, we could not find a reported case where the payments at issue were not voluntary because they were made pursuant to a court order, albeit a grossly incorrect order, and made as a result of the trial court's failure to perform its duty with respect to the entry of such order.

Exceptions are made to the "no credit for voluntary overpayment rule" when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children. See, *State ex rel. DHR v. Scott*, 637 So. 2d 892 (Ala. App. 1994); *In re Marriage of Rogers, supra*; *Finley, supra*; *Goodson, supra*; *Raczynski, supra*. See, generally, 24A Am. Jur. 2d, *supra*, § 1068.

We find that the exception to the rule is applicable to the situation at hand. Both parties' attorneys in the original modification action had a hand in producing the erroneous calculation of child support. It appears that Kristin's former attorney produced the original calculation, which Bryan's former attorney either overlooked, ignored, or implicitly approved by inaction. Although Bryan questioned the amount, he was assured by his former attorney that it was correct. The trial judge failed to check the figures submitted to him. Bryan paid the court-ordered sum for 20 months and was not delinquent. When Bryan contacted a different attorney some time later and was told that the child support figure was wrong, he filed an application for modification.

[13,14] The fact that Bryan's former attorney failed to ensure that Bryan was ordered to pay only the proper amount of child support gives us considerable pause in assessing Bryan's request for relief. This is because the general rule is that equitable relief is not available when the party seeking relief has an adequate remedy at law. *Ganser v. County of Lancaster*, 215 Neb. 313, 338 N.W.2d 609 (1983). However, it is generally recognized:

> Equity jurisdiction is not precluded by a legal remedy unless the latter is clear and certain, and the remedy at law,

> in order to be considered adequate, must be obtainable as of right. The mere existence of a possible remedy at law is not sufficient to warrant the denial of equitable relief.

27A Am. Jur. 2d *Equity* § 39 at 545-46 (1996).

Although Bryan may have a potential remedy at law against his former attorney, we are unable to ignore the fact that the trial judge wrongfully entered a child support order, which was obviously grossly incorrect. To do so, and leave Bryan with only a potential malpractice claim against his former attorney, would convey the impression that we are protecting one of our judicial brethren, notwithstanding that the facts cry out for equitable relief. Paragraph C of the child support guidelines instructs that all orders for child support obligations shall be established in accordance with the provisions of the guidelines, see *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999), absent an express finding by the trial court that one or both of the parties have rebutted the presumption that the guidelines apply, *Polly v. Polly*, 1 Neb. App. 121, 487 N.W.2d 558 (1992). There was no such finding here and no reason for the court to enter an order which was so obviously wrong. Accordingly, we conclude that equitable relief is appropriate.

We must determine if allowing a credit will work a hardship on the minor children. At trial, Kristin testified to the effect that she could take care of the children if the monthly child support payments were reduced to only $199 and that she has "never budgeted for the child support payment, to help raise the children." From Kristin's testimony, there is clear evidence that granting Bryan some sort of credit against his future child support payments will not work a hardship on the children in Kristin's custody.

Equitable Relief.

[15,16] Under our de novo review of the trial court's decision not to use its equitable powers to grant Bryan relief, see *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000), we find that Bryan should receive relief from the erroneous child support calculation. We still must decide the appropriate relief in this situation. "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon*

v. Kurtzman, 411 U.S. 192, 200, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973). In *Janke v. Chace*, 1 Neb. App. 114, 487 N.W.2d 301 (1992), we also said that where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. In the present case, we must strike an appropriate balance between Bryan's rights, Kristin's rights, and the needs of the children in Kristin's custody.

It would not be fair or feasible to require Kristin to return payments already made, which leaves us with only the option of a credit against future payments. We note that Bryan's child support obligation will end after his September 1, 2003, payment, when Nick, the parties' youngest child, reaches the age of 19. Thus, there are approximately 40 months of support to be paid, depending on the precise date of our mandate (which we cannot now know for certain). Therefore, we order that Bryan receive a credit of $517 per month, beginning with the first payment due after our mandate is issued until Bryan has been credited the $18,922 he has made in excess payments—a period of 37 months. Should it be later determined in a modification proceeding that Bryan's child support should exceed $517 per month, his monthly credit shall not exceed $517 for 37 months. Additionally, in keeping with the notion from *Janke, supra*, that equity crafts the necessary remedy, we also direct that if Bryan obtains any civil recovery from his former attorney, the amount of such recovery shall be offset on a monthly pro rata basis against any of the unaccrued monthly credit which we have provided for herein.

We reverse, and remand the matter to the district court for the entry of an order modifying the decree in accordance with our opinion and for such further orders as may be necessary if Bryan obtains any recovery from his former attorney. By mentioning the potential of Bryan's obtaining civil relief from his former attorney, we emphasize that we do not intend to imply anything about the merits of any such claim, a matter which is not before us for decision, but which is nonetheless relevant in considering the appropriate relief in the instant case.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, v. DEREK J. SCOVILL, APPELLANT.

608 N.W.2d 623

Filed April 4, 2000. No. A-99-154.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo.
3. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions which must be jealously and carefully drawn and applied only where there is a showing that the exigencies of the situation made that course imperative.
4. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
5. **Search and Seizure: Motor Vehicles.** Less rigorous requirements govern searches of automobiles, not only because of the element of mobility, but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.
6. **Constitutional Law: Search and Seizure: Proof.** The State must prove an inventory search was conducted pursuant to standard operating procedures to be constitutional under both federal and state Constitutions.
7. **Search and Seizure: Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** If police have probable cause to search a vehicle, the police may search every part of the vehicle and any container, relevant to the item sought, found therein pursuant to the automobile exception.
8. **Probable Cause: Words and Phrases.** Probable cause is a fair probability that contraband or evidence of a crime will be found and is determined by a standard of objective reasonableness, i.e., whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
9. **Search and Seizure: Motor Vehicles.** A driver of a vehicle does not lose his or her expectation of privacy in containers which had been in a vehicle but which were strewn about near the vehicle as a result of an accident.
10. **Constitutional Law: Investigative Stops: Probable Cause: Police Officers and Sheriffs.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
11. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs: Weapons.** An officer who reasonably believes that a person is armed and dangerous is entitled

for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Randall Wertz, Deputy Thayer County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marie Colleen Clarke for appellee.

HANNON, SIEVERS, and INBODY, Judges.

HANNON, Judge.

I. INTRODUCTION

Defendant, Derek J. Scovill, appeals his convictions for possession of methamphetamine, alprazolam, and marijuana on the basis that the evidence admitted against him was the fruit of an illegal search of the glove box of his car conducted after the car had been involved in a one-vehicle accident. Scovill specifically alleges, restated, that the trial court erred in (1) not making the necessary findings required by law and (2) admitting the evidence discovered in searches of his car, containers strewn about the accident scene, and his person. We reverse his convictions because the searches of the glove box, containers, and his person were unconstitutional and therefore the evidence obtained therefrom should have been excluded by the trial court.

II. PROCEDURAL BACKGROUND

The State of Nebraska charged Scovill by information with four counts of drug-related offenses: (1) possession of methamphetamine, pursuant to Neb. Rev. Stat. § 28-416(3) (Reissue 1995); (2) possession of alprazolam, also pursuant to § 28-416(3); (3) possession of marijuana, pursuant to § 28-416(11); and (4) possession of drug paraphernalia, pursuant to Neb. Rev. Stat. § 28-441 (Reissue 1995). Scovill made a motion to suppress to exclude the drugs and paraphernalia as fruit of an illegal search in violation of his rights under the U.S.

Const. amend. IV and Neb. Const. art. I, § 7. The district court for Thayer County overruled Scovill's motion to suppress as well as Scovill's renewed objection to the evidence at the bench trial. At the close of the evidence, the trial court dismissed the drug paraphernalia charge but found Scovill guilty on the remaining three charges. Scovill was sentenced to probation and ordered to pay court costs; he now appeals his convictions.

III. SUMMARY OF EVIDENCE

Nebraska State Patrol Trooper Kyle Johansen was dispatched to the scene of a one-car accident, occurring earlier in the day near Byron, Nebraska, in rural Thayer County, after a passerby reported seeing a weapon in the car. Johansen had visited the accident scene earlier in the day and had a brief conversation with Thayer County Deputy Sheriff Gordon Downing about the accident. At that time, Johansen observed an individual in the back of Downing's car whom Downing identified as the driver of the car in the accident and whom Johansen later learned was Scovill. Johansen talked to Downing a second time about the accident while at the sheriff's station later that same day, but before Johansen was dispatched to the scene on the weapons call.

When Johansen responded to the dispatch, he looked inside and immediately observed a handgun on the front passenger seat. At the time he responded to the call, no one else was present at the accident scene. Johansen testified that he did not remember whether he reached through a broken window to pick up the gun but that he did eventually open the passenger door of the car. Upon closer examination of the gun, Johansen realized it was a BB gun. After making this determination, Johansen continued searching for other weapons and for the registration of the vehicle. He testified that while he had seen the person identified as the driver, he was curious as to who owned the car. Johansen opened the glove box and found the car's registration, which listed Scovill as the owner. He also found a piece of broken mirror and small medical forceps which were burnt on the ends, which Johansen believed were drug paraphernalia.

Johansen then searched the remainder of the car for contraband before turning the focus of his search to the items strewn

about the accident scene. Johansen first found a Crown Royal whiskey bag about 30 feet in front of the vehicle, which he picked up and, upon feeling a small box inside, opened the bag and removed the box. He then opened the box and found a small, grain scale. Johansen also found a closed six-pack cooler, which he opened. Inside the cooler was a cardboard tube, which Johansen also opened and found short plastic straws which he believed were used for inhaling illegal drugs. Finally, Johansen found a bong, a pipe used for smoking marijuana, in a corn row in the harvested cornfield adjacent to the ditch which was "a considerable distance" from the other items that were strewn about.

Johansen collected the paraphernalia and other items strewn about the scene and placed the paraphernalia in his patrol car and the rest of the items in the trunk of Scovill's car. He then called Downing back to the scene to discuss what he had found. Downing informed Johansen that he could probably find Scovill at a truckstop in Hebron, Nebraska. While Downing remained at the scene, Johansen went to the truckstop and found Scovill leaning against an outside wall of the building. Johansen testified that he, while in uniform, approached Scovill and asked if he was Scovill. After Scovill nodded that he was, he informed Johansen that he was the only occupant in the car at the time of the accident and that the items in the car belonged to him.

Johansen then explained to Scovill that he had found drug paraphernalia at the scene and then asked whether Scovill had any weapons or contraband on his person. Scovill stated that he did not have any weapons. Johansen patted Scovill down nonetheless. Specifically, Johansen testified that he conducted the pat-down search because, based on what Johansen had found at the scene, he believed Scovill "still could have had drugs on him or possibly a weapon." On cross-examination, Johansen admitted he conducted the pat down "basically to search him to see if [he] could find anything else." Johansen also testified that he did not have any reason to believe Scovill was armed and dangerous other than the fact that Johansen did not know him, a possibility that exists with virtually anyone. Johansen was also curious because Scovill only answered that he did not have any weapons and said nothing about whether he had any contraband.

Johansen testified that he thought he could not have arrested Scovill at that point because he had only found drug paraphernalia which he knew to be an infraction which would justify only the delivery of a citation in lieu of arrest.

Johansen started with the right front pocket of Scovill's ski jacket and, without manipulation, felt what he believed to be a pipe used for smoking marijuana. He then asked Scovill to remove the item from his pocket, which he did, and Johansen found that it was a marijuana pipe which still had residue inside. Johansen next patted the right front change pocket of Scovill's jeans and felt a small bulge. Johansen manipulated the bulge a little to see if it was soft and then removed it from the pocket. Johansen discovered that the item was a wad of plastic wrap containing some marijuana. There was also a cellophane wrapper containing part of a pill later determined to be alprazolam.

As Johansen continued his pat-down search on the right side of Scovill's coat, he felt a pocket with a small rectangular box inside. Johansen asked Scovill what the box contained, to which Scovill replied, "[S]ome meth." Johansen then removed the box, opened it, and found a razor and a small baggie containing a yellowish white powder, which Johansen believed to be methamphetamine. Johansen testified that he did not arrest Scovill until he completed searching him and that then he placed Scovill under arrest for possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia.

IV. ASSIGNMENTS OF ERROR

Scovill alleges, restated, that the trial court erred in (1) failing to make sufficient findings of fact or law regarding the warrantless search of Scovill's automobile and (2) overruling Scovill's motion to suppress and holding that the detention and search were justified.

V. STANDARD OF REVIEW

[1,2] The Nebraska Supreme Court articulated the applicable standard of review for this case in *In re Interest of Andre W.*, 256 Neb. 362, 365, 590 N.W.2d 827, 830 (1999):

> A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investi-

gatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. [Citation omitted.]

A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. However, findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.

VI. ANALYSIS

1. First Assignment of Error

Scovill's first assignment of error alleges that the trial court failed to make the necessary findings mandated by *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). With respect to granting or denying a motion to suppress, *Osborn* held:

> Such findings of fact may be indispensable to a proper appellate review. [Citations omitted.] Without guidance, we might not know whether the trial court rejected a defendant's factual contentions or had acted on some legal basis. Under our standard of review, we would not know the basis of the trial court's judgment. A different standard of review applies to each. Henceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary, of course, from case to case.

250 Neb. at 66-67, 547 N.W.2d at 145. Here, the trial court entered several paragraphs in its trial docket regarding the admission of the evidence against Scovill. While the trial court did not discuss what Scovill apparently believes it should have discussed, the trial docket, albeit difficult to follow, attempts to explain the trial court's reasoning in admitting the evidence against Scovill.

Osborn explained that the necessary findings would vary according to the applicable standard of review and the facts and

circumstances of each case. In this case, the issues appealed center on whether Johansen had reasonable suspicion or probable cause to conduct the searches of the glove box, containers, accident scene, and Scovill's person. The trial court's factual findings in this case are of relatively no moment because the applicable standard requires us to review reasonable suspicion and probable cause de novo. Also, Scovill does not dispute any facts in evidence, only whether Johansen's searches were lawful. Accordingly, we find this assignment without merit.

2. Second Assignment of Error

(a) Glove Box

Scovill argues that Johansen illegally searched the glove box of the car and that therefore all of the evidence discovered thereafter is tainted as fruit of the poisonous tree. Both the U.S. Constitution and the Nebraska Constitution protect people against unreasonable searches and seizures. See, *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990). Johansen's actions in this case clearly merit analysis under this body of law. Johansen searched Scovill's car, his belongings, and his person and seized several items found during these searches. He also seized Scovill himself when he conducted the pat-down search.

[3,4] In *State v. Craven*, 253 Neb. 601, 606, 571 N.W.2d 612, 617 (1997), the Nebraska Supreme Court stated:

> While searches and seizures conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable, warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few "'"specifically established and well-delineated exceptions"'" which must be "'"jealously and carefully drawn". . .'" and applied only where there is a showing that "'"the exigencies of the situation made that course imperative."'"

(Citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), and *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996)). The law is equally clear that "[i]n the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more

of the exceptions to the warrant requirement." *Craven*, 253 Neb. at 606, 571 N.W.2d at 617.

[5] We turn first to the search Johansen conducted at the scene of the accident. With respect to the search of a vehicle, the Nebraska Supreme Court has opined:

> Less rigorous requirements govern searches of automobiles, not only because of the element of mobility, but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. [Citation omitted.] One has a lesser expectation of privacy in a motor vehicle because its function is for transportation purposes and it seldom serves as one's residence or as the repository of personal effects. [Citations omitted.] As such, the recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view.

State v. Konfrst, 251 Neb. 214, 223-24, 556 N.W.2d 250, 258-59 (1996). Accordingly, because Johansen conducted his search of Scovill's car without a warrant, the State must show that the search falls within one of the listed exceptions to the warrant requirement in order for the evidence to be admissible.

(i) Inventory Search

[6] With respect to Johansen's search of the glove box, the State solely argues that Johansen performed a public caretaking function as part of an inventory search. We agree with the apparent choice by the State not to argue any of the other exceptions for vehicles, as we believe the evidence in the record fails to provide sufficient support for the other exceptions. Inventory searches, which are excepted from the warrant requirement under the U.S. Constitution and the Nebraska Constitution, are judged by a standard of reasonableness. See *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993). "However, such searches must be performed in accordance with standard operating procedures." *Id.* at 279, 494 N.W.2d at 547. See, also, *Newman, supra* (reiterating that State must prove inventory search was conducted pursuant to standard operating procedures to be constitutional under both federal and state Constitutions).

The progeny of U.S. Supreme Court cases regarding inventory searches has consistently required showing some standardized procedure or established routine. In *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the Court found an inventory search performed in accord with strict police department guidelines constitutional. In *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), the Court held that an inventory search of an arrested person's backpack was reasonable because the arrest was lawful and the search was part of the routine procedure for booking an arrested person.

Similarly, in *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court concluded that reasonable police regulations relating to inventory searches conducted in good faith satisfy the Fourth Amendment. Finally, in *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990), the Court explained that requiring some standardized criteria or established routine to regulate inventory searches prevents such searches from becoming a pretext for general rummaging to find incriminating evidence.

Johansen did not testify regarding any procedures or routines, and the State provided no other evidence of the same. Because the State carried the burden of proving the applicability of the exception to the warrant requirement, its failure to make this necessary showing results in our finding that the inventory search exception does not apply in this case. See *Filkin, supra* (explaining that law enforcement departments are not required to have inventory search policies in writing; however, State must prove that search was made pursuant to standardized procedures or established routine, or court must find such search unconstitutional). Further, the record does not reflect that Johansen searched the car and collected the items strewn about in order to secure and protect them as discussed in *Opperman, supra*, as the justification for an inventory search.

(ii) Community Caretaking

The State also argues that Johansen was performing a community caretaking function, which excepts his actions from the warrant requirement under federal and state law. Nebraska has only addressed the community caretaking function once, in *State*

v. Smith, 4 Neb. App. 219, 540 N.W.2d 374 (1995). See, also, *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999) (declining to consider community caretaking exception as State requested because circumstances of case did not give rise to need to address issue). In *Smith*, we recognized that "under appropriate circumstances a law enforcement officer may be fully justified in stopping or contacting a vehicle to provide assistance, without needing any reasonable basis to suspect criminal activity." 4 Neb. App. at 225, 540 N.W.2d at 379. We cited *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), which explained that times occur in which local police officers investigate accidents, not under a claim of criminal liability, but under a community caretaking function divorced from the detection, investigation, or acquisition of evidence of a crime. Accordingly, we held that the officer in *Smith* constitutionally detained a vehicle for a brief period of time to determine the condition of the driver when the officer believed exigent circumstances might have existed.

We note briefly that *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996), which came after our decision in *Smith*, did not list community caretaking as an exception to the warrant requirement with respect to vehicles. *Konfrst* stated that the recognized exceptions to the warrant requirement "included" the ones listed. *Konfrst* gave no indication that the list provided was exhaustive. Further, *Konfrst* cited only generally to 68 Am. Jur. 2d *Searches and Seizures* §§ 61 and 62 (1993) for the list of exceptions provided. This situation, coupled with the close parallel between federal and Nebraska search and seizure laws, leads us to believe the Nebraska Supreme Court did not intentionally omit the community caretaking exception for the purpose of barring the use of the exception in appropriate cases.

In this case, no evidence suggests the presence of any exigent circumstances. In fact, Johansen testified that he opened the glove box because he was curious as to who owned the car. This reason is not sufficient to constitute a community caretaking function. The record presents no evidence that Johansen's duties while at the scene of the accident required him to open and search the glove box. If such a need existed, the State carried the burden to prove it, and in the absence of such a showing, we find that the community caretaking function does not apply.

(b) Accident Scene

Scovill also argues that the evidence Johansen found in the containers strewn about the accident scene was fruit of the illegal search of the glove box and therefore was inadmissible. The State asserts that Johansen acted reasonably in taking an inventory of the items ejected from the car and that Scovill cannot have a reasonable expectation of privacy in the items left in the ditch. In support of its argument, the State cites *State v. Cronin*, 2 Neb. App. 368, 509 N.W.2d 673 (1993), where we held that cocaine discarded by a defendant while pursued on foot by the police constituted abandoned property for search and seizure purposes. In the instant case, the State asserts that even without the search of the glove box, these items remain admissible because no expectation of privacy could attach at the time Scovill left them lying in the ditch as he left with Downing.

[7] In *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), the U.S. Supreme Court specifically addressed the issue of searching containers located in automobiles, the automobile exception. The Court held that if the police have probable cause to search a vehicle, the police may search every part of the vehicle and any container, relevant to the item sought, found therein pursuant to the automobile exception. See, also, *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985) (stating that Nebraska has adopted the *Ross* rule), *abrogated on other grounds, Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

[8] The Nebraska Supreme Court defines probable cause as

> "'"a fair probability that contraband or evidence of a crime will be found."'" . . . Probable cause is determined by a standard of objective reasonableness, i.e., whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of [a] crime will be found.

State v. Craven, 253 Neb. 601, 610, 571 N.W.2d 612, 619 (1997). After assessing that the weapon was a legal BB gun, Johansen did not have probable cause to search Scovill's car or the containers according to the evidence in the record. Further, Johansen testified that he searched the glove box because he was curious as to who owned the car; he did not testify that he

observed any facts or circumstances which reasonably indicated that contraband or evidence of a crime would be found. Johansen's curiosity does not dispense with the requirement of probable cause. Without probable cause to search the car, Johansen's search of the containers was illegal.

As for the State's argument that Scovill had no expectation of privacy in containers he left strewn about the accident scene, we find that the State misapplies *Cronin, supra*. In that case, we addressed the admissibility of drugs discarded by the defendant while being pursued by police officers. We held that because the defendant discarded the property before the police had applied physical force to restrain him, the drugs were abandoned property which could be lawfully recovered by the officers. In this case, Scovill did not intentionally throw the containers in the ditch while evading police; rather, the containers were strewn about as a result of the accident. The record contains no evidence that Scovill left the containers in the ditch with the intent of abandoning them.

[9] Based on the record, we conclude that a driver of a vehicle does not lose his or her expectation of privacy in containers which had been in a vehicle but which were strewn about near the vehicle as a result of an accident. The containers were inadvertently thrown into the ditch by the accident, and we believe this is insufficient to strip Scovill's expectation of privacy in them, which the law otherwise accepts as reasonable. According to the authority discussed above, containers in vehicles require probable cause for the container or for the vehicle generally in order to be searched. We believe these containers required no less. Further, if Johansen believed he needed to search the containers, he could have secured them and obtained a warrant first.

With respect to the bong, we believe Johansen acted lawfully under the plain view doctrine. "Objects falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search." *State v. Merrill*, 252 Neb. 510, 516, 563 N.W.2d 340, 344 (1997). Johansen found the bong lying on the ground while he walked around the accident scene. Johansen acted lawfully in walking around the accident and is therefore not prohibited from seizing recognized contraband. The bong alone may have justified Johansen in continuing an investigation and perhaps given him reasonable suspicion to

conduct a *Terry* stop of Scovill at the truckstop, but, alone, it does not justify a full search. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Probable cause was needed, and the bong alone in these circumstances could not provide it. See, e.g., *State v. Brownlie*, 149 Or. App. 58, 941 P.2d 1069 (1997) (holding that marijuana pipe alone seen in purse with use of x ray machine at courthouse did not give rise to probable cause to search or arrest).

We note however that all of the evidence that Johansen was aware of at this point was drug paraphernalia, an infraction.

(c) Scovill's Person

[10] We now turn to Johansen's search of Scovill's person at the truckstop.

> " ' "[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment.' " . . . " 'Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause." . . .' "

State v. Soukharith, 253 Neb. 310, 321, 570 N.W.2d 344, 354 (1997). Under this standard, Johansen was justified in speaking to Scovill in light of the bong found at the accident scene and the fact that Scovill stated, early in the conversation with Johansen, that the items at the scene belonged to him.

[11] The next question then is whether the evidence Johansen found when searching Scovill is admissible. For the evidence to be admissible, Johansen must have had sufficient foundation for conducting the pat down and have conducted the search within its proper scope.

> The standard has long been that an officer who reasonably believes that a person is armed and dangerous is entitled for the protection of himself or herself and others to conduct a carefully limited search of the outer clothing of such person in order to discover weapons which may be used to assault him or her.

In re Interest of Andre W., 256 Neb. 362, 367, 590 N.W.2d 827, 831 (1999). We do not need to address whether Johansen had reasonable suspicion that Scovill was armed and dangerous, because we find that even if he had such a belief, Johansen exceeded the limited scope of the search.

In *State v. Kimminau*, 240 Neb. 176, 181, 481 N.W.2d 183, 187 (1992), the Nebraska Supreme Court explained that a pat-down search must be " 'carefully limited' " to a search for weapons and that a search conducted to look for both firearms and controlled substances exceeds the scope of a *Terry* search. The court found that the evidence in that case was however admissible because the officers also had probable cause to arrest the defendant at the time of the search. Johansen testified that he patted Scovill down because he believed Scovill could still have drugs on him or possibly a weapon, and he admitted that he thought he did not have grounds to arrest Scovill prior to the search of his person, but only to give him a citation in lieu of arrest. As articulated in *Kimminau*, a search for this combination of reasons goes beyond the permissible scope of a *Terry* search.

"Evidence obtained as the fruit of an unconstitutional search and seizure is inadmissible in a state prosecution." *State v. Hicks*, 241 Neb. 357, 367, 488 N.W.2d 359, 365 (1992) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). Accordingly, the evidence obtained from Johansen's search of the glove box, the bag, the cooler, and Scovill's person is inadmissible as fruit of illegal searches. Only the bong was lawfully discovered and therefore admissible against Scovill in this case.

Finally, we address *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992), which both parties and the trial court cited in support of their positions on Johansen's search. In *Sassen*, police officers who noticed that a car did not have a front license plate and was being driven with its back window completely covered in snow stopped the car and spoke with the driver. The driver admitted that she was driving without a driver's license, and during the course of later conversation, the officers observed that the driver had drug paraphernalia. The officers then arrested the driver; searched the car, her purse, and her person; and found methamphetamine.

The Nebraska Supreme Court affirmed the driver's conviction for possession of a controlled substance and found the driver's argument that the officers did not have probable cause to arrest her without merit. The driver argued that Neb. Rev. Stat. § 29-435 (Reissue 1995) requires officers to issue a citation in lieu of an arrest when faced with an infraction such as possession of drug paraphernalia. *Sassen* noted that the driver's argument was faulty because at the time of the arrest, the officers had three separate misdemeanors supporting the arrest—the missing license plate, driving without a license, and snow covering the rear window.

In additional comments, *Sassen* noted that § 29-435 makes an exception for situations falling under Neb. Rev. Stat. § 29-427 (Reissue 1995), which states:

> Any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain him further when the accused fails to identify himself satisfactorily, or refuses to sign the citation, or when the officer has reasonable grounds to believe that (1) the accused will refuse to respond to the citation, (2) such custody is necessary to protect the accused or others when his continued liberty would constitute a risk of immediate harm, (3) such action is necessary in order to carry out legitimate investigative functions, (4) the accused has no ties to the jurisdiction reasonably sufficient to assure his appearance, or (5) the accused has previously failed to appear in response to a citation.

According to *Sassen*, the investigation following the driver's arrest was directly related to the charge of drug possession, and all the circumstances taken together required further investigation. *Sassen* held that the search was permitted under § 29-427.

While this case also involves an initial finding of drug paraphernalia, we believe that *Sassen* is distinguishable from this case in several legally significant ways. First, the officers in *Sassen* had three independent causes to arrest the driver, but in this case, Johansen had no such other reasons to support his actions. Further, any arrest of Scovill would not have justified searching his car incident to that arrest, like the search in

Sassen, because "the search incident to that arrest is valid if conducted in the area within the arrestee's " 'immediate control,' " the area from within which the arrestee could gain possession of a weapon or destructible evidence." *Sassen*, 240 Neb. at 777, 484 N.W.2d at 472. Here, Scovill was miles from his car when Johansen approached him.

With respect to the additional comments in *Sassen*, we note that in this case, Johansen testified that he knew he did not have grounds to arrest Scovill and that he did not arrest Scovill in order to carry out any further investigative functions. Rather, Johansen investigated first, then arrested based on what he had found. This sequence directly contradicts § 29-427, which begins by stating that an officer having grounds for an arrest or having done so already may continue to satisfy an investigative need. With these important distinctions in mind, *Sassen* does not apply in this particular case.

VII. CONCLUSION

For the foregoing reasons, we reverse Scovill's convictions because the searches conducted by Johansen of the glove box, the two containers, and Scovill's person were unconstitutional under both the U.S. Constitution and the Nebraska Constitution, and therefore, we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DOMINGO SEPULVEDA, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

609 N.W.2d 42

Filed April 4, 2000. No. A-99-303.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act; the final order rendered by a district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Due Process: Appeal and Error.** Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process pre-

sents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court.

3. **Constitutional Law: Due Process: Administrative Law: Prisoners.** If there is a constitutionally protected liberty interest at stake, then at a minimum, prison disciplinary proceedings must comply with constitutionally adequate due process standards.
4. **Due Process: Sentences: Prisoners.** Reduction of a sentence for good behavior is a statutory right which may not be taken away without following minimum due process procedures.
5. **Administrative Law: Prisoners.** Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant do not apply to prisoners.
6. **Constitutional Law: Due Process: Administrative Law: Sentences: Prisoners.** When good time credits are a protectable liberty interest, a prisoner facing disciplinary charges must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his or her defense; and (3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action.
7. **Due Process: Administrative Law: Evidence: Prisoners.** In order to comport with minimum requirements of due process, findings of a prison appeals board must be supported by some evidence in the record.
8. **Courts: Administrative Law: Prisoners.** Unless there is a clear constitutional violation, courts are reluctant to interfere with a prison's internal discipline methods.
9. **Constitutional Law: Witnesses.** Compulsory process of witnesses is not an absolute right in any proceeding, but can be limited.
10. **Constitutional Law: Administrative Law: Witnesses: Prisoners.** Prisoners do not have an absolute right of confrontation and cross-examination of those furnishing evidence against them in prison disciplinary proceedings.
11. **Administrative Law: Witnesses: Prisoners.** Prison officials are accorded great discretion in prison disciplinary proceedings to refuse to call witnesses whose testimony is irrelevant or unnecessary, or who may undermine prison authority.
12. ___: ___: ___. Preventing retaliation against an inmate witness is a legitimate security concern justifying prison officials' refusal to allow witnesses at a disciplinary proceeding.
13. ___: ___: ___. Prison officials are justified in withholding information about confidential informants because of the risk of revealing identities. To order the supplying of the identities of confidential informants, or the substance of their information, not only endangers the informants, but may be disruptive to prison security.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Melanie Whittamore-Mantzios for appellant.

Domingo Sepulveda, pro se.

HANNON, MUES, and CARLSON, Judges.

CARLSON, Judge.

The Nebraska Department of Correctional Services (DCS) appeals the decision of the Lancaster County District Court which reversed a ruling by the DCS Appeals Board (Appeals Board) that Domingo Sepulveda violated 68 Neb. Admin. Code, ch. 5, §§ 005I[C] and 005II(G) (1994), which denominate the offenses of "Aggravated Assault/Assault/Fighting" and theft, respectively. For the reasons set forth below, we reverse the order of the district court and remand the matter with directions.

BACKGROUND

On June 23, 1998, a Sergeant Milem, an employee of DCS assigned to the Lincoln Correctional Center, was informed by a confidential informant that inmates Justin Allee and Sepulveda, the appellee, had assaulted inmate Thomas Holmes in the penal compound and had stolen various store-bought items from him. A misconduct report was prepared and filed on that same date. The next day, a principal hearing was held on the report, and Sepulveda had no comment at the time but wanted inmates Anthony De Los Santos, Bill Birdhead, and Allee to appear as witnesses at the disciplinary hearing. Sepulveda also submitted inmate interview requests with questions for Holmes, inmate John Fair, and De Los Santos.

At the disciplinary hearing held on July 7, 1998, inmate Floyd Yarbrough appeared as Sepulveda's legal representative. During the hearing, Sepulveda denied any wrongdoing, and he was supported in this position by the testimony of Birdhead and De Los Santos. The disciplinary committee found Sepulveda guilty of the assault and theft and imposed penalties of 21 days' disciplinary segregation for the assault charge and loss of 1 month's good time for the theft charge. Sepulveda appealed to the Appeals Board, claiming primarily that his constitutional rights were violated because he did not have his questions answered by Holmes and that the committee's decision was based on confidential information which was not reliable or credible. The Appeals Board upheld the decision of the disciplinary committee, finding that there was competent evidence to

support the committee's decision and that Sepulveda's due process rights were not violated.

Sepulveda appealed that decision to the Lancaster County District Court, claiming basically the same errors he asserted to the Appeals Board. DCS moved for a protective order to place the confidential information considered by the disciplinary committee under seal and not disclose the information to Sepulveda. This latter motion was granted, but in the district court's decision of February 25, 1999, the court reversed the decision of the Appeals Board and, further, rescinded the protective order in part. DCS appeals.

ASSIGNMENTS OF ERROR

On appeal, DCS assigns that the court erred in (1) reversing its previous protective order and requiring that the confidential statements of Holmes be disclosed to Sepulveda and (2) finding that the disciplinary committee's failure to call the alleged victim, Holmes, as a witness violated Sepulveda's due process rights.

STANDARD OF REVIEW

[1] An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act; the final order rendered by a district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Gramercy Hill Enters. v. State*, 255 Neb. 717, 587 N.W.2d 378 (1998).

[2] Determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law, regarding which an appellate court is obligated to reach its own conclusions independent of those reached by the trial court. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

ANALYSIS

[3-5] At the outset, it should be noted that if there is a constitutionally protected liberty interest at stake, then at a minimum, the disciplinary proceedings must comply with constitutionally adequate due process standards. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). In Nebraska, the

reduction of a sentence for good behavior is a statutory right which may not be taken away without following minimum due process procedures. *Id.* Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant do not apply to prisoners. *Id.*

[6,7] In *Wolff v. McDonnell, supra*, the Supreme Court held that when good time credits are a protectable liberty interest, a prisoner facing disciplinary charges must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, *when consistent with institutional safety and correctional goals*, to call witnesses and present documentary evidence in his or her defense; and (3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action. The Court did not specify what amount of evidence would be necessary to support the fact finder's decision. In *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), the Court held that in order to comport with minimum requirements of due process, the findings of the prison board must be supported by "some evidence" in the record. Other jurisdictions have added that although only "some evidence" is required to meet minimum due process requirements, that evidence must have some "indicia of reliability of the information that forms the basis for prison disciplinary actions." *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). See, also, *Mendoza v. Miller*, 779 F.2d 1287 (7th Cir. 1985), *cert. denied* 476 U.S. 1142, 106 S. Ct. 2251, 90 L. Ed. 2d 697 (1986); *Kyle v. Hanberry*, 677 F.2d 1386 (11th Cir. 1982). With these preambles in mind, we will proceed to analyze Sepulveda's specific complaints.

HEARING

The district court's judgment cites the refusal of the disciplinary committee to make Holmes available to answer questions. The court stated that "[e]ven the most minimal requirements of due process [require] that a person who is the alleged victim of an assault be available to answer questions if that is requested by the accused." This position is not supported by the facts of this case or the law.

[8] At the hearing, Sepulveda denied the charges and two of his witnesses testified in support of his position. His complaint

that Holmes was not called or did not respond to questions is initially answered by the fact that there was never a request by Sepulveda for Holmes to be a witness. It should also be noted that there is no DCS rule that allows for written questions to be submitted to a witness. What the rules do provide for, in part, is that an "inmate charged shall be allowed to call witnesses with relevant knowledge and present relevant documentary evidence in the inmate's defense *when permitting the inmate to do so will not be unduly hazardous to institutional safety or correctional goals*." (Emphasis supplied.) 68 Neb. Admin. Code, ch. 6, § 006.07 (1994). Accord Neb. Rev. Stat. § 83-4,122 (Reissue 1999). As we will see, this rule comports with the constitutional requirements of due process in such hearings, and, unless there is a clear constitutional violation, the courts are reluctant to interfere with a prison's internal discipline methods. *Glick v. Sargent*, 696 F.2d 413 (8th Cir. 1983). See, *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Moore v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 8 Neb. App. 69, 589 N.W.2d 861 (1999).

[9-12] Even if Sepulveda had requested Holmes as a witness, there is no absolute right to have had him present. Compulsory process of witnesses is not an absolute right in any proceeding, but can be limited. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Jones*, 231 Neb. 47, 435 N.W.2d 167 (1989). The due process available in an open society is much different from the situation presented by a disciplinary proceeding in a state prison. Prisoners do not have an absolute right of confrontation and cross-examination of those furnishing evidence against them in such actions. As stated in *Wolff v. McDonnell, supra*, if such right were allowed, "there would be considerable potential for havoc inside the prison walls." 418 U.S. at 567. As mentioned earlier, prison officials are accorded great discretion to refuse to call witnesses whose testimony is irrelevant or unnecessary, or who may undermine prison authority. *Turner v. Caspari*, 38 F.3d 388 (8th Cir. 1994). Preventing retaliation against an inmate witness is a legitimate security concern justifying prison officials' refusal to allow witnesses at a disciplinary proceeding. *Wolff v. McDonnell, supra*.

For all these reasons, Sepulveda's due process rights were not violated in the disciplinary hearing. To reiterate, he told his story, he called witnesses, and the committee had justifiable reasons, both procedural and substantive, to deny his requests.

PROTECTIVE ORDER

[13] On November 25, 1998, the district court signed a protective order directing that reports of the confidential informant or informants "shall be kept from the Plaintiff [Sepulveda] and the public and placed under seal and will not be disclosed to anyone without further order of the Court." In the court's February 25, 1999, judgment, the protective order was vacated in part. We find that this was error. As we pointed out earlier, prison officials are justified in withholding information about confidential informants because of the risk of revealing identities. To order the supplying of the identities of confidential informants, or the substance of their information, not only endangers the informants but may be disruptive to prison security. Obviously, in these circumstances, there is a concern for the need to check the reliability of the confidential informant. *Freitas v. Auger*, 837 F.2d 806 (8th Cir. 1988), indicates that the reliability of an informant may be established by a statement on the record by the chairperson of the disciplinary committee that there was a past record of that informant's reliability. Such a statement was made by the chairperson of the disciplinary committee in this case.

CONCLUSION

We find that the record and the law are not supportive of the district court's decision reversing the decision of the Appeals Board and vacating the protective order in part. Accordingly, the decision of the district court is reversed, and the matter is remanded with directions to reinstate the Appeals Board's decision and the protective order of November 25, 1998.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT R. JOHNSON, APPELLANT.

609 N.W.2d 48

Filed April 11, 2000. No. A-98-1203.

1. **Directed Verdict.** 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.
2. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
4. **Sexual Assault: Proof.** The crime of first degree sexual assault requires proof that the defendant subjected the victim to sexual penetration and overcame the victim by force; threat of force, express or implied; or coercion or deception, or knew that the victim was mentally or physically incapable of resisting.
5. **Rules of Evidence.** Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
6. **Sexual Assault: Evidence: Proof.** Under the rape shield law, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions, i.e., source of physical evidence or consent.
7. **Sexual Assault: Trial: Witnesses.** The rape shield law is to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicits evidence of questionable relevance to the case being tried.
8. **Constitutional Law: Trial: Witnesses.** The right of cross-examination is implicit in the constitutional right of confrontation and is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
9. **Constitutional Law: Sexual Assault: Trial: Witnesses.** If the prosecution tries a sexual assault case in a way that puts the victim's sexuality or sexual habits in issue and such sexuality or sexual habits are relevant because they make a material fact more or less probable, then the defendant has a constitutional right under the Confrontation Clause to respond, notwithstanding the rape shield law.
10. **Criminal Law: Testimony: Proof.** The test for whether a fact inquired of in cross-examination in criminal proceedings is collateral is whether the cross-examining party is entitled to prove it as part of his or her case.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Robert R. Johnson was charged by information with first degree sexual assault to which he entered a plea of not guilty. After a jury trial in August 1998, in the Adams County District Court, Johnson was convicted and sentenced to not less than 3 nor more than 5 years' imprisonment. Johnson appealed to this court, and we affirmed his conviction in *State v. Johnson*, 8 Neb. App. 762, 602 N.W.2d 253 (1999). Johnson filed a motion for rehearing, which we have granted, and now we decide the appeal anew. Therefore, we withdraw our previous opinion, which is superseded in its entirety by this opinion.

BACKGROUND

Johnson was charged by an information filed in the Adams County District Court with first degree sexual assault of M.L.H. on or between December 22 and 23, 1995.

M.L.H. first became acquainted with Johnson in August 1994 when she was dating Dave Wolz, Johnson's friend and roommate. M.L.H. dated Wolz for about 6 months and socialized with Johnson and his girl friend, Kelly Fielder, during this time period. Fielder was M.L.H.'s best friend at that time. After M.L.H. and Wolz stopped dating, M.L.H. continued to socialize with Johnson and Fielder.

M.L.H., Johnson, and Fielder took a trip to Kansas City, Missouri, in July 1995. The three shared a hotel room, with Fielder and Johnson sharing one bed and M.L.H. in another. On this trip, M.L.H. testified that Johnson unlocked the bathroom door while she was taking a shower, which made her uncomfortable. Johnson made the suggestion that M.L.H., Fielder, and he should have a "threesome," to which M.L.H. said no and that she did not want to do anything with him of such a nature.

Both M.L.H. and Johnson testified that Johnson flirted with M.L.H. and repeatedly asked her to have sex with him, and that she always said no. M.L.H. stated that she was not attracted to

Johnson and testified that Johnson's advances got to the point that they did not bother her.

On December 22, 1995, Fielder and Johnson picked M.L.H. up in Johnson's car and the three went to a bar together. At the bar, the three danced and had drinks. M.L.H. drank five to six drinks and testified that Johnson probably had more. At about 11:30 p.m., the three left and returned to Johnson and Fielder's apartment. After staying there for approximately 10 minutes, M.L.H. stated that she did not feel well and wanted to go home. Johnson told Fielder that he would take M.L.H. home and that Fielder should stay there at the apartment. Johnson and M.L.H. then got in Johnson's car to go to M.L.H.'s home, where she lived with her parents, which was approximately four blocks away. From this point forward, the testimony is in conflict.

M.L.H. testified that on the way to her house, Johnson did not turn when she expected him to, but, rather, drove another block, turned left, and parked the car. At this time, Johnson turned toward M.L.H., grabbed her left leg, and pulled it over to the side between the back of the seat and his body. M.L.H.'s head was caught by the door. She told Johnson that she wanted to go home, but he did not let her leave. Johnson unbuttoned and pulled down her pants, pulled her shirt and bra up, lifted her right leg, and performed oral sex on her. M.L.H. tried to push him away, but could not because her legs were caught, as was her head. Johnson then had intercourse with M.L.H. and stopped after a few minutes. M.L.H. stated that Johnson stopped "because he said he didn't want to get me pregnant." M.L.H. testified that she did not want to have intercourse with Johnson and communicated that to him by telling him no during the incident. She stated at trial that "[d]uring the whole thing I was saying no and trying to push him off, and I was crying and said I wanted to go home." Afterward, Johnson pulled up his pants and told M.L.H. to put her clothes back on. Johnson then drove M.L.H. home. When they arrived at M.L.H.'s home, Johnson told her to quit crying.

Johnson related that they had a consensual sexual encounter. He testified that M.L.H. had kissed him on the lips prior to that night and that during the drive to M.L.H.'s house, he gave her a kiss and she "French" kissed him. Johnson then drove across the

street and parked the car. According to his testimony, things progressed, and M.L.H. helped him take one of her shoes off and one of the legs of her jeans off. Johnson stated that he performed oral sex on her and that then, they had consensual sexual intercourse. He also testified that during the encounter, M.L.H. was giggling, did not say no or stop, and did not try to hit, push, or kick him. Johnson stated that he stopped having intercourse with her when she began to cry because she was afraid she would get pregnant. M.L.H. denies Johnson's version.

Johnson delivered M.L.H. to her house. When M.L.H. entered her home, her mother was still up. The mother testified that while she noticed nothing unusual about her daughter's clothes or hair, she thought her daughter looked upset. M.L.H. told her mother that she was going to take a bath and go to bed, but did not tell her about what had happened with Johnson. M.L.H.'s mother testified that her daughter complained, after that night, of a stomach ache and was not eating very well. M.L.H. did not seek medical treatment after the encounter with Johnson.

On December 23, 1995, M.L.H. visited Fielder and Johnson at their apartment, where M.L.H., Fielder, and Johnson exchanged Christmas gifts. M.L.H. then followed Fielder and Johnson in her car to a bar, where the three stayed for approximately 2 hours. M.L.H. then drove herself home. On December 26, M.L.H. told a few friends, including Fielder, about the incident that had occurred with Johnson. She then reported it to the police and also informed her mother about what had happened with Johnson.

On December 26, 1995, when M.L.H. told Fielder about the incident, Fielder moved out of the apartment she shared with Johnson. However, she moved back in after a while, and Johnson was still her boyfriend at the time of the trial.

Johnson and Fielder both testified that when Johnson arrived back at his and Fielder's apartment, he told Fielder that he and M.L.H. had had consensual sex. However, when Fielder was interviewed by police several days after the incident between M.L.H. and Johnson, she stated that when Johnson returned home he told her that nothing had happened. During the trial, Johnson's attorney attempted to cross-examine M.L.H. about

her sexual activity with Wolz. Objection thereto was made and sustained. We shall discuss this fully in the analysis portion of our opinion.

ASSIGNMENTS OF ERROR

Johnson assigns five errors: The district court (1) erred in failing to grant Johnson's motion for a directed verdict at the close of all the evidence, (2) erred in failing to grant his motion for a new trial because the verdict entered is contrary to law, (3) abused its discretion in refusing to place him on probation, (4) abused its discretion in imposing a sentence which was excessive and disproportionate to the severity of the offense when considered with his background and prior record, and (5) erred in failing to allow him to fully cross-examine and confront the witnesses against him.

ANALYSIS

Denial of Motion for Directed Verdict.

Johnson first argues that his motion for a directed verdict at the close of all the evidence should have been granted by the trial court.

[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. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998); *State v. McBride, supra.*

[2] Regardless of whether evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as failure to direct a verdict, insufficiency of evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641

(1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[3] A directed verdict in a criminal case is proper only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character and lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. McBride, supra*; *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law. *State v. Hirsch, supra.*

[4] The crime of first degree sexual assault requires proof that the defendant subjected the victim to sexual penetration and overcame the victim by force; threat of force, express or implied; or coercion or deception, or knew that the victim was mentally or physically incapable of resisting. Neb. Rev. Stat. § 28-319 (Cum. Supp. 1994).

It is clear from the record that the trial court found the evidence sufficient to submit the case to the jury. Johnson admitted to sexual penetration, and M.L.H. testified as to force used by Johnson to accomplish penetration. There was also ample testimony as to M.L.H.'s lack of consent. Although Johnson said that this was consensual sex, the credibility of witnesses and resolution of conflicts in the evidence is for the jury to determine. See *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996).

There was neither a failure of proof of an element of the crime charged nor evidence so doubtful in character and lacking in probative value, that a finding of guilt could not be sustained. See, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). The prosecution's evidence, if believed, was obviously sufficient to sustain the conviction. There was no error in denying the motion for a directed verdict.

Rape Shield Protection Versus Confrontational Clause.

Johnson next contends that he is entitled to a new trial because the verdict was contrary to law. Johnson argues that he was "denied his right to fully cross-examine the victim" and

therefore "has been denied his right of confrontation and should receive a new trial." Brief for appellant at 7.

During Johnson's trial, the prosecution asked M.L.H. if she and Wolz had had sexual intercourse during their relationship, in an apparent foundational effort to show that M.L.H. understood what sexual intercourse was and thus could testify that the incident with Johnson involved sexual intercourse. Johnson attempted to cross-examine M.L.H. further regarding her sexual relationship with Wolz. The prosecution objected, relying on Nebraska's rape shield law, Neb. Rev. Stat. § 28-321 (Reissue 1995). The district court sustained the objection because Johnson had not given the required statutory 15 days' notice concerning this line of inquiry and because such evidence was irrelevant.

Johnson thereafter made an offer of proof. Johnson intended to question M.L.H. about an incident that allegedly occurred while she was dating Wolz. Johnson alleges that while M.L.H. and Wolz were having sexual intercourse, they called Johnson and Fielder into the room to watch them. Johnson asserts that he should have been allowed to cross-examine M.L.H. about this incident to show that M.L.H.'s testimony that she felt uncomfortable when Johnson walked into the bathroom in Kansas City while she was taking a shower was not true.

[5] Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997) (under rape shield law, admissibility of prior sexual behavior of victim is primarily one of relevance). The admissibility of evidence is reviewed for an abuse of discretion where, as here, the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Id.*; *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

Johnson argues that his right to cross-examine M.L.H. was unfairly limited by the district court under Nebraska's rape shield law, § 28-321, as to matters going to the credibility of M.L.H.'s direct testimony.

Section 28-321 provides in part:

> (1) If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of

such intention shall be given to the prosecuting attorney and filed with the court not later than fifteen days before trial.

(2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior.

The district court found that since Johnson did not give the required 15 days' notice of the proffered evidence, he could not introduce such testimony at trial, even if elicited through cross-examination. Johnson argued that the notice provision in § 28-321 did not apply, as he did not learn of M.L.H.'s Kansas City trip testimony until during the trial. Additionally, he was only cross-examining M.L.H. regarding a matter already inquired into by the prosecution, i.e., her sexual activities with Wolz. Because we have concluded that we must analyze Johnson's claim on constitutional grounds, under the Confrontation Clause, we do not think the 15-day statutory notice requirement is dispositive of the issue. Thus, we turn to the substantive question of the exclusion of this evidence under the rape shield law.

Section 28-321 further provides, in pertinent part, as follows:

> Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

[6,7] In *State v. Earl*, 252 Neb. 127, 134, 560 N.W.2d 491, 496 (1997), the Nebraska Supreme Court wrote:

> Under this statute, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions; i.e., source of physical evidence, or consent. The legislative purpose and history of the rape shield law is amply discussed in *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), and *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986). Stated briefly, the statutory purpose was to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicited evidence of questionable relevance to the case being tried. See *id.*

Johnson's stated purpose for offering the evidence at issue was to rebut the testimony about being "uncomfortable" during the Kansas City trip. Johnson argues that he was entitled to cross-examine M.L.H. about her sexual conduct with Wolz in front of Johnson to show that her testimony about the Kansas City trip was not credible. Obviously, the stated purpose of the cross-examination was not to show another source of physical evidence or that M.L.H. consented on the night in question. The district court's exclusion of the proposed cross-examination was consistent with the restrictive intent of § 28-321, because the evidence was not offered for either of the two permitted purposes. If our only concern was the rape shield law, our analysis would be complete.

However, Johnson contends that sometimes evidence of a victim's prior sexual behavior may be so relevant and probative that the defendant's right to present it is constitutionally protected, notwithstanding the rape shield law. Johnson relies on the recent case of *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999), which was decided after our earlier opinion in this matter. We granted the motion for rehearing to reconsider this argument in light of the Supreme Court's decision in *Lessley*.

[8] In *State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982), quoting *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), the Nebraska Supreme Court noted that the right of cross-examination "'is implicit in the constitutional right of confrontation'" and is "'"an essential

and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" " "'[T]he right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial.'" *Thaden*, 210 Neb. at 627, 316 N.W.2d at 321, quoting *United States v. Jones*, 557 F.2d 1237 (8th Cir. 1977).

In *State v. Privat*, 251 Neb. 233, 248, 556 N.W.2d 29, 38 (1996), the Nebraska Supreme Court held:

> [A]n accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

Johnson's proposed cross-examination, if it means anything, goes only to M.L.H.'s credibility, not to any bias on her part. But the rape shield law obviously places limits on cross-examination going to the victim's credibility when the subject is the victim's sexual conduct with someone other than the defendant. In *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986), the constitutionality of the rape shield law was upheld. See, also, *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991) (Court rejected challenge to Michigan rape shield law, holding that defendant's right to present testimony may have to bow to other legitimate interests in criminal trial process).

In *State v. Lessley, supra*, the Nebraska Supreme Court dealt with the admissibility of evidence seemingly barred by the rape shield law. Lessley argued that the State "opened the door" to otherwise inadmissible evidence by first stating in opening arguments that the victim was a lesbian, then eliciting testimony from the victim that she was a lesbian, and asking the victim detailed questions regarding whether she told a coworker certain information about her past sexual behavior, specifically, whether she engaged in anal intercourse with men so as to avoid getting pregnant. The victim denied making such a statement. Lessley wanted to adduce rebuttal evidence which he claimed would directly contradict the victim's denial that she told a coworker

that she engaged in anal intercourse with men. The trial court prevented Lessley from presenting this evidence, citing the rape shield law. The Nebraska Supreme Court found that the circumstances of the case were such that the accused's constitutional rights to confrontation required the admission of the excluded evidence concerning the victim's prior sexual behavior, although it would be inadmissible under the rape shield law. The court found:

> The only issue in this case was whether the encounter between M.B. and Lessley was consensual. Whether intended by the State or not, M.B.'s testimony on direct examination regarding her sexual preference and experience permitted the jury to draw an inference that she did not consent to sexual relations with Lessley. The evidence proffered by the defense would have made this critical inference less probable. The trial court's exclusion of this evidence was error because it materially impaired Lessley's Sixth Amendment right to confront his accuser on the dispositive issue of consent.

State v. Lessley, 257 Neb. 903, 911, 601 N.W.2d 521, 527-28 (1999).

In *Lessley*, when the State introduced evidence that the victim was a lesbian, Lessley's defense of consensual sex with her was attacked head-on via a "preemptive strike." In short, the State's message to the jury from its evidence was: "Reject the defendant's consent defense because lesbians do not have consensual sex with men, and the victim is a lesbian." It is clear that in *Lessley*, the prosecution's evidence was a direct attack on the defense of consent and that for better or worse, it also put the nature of the victim's sexual activities in issue. Therefore, Lessley was entitled under the Confrontation Clause to respond to the State's preemptive strike on his consent defense by exploring whether the victim engaged in sex with men, despite being a lesbian.

[9] We see the *Lessley* decision as being driven by the unique circumstances of that trial rather than as a weakening of the rape shield law. In other words, if the prosecution tries a case in a way that puts the victim's sexuality or sexual habits in issue and such sexuality or sexual habits are relevant because they make a

material fact more or less probable, then the defendant has a constitutional right under the Confrontation Clause to respond, notwithstanding the rape shield law. This, in our view, is what happened in *Lessley*. In short, the prosecution's tactics dictated the result in *Lessley*, but the Supreme Court's decision is by no means a blank check for defendants to begin rummaging in the sexual past of victims as happened before the rape shield law.

[10] After *Lessley*, the question for us in the instant case is whether the excluded cross-examination either is so directly related to Johnson's defense or bears so strongly on the believability of M.L.H.'s testimony about the elements of the crime that the Confrontation Clause must override the restrictions of the rape shield law, which would otherwise clearly exclude this evidence. Our answer is in the negative, and therefore, we hold that the rape shield law still excludes this evidence because the disputed evidence here and in *Lessley* are markedly dissimilar in their materiality and relevance. Here, the proposed evidence only goes to credibility, which is deemed a collateral matter. See *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972) (trial court did not abuse its discretion in refusing to permit impeachment of witness' credibility by showing that she had testified falsely at preliminary hearing in denying she was prostitute, since witness' prostitution was collateral matter and not substantive proof of any fact relative to breaking and entering charge against defendant). The test for whether a fact inquired of in cross-examination in criminal proceedings is collateral—would the cross-examining party be entitled to prove it as part of his or her case—is set forth in *State v. Williams*, 219 Neb. 587, 365 N.W.2d 414 (1985). In *Lessley*, the State's evidence made the evidence of the victim's sexual habits relevant and material, but here, whether M.L.H. was or was not "uncomfortable" in Kansas City is collateral and greatly attenuated from whether at some point in the future she consented to sex with Johnson.

Moreover, while the State in the instant case did inquire about whether M.L.H. had sexual intercourse with Wolz, that question did not open the proverbial "door" in quite the same way that the prosecution kicked the "door" off of its hinges with the testimony from the victim that she was a lesbian in *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). Here, the ill-conceived

question merely stated the obvious—M.L.H. understood what sexual intercourse was.

Johnson's evidence that M.L.H. and her boyfriend called Johnson and his girl friend into the bedroom to watch them have sex allegedly impeaches M.L.H.'s assertion that she felt "uncomfortable" when Johnson entered the hotel bathroom while she was in the shower. The two situations are not so closely tied to each other, and to the overall question of M.L.H.'s credibility, that the constitutional guarantee of the Confrontation Clause overrides the protection that the Legislature has given M.L.H. through the rape shield law. The cross-examination does not address M.L.H.'s consent to have sex with Johnson, nor does it so directly impact and relate to M.L.H.'s credibility that it must be admitted. In the words of *State v. Privat*, 251 Neb. 233, 248, 556 N.W.2d 29, 38 (1996), the cross-examination would not give a reasonable jury a "significantly different impression of [M.L.H.'s] credibility" if Johnson had been allowed to pursue this line of questioning. In *State v. Earl*, 252 Neb. 127, 135, 560 N.W.2d 491, 497 (1997), the court said that rejected evidence of the victim's "prior sexual behavior [was not] so relevant and probative that [the defendant's] constitutional right to present it would be triggered." The proposed cross-examination here is not so probative and relevant on the collateral matter of M.L.H.'s credibility about the Kansas City hotel incident that the Constitution requires that it be admitted. *Lessley* itself notes that matters of credibility are viewed from a different perspective. In *Lessley*, the court quoted approvingly from *State v. Williams*, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986):

> "The contested issue in this case is *consent* . . . . The victim testified on direct examination that she *never* consents to sex with men. The testimony proffered by [defendant] directly refutes this contention. [T]his evidence is submitted for more than mere impeachment of a witness' credibility. . . . [T]he proffered evidence has a more important purpose, which is to negate the implied establishment of an element of the crime charged."

257 Neb. at 910, 601 N.W.2d at 527.

Even after *Lessley*, the exclusion of Johnson's proffered evidence to impeach a small portion of M.L.H.'s testimony, regarding her level of comfort around Johnson in the Kansas City hotel, was proper. The exclusion of such evidence does not rise to the level of a deprivation of constitutional rights, as we do not believe that a critical inference regarding an element of the crime, namely consent, was implicated by the testimony about the Kansas City trip and the victim's "comfort level" on that occasion.

The excluded evidence does not relate to whether intercourse was consensual in the same way and to the same degree as the suggestion that "lesbians do not have consensual sex with men" bears upon and refutes a defense of consent when the victim is a lesbian. *Lessley* involves a direct correlation between the excluded evidence and consent, whereas here, the excluded evidence bears only on M.L.H.'s credibility in a peripheral and collateral matter: the Kansas City incident, which does not bear upon the issue of consent on the night in question.

The rape shield law is designed to protect people from being "assaulted" in the courtroom by their sexual history. We believe that its philosophical underpinnings are that consent to sex with one person is not consent to sex with all people, nor is consent on one occasion consent for all occasions. The rape shield law seeks to bring those notions into our rules of evidence by restricting a defendant's examination of a victim's sexual history. While the Confrontation Clause may trump the rape shield law in some compelling circumstances, as in *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999), we should not lightly weaken the protections of the rape shield law by allowing exploration of a person's sexual history when the connection between that history and the elements of the crime is illusory and attenuated, as is true here.

Therefore, while we granted a rehearing so that we could reconsider our decision in light of *Lessley*, we hold that *Lessley* does not require a different result and that the proposed cross-examination of M.L.H.'s prior sexual conduct was properly excluded.

Denial of Johnson's Motion for New Trial.

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. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997); *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). An abuse of discretion takes place when the court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998). As previously discussed, the district court did not err by limiting the scope of Johnson's cross-examination of M.L.H. regarding her prior sexual behavior. Thus, the trial court did not abuse its discretion in denying Johnson's motion for new trial.

Determination of Sentence.

We now consider Johnson's argument that we should reduce his sentence. A sentence within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999). Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, and a judgment denying probation will be upheld unless the trial court abuses its discretion. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992); *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Hill, supra.*

The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances of the defendant's life. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. White, supra*; *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

Johnson is a 46-year-old divorced male with two children, ages 19 and 15. He has a high school diploma and has an associate's degree in carpentry from a community college. At the time of sentencing, he was employed by a construction company earning $8.85 per hour. Johnson has a lengthy criminal record dating back to 1968, including such offenses as larceny, burglary, forgery, possession of marijuana, assault, shoplifting, and driving under the influence. In addition, he spent 2 years in the Nebraska Penal and Correctional Complex for carrying a concealed weapon. Most recently, in 1996, Johnson served 60 days in jail and received 3 years' probation for the unlawful distribution of a controlled substance.

Pursuant to § 28-319, first degree sexual assault is a Class II felony, which carries with it a penalty of a 1-year minimum and 50-year maximum sentence of imprisonment. The district court's sentence in the instant case of not less than 3 nor more than 5 years' imprisonment was well within the range of possible penalties for a Class II felony. The trial court did not abuse its discretion in sentencing Johnson.

AFFIRMED.

PAOLA A. ZUCO, APPELLEE,
V. LEROY WAYNE TUCKER, APPELLANT.
609 N.W.2d 59

Filed April 11, 2000. No. A-99-397.

1. **Judgments: Appeal and Error.** The standard of review for an appeal of a protection order is ordinarily de novo on the record.
2. ___: ___. To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence.
4. ___: ___. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, 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.

5. ___: ___. In a civil case, to constitute reversible error contemplated in Neb. Evid. R. 103(1)(b), Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995), admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
6. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
7. **Due Process: Witnesses.** Any blanket policy of the trial court to limit witnesses in protection order cases denies due process and is to be discouraged.
8. **Rules of Evidence.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
9. **Rules of Evidence: Proof.** In protection order proceedings, the trial judge is justified in insisting upon a short offer of proof so that the judge may on her or his own volition enforce Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
10. **Witnesses: Records: Proof: Appeal and Error.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Jeffrey S. Schmidt, of Schmidt Law Office, for appellant.

No appearance for appellee.

IRWIN, Chief Judge, and HANNON and CARLSON, Judges.

HANNON, Judge.

INTRODUCTION

Paola A. Zuco sought a protection order against her ex-husband, Leroy Wayne Tucker. At the show cause hearing, the trial court limited the testimony to that of the parties and did not allow Tucker to call witnesses prepared to testify on his behalf. After the trial court entered the protection order, Tucker appealed, alleging that the trial court violated his due process rights in not allowing him to present evidence through his additional witnesses. We find that the trial court did violate his due process rights, but because Tucker did not make an offer of proof or make the content of the witnesses' testimony apparent, his appeal cannot stand. Accordingly, we affirm.

SUMMARY OF EVIDENCE

Zuco applied for a protection order against Tucker, pursuant to Neb. Rev. Stat. § 42-924 (Reissue 1998). In Zuco's application, filed March 4, 1999, she alleged several instances of harassment by Tucker since the time of their divorce in 1996. Her application listed some physical violence while they were still married and periodic instances of verbal abuse and threats of assault after their divorce. Zuco's petition alleges several instances occurring in 1998 and 1999 in which Tucker used vulgar descriptions of her and threatened to assault her.

Tucker was given notice of the hearing set for March 15, 1999, and ordered to show cause why a protection order should not be issued against him. Tucker appeared at the hearing with counsel, while Zuco appeared pro se. Zuco testified that Tucker was verbally abusive and had threatened to assault her. Zuco stated that seeking the protection order was a way for the parties to get on with their lives. To conclude, she affirmed the allegations she made in her application.

Tucker denied the allegations made by Zuco in her application, and while on the stand, he explained some of the disagreements and categorically denied ever threatening Zuco either mentally or physically. He also testified that Zuco reciprocated and that they both used vulgar names toward each other. Tucker admitted an Aliant Communications invoice showing that he purchased a call rejection package to prevent Zuco from calling him at work. Tucker also expressed concern that a consequence of a protection order would be that his visitation rights with their two children would be limited.

At the end of Tucker's testimony, Tucker's counsel informed the court that while he understood the trial court had a policy of limiting witnesses in such cases, he had "other individuals here to testify to support some of Mr. Tucker's testimony." The trial court denied the request to call other witnesses, and Tucker's counsel objected regarding due process. The court then found that Tucker had failed to show cause and thereby entered the protection order against him for 1 year, holding however that the order was not to interfere with Tucker's visitation rights. Tucker now appeals.

ASSIGNMENT OF ERROR

Tucker alleges that the trial court erred by refusing to allow him to present witnesses to rebut the accusations made against him. Zuco did not file a brief on appeal.

STANDARD OF REVIEW

[1,2] While the standard of review for an appeal of a protection order is ordinarily de novo on the record, *Lockenour v. Sculley*, 8 Neb. App. 254, 592 N.W.2d 161 (1999), the issue we address to decide this appeal is solely a question of law, and therefore a different standard applies. "To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below." *Gress v. Gress*, 257 Neb. 112, 115, 596 N.W.2d 8, 12 (1999).

ANALYSIS

[3,4] The issue presented in this case must be decided according to the rules of evidence, and "[i]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence." *State v. McManus*, 257 Neb. 1, 4, 594 N.W.2d 623, 626 (1999).

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n 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.

Neb. Evid. R. 103(1)(b), Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995). This section requires that two conditions exist before an alleged error is appealable: The alleged error must (1) affect a substantial right and (2) be made known to the trial court. We will address each condition accordingly.

Substantial Right Affected.

[5] " 'In a civil case, to constitute reversible error contemplated in [§ 27-103(1)(b)] admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant com-

plaining about such evidence admitted or excluded.'" *Equitable Life v. Starr*, 241 Neb. 609, 619, 489 N.W.2d 857, 864 (1992), quoting *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989). The record indicates that the trial court prohibited Tucker from calling additional witnesses according to an alleged policy to further the interest of judicial economy. When informed that additional witnesses were waiting to testify, the trial judge stated, "No. This is a rather summary hearing. We've got about four of these a day and we'd be hearing them next March, a year from now." Tucker's counsel voiced his concerns "regarding the due process of this" and objected for the record.

[6] In *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999), the Nebraska Supreme Court stated:

> Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.

Id. at 476-77, 590 N.W.2d at 401 (discussing due process rights of father in case to terminate his parental rights).

[7] We believe that any blanket policy of the trial court to limit witnesses in protection order cases denies due process and is to be discouraged. Of course, a court must manage its docket, but a court cannot subjugate a litigant's due process rights under the guise of judicial economy. See *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999) (holding that denying party's request for witness' attendance may violate due process if party shows witness' testimony would add something to information in record).

Further, we note that protection orders, as applied in this case, are governed by § 42-924 and Neb. Rev. Stat. §§ 42-925 and 42-926 (Reissue 1998). None of these sections procedurally limit a respondent's witnesses when showing cause why a protection order should not be granted. In fact, the statutory scheme is

designed to afford a respondent due process, requiring both notice and an opportunity to be heard.

[8,9] Our holding that a trial court may not enforce a blanket policy denying a party the right to call nonparty witnesses is not a holding that the trial court must listen to every witness a party might call. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). In view of the fact that protection order proceedings are summary in nature and that frequently one or both parties are not represented by counsel, we believe the trial judge is justified in taking an active role in enforcing § 27-403 in such cases. We also realize that the contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true. We therefore think that in protection order proceedings, the trial judge is justified in insisting upon a short offer of proof so that the judge may on her or his own volition enforce § 27-403. There was no offer of proof of any kind made in this case, which we find fatal to this appeal.

Made Known to Trier of Fact.

[10] The second condition in § 27-103(1)(b) which must occur for an appealable error to exist is that the substance of the excluded evidence must be made known to the trial court either from the context under which the evidence was elicited or through an offer of proof.

> In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. [Citation omitted.]
>
> In the absence of an offer of proof, the question becomes whether the substance of the evidence was apparent from the context within which the question was asked and whether the evidence would have been material and competent.

Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., 253 Neb. 813, 818, 572 N.W.2d 362, 366 (1998).

Tucker's counsel stated only that he had "other individuals here to testify to support some of Mr. Tucker's testimony." Counsel did not make or attempt to make an offer of proof regarding the substance of the witnesses' testimony, and the same was not apparent from the context of the discussion between counsel and the trial court. In fact, the above-quoted language is the only indication in the record of the substance of the excluded witnesses' testimony. This is insufficient for either a trial court or an appellate court to evaluate and rule upon the admissibility of the testimony. At best, Tucker's counsel's statements indicate the witnesses would corroborate Tucker's testimony, but even this reading involves a degree of speculation.

CONCLUSION

While we find that the trial court's policy of limiting witnesses affected Tucker's substantial right of procedural due process, we find that Tucker's failure to make the substance of the excluded witnesses' testimony apparent to the trial court leads us to affirm the decision of the trial court.

AFFIRMED.

ANDREA HOFFART, PERSONAL REPRESENTATIVE OF THE ESTATE OF C. ELIZABETH LEMON, DECEASED, APPELLANT, V. DENNIS L. HODGE, APPELLEE.

609 N.W.2d 397

Filed April 18, 2000. No. A-99-113.

1. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
2. **Trial: Expert Witnesses: Appeal and Error.** Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
3. **Rules of Evidence: Witnesses: Proof.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

4. **Rules of Evidence: Testimony: Proof.** Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.
5. **Trial: Evidence:** The precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated, and as with other areas of relevancy, admissibility depends on the trial judge's evaluation of the particular facts of the case.
6. **Evidence.** Habit evidence is relevant because such evidence makes it more probable that the person acted in a manner consistent with that habit.
7. **Rules of Evidence: Health Care Providers.** Neb. Rev. Stat. § 27-406 (Reissue 1995) speaks of the evidence of habit of a person or of the routine practice of an organization, and a medical practice involving doctors and nurses can be an organization.
8. **Trial: Rules of Evidence: Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
9. **Trial: Expert Witnesses: Appeal and Error.** A trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous.
10. **Expert Witnesses.** Whether one qualifies as an expert depends on the factual basis or the reality underlying the witness' claim to expertise rather than upon a title.
11. **Trial: Witnesses: Evidence: Insurance.** Absent evidence that a witness has a direct interest in the outcome of the litigation, such as an agent, owner, or employee of the defendant's insurer, the potential for bias is too remote and is outweighed by the prejudice the admission of evidence of insurance would cause.
12. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
13. **Pretrial Procedure: Insurance: Liability: Proximate Cause.** Insurance coverage issues do not relate to liability and proximate cause issues, and, therefore, discovery beyond the disclosure of the extent of the coverage is limited.

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

William A. Wieland and Jeffry D. Patterson, of Healey & Wieland Law Firm, for appellant.

Mark E. Novotny and Robert A. Mooney, of Lamson, Dugan & Murray, for appellee.

Rick G. Wade and Theodore L. Kessner, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

SIEVERS, Judge.

This is the second appearance in this court of this medical malpractice action involving the diagnosis of breast cancer. In our earlier opinion, *Hoffart v. Hodge*, 5 Neb. App. 838, 567 N.W.2d 600 (1997), we reversed a jury verdict for the defendant, Dr. Dennis L. Hodge. Hodge had offered evidence to support his claim that his patient, C. Elizabeth Lemon, was contributorily negligent for failing to return for reexamination of her breast as he alleged to have instructed her. We reversed, because the evidence was such that the jury, absent guesswork, could not determine to what degree, if any, Lemon's chance to survive her ultimately fatal breast cancer was impacted by her failure to report for reexamination by Hodge. This appeal addresses the retrial after our remand.

FACTUAL BACKGROUND

A comprehensive statement of the factual background in this case is set forth in *Hoffart v. Hodge, supra*, and while there has been a new trial, our examination of that trial record reveals that the core of the evidentiary presentation in the second trial is the same as that in the first trial. Thus, we refer the interested reader to our first opinion and limit our opinion here to a basic factual outline.

Lemon was a 40-year-old accountant residing in Lincoln who found a lump in her left breast and contacted Hodge's office on September 26, 1989. Hodge, an obstetrician-gynecologist (Ob-Gyn), examined her on October 5. Hodge's memory of the visit was vague, at best, and he relied primarily on his records to testify that he found a 1-centimeter marble-sized lump in Lemon's breast on October 5. Because she was menstruating, Hodge suspected the lump was a cyst. Nonetheless, a mammogram was ordered and performed by a radiologist on October 9. The radiologist's report stated the breast was " '[n]egative bilateral' " and the " '[p]alpable mass must still be evaluated on a clinical basis.' " Hodge's testimony was that he asked Lemon to return for reevaluation, which she did on October 26, and his notes from that examination reflect his impression that the lump was " '[v]ague now, can't hardly feel.' " Hodge's evidence was that he would have told her to make an appointment in 2 months to

be checked again. Lemon testified by deposition that she asked Hodge what she should be watching for "in this period of time," and he told her that if the lump changed in size or became painful or sensitive to the touch, she should notify him. Lemon's testimony was that when she left the office that day, she had no further anxiety and felt she had nothing to worry about unless there was a change in the size or sensitivity of the lump. Lemon continued to check her breast, and in late April 1990, she began to feel pain in the breast and called Hodge's office on April 27. She returned for further examination on May 21. At this point, Hodge referred Lemon to a surgeon for a biopsy, who removed a 1.5-centimeter mass which was found to be malignant. Lemon underwent a modified radical mastectomy, radiation therapy, chemotherapy, and cell harvesting for possible bone marrow transplant. Despite these efforts, Lemon died of breast cancer on May 17, 1995, and this action is brought by her personal representative, Andrea Hoffart. However, throughout our opinion, we will use Lemon's name when referencing the plaintiff in this case.

Lemon's evidentiary presentation involved expert witnesses who testified generally that the standard of care in this situation required that Hodge diagnose the lump present on October 5 and 26, 1989, by either aspiration or biopsy. Aspiration is a procedure where a needle is inserted into the lump to bring out fluid, which will occur if a cyst is present and which will make the mass disappear. But, if no fluid is withdrawn, a more serious situation is present, requiring referral to a surgeon for biopsy of the lump. The evidence was that neither the physical examinations in October nor the mammogram provided a diagnosis of the lump and that a normal mammogram provides a false sense of security because patients think it is a guarantee that cancer is not present, when in fact, false negatives occur in approximately 20 percent of all mammograms.

Lemon introduced opinion evidence from an expert that Hodge's treatment did not conform to the standard of care because Hodge did not make a diagnosis of the breast mass in early October 1989 and that there was no reason to delay securing a diagnosis. The opinion was that Hodge's clinical impression of a cyst should have been confirmed by aspiration or

biopsy or that, alternatively, Lemon should have been referred to a surgeon. Lemon also introduced evidence that Hodge's treatment fell below the standard of care on the second visit of October 26, because there was still a mass that had not been diagnosed. Lemon's expert oncologist testified that it was medically probable that in October, Lemon had stage I breast cancer without lymph node involvement, and that had the tumor been removed then, she would have had an 85- to 90-percent survival chance.

Hodge produced expert witnesses who testified that his examination and diagnosis of Lemon met the standard of care and that mammography was the best modality for evaluating the breast. Dr. David Bouda, whose qualifications and testimony will be discussed in more detail in the analysis portion of our opinion, testified about cancer and the doubling of tumors. Bouda's testimony was that by extrapolation, Lemon had cancer in her lymph nodes long before Hodge saw her in October 1989 and that the approximately 200-day delay in diagnosing her breast cancer did not change the outcome. Hodge testified on his own behalf that the lump felt cystic upon palpation on October 5, that he would have told her about the failure rates for mammograms when she came back to the office as part of his normal procedure, and that he told her she should return in 2 months or sooner if there were changes in the lump. He testified that he did not see Lemon after October 26, until May 21, 1990, at which point she presented a more defined lump and that a biopsy was ordered. The jury returned a verdict in Hodge's favor, and Lemon appeals.

ASSIGNMENTS OF ERROR

Lemon asserts six assignments of error, which slightly restated are as follows: (1) The trial court erred in receiving Hodge's testimony as to his habit and routine about advice to patients without proper foundation; (2) there was error in allowing Bouda's testimony as to the standard of care applicable to Hodge when there was no evidence to establish Bouda's qualifications to testify about the standard of care for an Ob-Gyn in Lincoln; (3) the trial court erred in refusing to allow cross-examination of Hodge's expert medical witnesses concerning their

bias or prejudice because they were qualified physicians under the Nebraska Hospital-Medical Liability Act (Act), Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998); (4) the trial court erred in refusing to allow Lemon to pursue discovery as to the legal advice provided to Michael Ward, administrator of the Excess Liability Fund (Fund), Neb. Rev. Stat. § 44-2829 et seq. (Reissue 1998), so as to establish a conflict of interest existing, in the words of Lemon's attorney, between "defendant's counsel, counsel for the underlying liability carrier, the Fund, and the rights of victims of medical negligence"; (5) the trial court erred in refusing to allow Lemon to pursue discovery about the administration of the Fund in its dealings with Hodge's underlying liability insurance carrier; and (6) the trial court erred in refusing to allow Lemon to pursue discovery as to settlement practices existing in the administration of the Fund and the participation of Hodge's underlying liability insurance carrier.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999); *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998).

[2] Admission of expert witness testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Woollen v. State, supra*; *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997).

An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

ANALYSIS

Habit Evidence.

[3,4] Lemon first asserts that the trial court abused its discretion by allowing Hodge to testify, over objection, as to his habit or routine of advising his patients about mammogram failure

rates. Habit evidence is relevant to show conformity therewith in a specific instance pursuant to Neb. Rev. Stat. § 27-406 (Reissue 1995), which provides:

> (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (2) Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

At the outset, we note that our analysis is limited to situations where a party attempts to prove habit by way of opinion rather than by specific instances of conduct. This is because nowhere in the record did Hodge attempt to prove his habit based on specific instances of conduct in similar situations. Rather, Hodge simply offered his opinion as to his policy of informing patients of failure rates in support of the notion that he informed Lemon in conformity with his policy. (For an analysis of proving habit by specific instances of conduct, see 64 A.L.R.4th 567 (1988).)

[5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules, and judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). The precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated, and as with other areas of relevancy, admissibility depends on the trial judge's evaluation of the particular facts of the case. See *State v. Pharr*, 115 Wis. 2d 334, 340 N.W.2d 498 (1983). See, also, 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 406 (2000). We hold that the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under § 27-406, and as a result, the trial court's decision will not be reversed absent an abuse of discretion. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998) (exercise of judicial discre-

tion is implicit in determinations of relevancy which will not be reversed absent abuse of discretion). Under § 27-406, the trial court determines whether the predicate evidence necessary to prove conduct by habit has been introduced. As noted above, habit may be shown by opinion or specific instances of conduct. 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. See *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

Lemon asserts that Hodge's testimony about what he would have told Lemon was improperly admitted, arguing: "When a witness, for whatever reason, fails to recall and relate specific facts relating to the witnesses' past conduct, to allow the witness, without foundational predicate, to then testify in detail about habit and routine, i[s] nothing more than an invitation to self-serving fantasy." Brief for appellant at 23.

[6] Habit evidence is relevant because such evidence makes it more probable that the person acted in a manner consistent with that habit. *Steinberg v. Arcilla*, 194 Wis. 2d 759, 535 N.W.2d 444 (Wis. App. 1995). At the outset, we must recognize the reality that a doctor cannot be expected to specifically recall the advice or explanation he or she gives to each and every patient he or she sees and treats.

Hodge stated that he sees approximately 140 patients per week in his practice. Out of the thousands of patients he has treated, it is likely that the great majority of patient visits are routine, at least for the doctor, which over time substantially decreases the likelihood that the doctor will recall a specific conversation with a specific patient. Thus, evidence of habit may be the only vehicle available for a doctor to prove that he or she acted in a particular way on a particular occasion, and, therefore, proof of habit may be highly relevant.

Hodge stated that on October 5, 1989, he was aware of the accuracy or reliability of mammograms. He described the failure rate as being 10 to 15 percent. When asked if he had a "policy" of advising his patients of mammogram failure rates, he responded that he did and that he explains the failure rate of mammograms to his patients. When asked about the specifics of his policy of advising patients of the failure rate, Hodge stated:

"We would advise them it is not 100 percent. There is a failure rate and that it can be 10 to 15 percent not accurate."

Hodge then testified at length concerning mammograms, ultrasounds, aspiration, and biopsy when diagnosing breast lumps. Hodge stated: "I can just say what we routinely would talk to patients about." He agreed that his sources of recollection concerning what he and Lemon discussed would be his chart, his routine, and his memory.

In *Bloskas v. Murray*, 646 P.2d 907 (Colo. 1982), the court found that evidence of a doctor's habit or custom of routinely advising patients about to undergo hip or knee replacement surgery of the risks of infection and loosening of the artificial joint was admissible as circumstantial evidence to show that he had given the same advice to the plaintiff, even though he had no independent recollection of ever so advising the plaintiff. Another example of habit evidence is found in *Reaves v. Mandell*, 209 N.J. Super. 465, 507 A.2d 807 (1986). Again, in *Reaves*, the doctor could not recall the specifics of any conversation he had with the plaintiff. Yet, the court allowed the doctor to testify about the specific information which he said he invariably gave to patients with a fibroid uterus, such as the plaintiff, based on a routine developed over 15 years of practice. The evidence was admitted to show that he gave the plaintiff the same information on a particular occasion.

[7] In the instant case, Hodge admitted that he had no specific recollection of what he told Lemon on any specific occasion. He stated that he would not have told Lemon that history, palpation, mammograms, and ultrasounds do not diagnose cancer and that he would not use the word "cancer" when informing patients about mammogram failure rates, because words such as "cancer" can scare patients. Hodge testified that in his practice, which involved examining 140 patients per week, a small percentage of which were being seen because of a recent mammogram, he had a policy of informing patients of mammogram failure rates and that because of that policy, he would have informed Lemon as well. As evidence that she was told of the need to be reexamined, Hodge relied upon the fact that she was seen on October 26, 1989, which was after the mammogram and after she had been contacted on October 9 about her mammo-

gram results. We are not unaware that in Hodge's testimony, he admitted that the advice about mammogram results is sometimes given by one of his nurses and it is at this point that failure rates are discussed. He also admitted that the information on Lemon's chart showed that "DS, the nurse . . . is making the call and informing [Lemon] about the mammogram." But § 27-406 speaks of the evidence of habit of a person or "of the routine practice of an organization." And, we conclude that a medical practice involving doctors and nurses can be "an organization." See *Hall v. Arthur*, 141 F.3d 844 (8th Cir. 1998) (habit evidence of doctor's office properly admitted as evidence of routine practice of organization). Thus, the fact that a nurse apparently was the person within Hodge's "organization" to talk with Lemon, at least immediately after the mammogram, does not foreclose, because of a foundational objection as was made here, proof of conduct by conformity to habit or routine practice.

Nonetheless, this case presents a close question of whether sufficient foundation was laid so that the trial court could properly find that Hodge's testimony concerning his "policy" of informing patients of mammogram failure rates was admissible under § 27-406. While the foundation laid in this particular instance was not thoroughly or artfully presented, it is clear that Hodge did testify to a policy, including utilizing his nurses, of advising mammogram patients of their results, the "failure rates" of the procedure, and the need for reexamination. Therefore, we cannot say the trial court abused its discretion in allowing Hodge to offer his opinion as to his policy, i.e., habit of informing patients of mammogram failure rates. The lack of detail concerning regularity (which involves frequency and consistency), specificity, and involuntary response, which are the hallmarks of proof of habit by specific instances rather than by opinion, does not render the opinion evidence inadmissible. See 64 A.L.R.4th 567 (1988). The absence of evidence of such hallmarks, as here, and the reliance on mere opinion may well mean that the evidence is weak and easily attacked by cross-examination or in argument to the jury, but it does not preclude admission of habit proved by opinion as § 27-406 clearly allows proof of habit by opinion. While we agree with Lemon that Hodge's opinion about his policy is self-serving, such argument

goes to the weight and credibility of the opinion rather than its admissibility. Therefore, the admissibility of habit evidence by opinion, as contrasted to specific instances of conduct, is reviewed for abuse of discretion. Finding no abuse of discretion in allowing Hodge's habit testimony, we consider Lemon's next assignment of error.

Expert Witness.

Lemon next asserts that the trial court erred in receiving Bouda's testimony as to the standard of care applicable to Hodge, an Ob-Gyn, when there was no evidence to establish his qualification to so testify. Lemon argues that because Bouda is not an Ob-Gyn and does not have the same credentials and experiences as the other expert witnesses who testified at trial, he is not properly qualified to express an opinion as to the standard of care applicable to Hodge's treatment and diagnosis of Lemon's breast cancer. As in any medical malpractice action, one of the issues to be determined by the jury is whether Hodge complied with the applicable standard of care when providing treatment and care for Lemon. Section 44-2810 provides the definition of professional malpractice for health care providers:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

The appropriate standard of care is based on an analysis focusing on what care a physician would ordinarily exercise under similar circumstances in the same or similar community while engaged in the same or a similar line of work. The record shows, and the parties agree, that the standard of care applicable in this

case, a national standard, is not unique to Lincoln, where Hodge practices. The issue raised by the assignment of error is whether Bouda's qualifications show that he has done the same or similar lines of work as Hodge sufficient to allow him to offer an expert opinion on the standard of care applicable to Hodge. Lemon argues that because Hodge and the other testifying experts are all Obs-Gyns, only an Ob-Gyn is qualified to express an opinion as to the standard of care required when a physician treats a patient for breast cancer. We do not agree, nor do we believe § 44-2810 requires such a conclusion.

[8-10] Neb. Rev. Stat. § 27-702 (Reissue 1995) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact . . . to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). 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. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Id.* Whether one qualifies as an expert depends on the factual basis or the reality underlying the witness' claim to expertise rather than upon a title. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997); *State v. Reynolds, supra.*

Bouda stated that he was board certified in internal medicine, which is the care of the various chronic diseases found in adults. Bouda specializes in oncology, the treatment of cancer. His extensive medical education includes training in the treatment and diagnosis of breast diseases. Although Bouda has never done a residency or internship in obstetrics or gynecology, he has personally diagnosed and treated breast lumps, including those with the diagnosis of breast cancer. Based on his education, training, and experience, Bouda stated that he was familiar

with the standard of care for gynecologists for the diagnosis and treatment of breast lumps in Nebraska in 1989. Bouda is also familiar with the various types of breast cancer.

Based on this testimony, plus further extensive foundational testimony which we do not reproduce here, the trial court, over objection, allowed Bouda to express his expert opinion as to whether Hodge's treatment and diagnosis of Lemon's breast lump met or exceeded the applicable standard of care. Whether Bouda is an obstetrician or gynecologist may be relevant to his qualifications, but it is not determinative, because equally important, and probably more so, is the question of whether he has sufficient experience in the diagnosis and treatment of lumps in the breasts of women. In short, does his work experience parallel Hodge's? The record shows that it does, because Bouda is an oncologist with extensive experience in treating and diagnosing breast cancer. The standard of care is not based on the title of the physician, but, rather, on the substance of the treatment.

> Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. [Citation omitted.] Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.

Ashby v. First Data Resources, 242 Neb. 529, 535, 497 N.W.2d 330, 335 (1993). Bouda has engaged in the same or a similar line of Hodge's work, which is at issue here, treating and diagnosing breast lumps. We note that his experience and ability to do so were not disputed or challenged, it is only that lack of a "title" which is implicated in this assignment of error. Therefore, Bouda's expert opinion was properly admitted. The fact that he was not formally an Ob-Gyn is only a matter of weight to be discussed with the jury, if Lemon's counsel desired. Lemon's second assignment of error is without merit.

Cross-Examination for Expert Witness Bias.

Lemon next asserts the trial court erred in refusing to allow cross-examination of Hodge's medical experts concerning their

participation in the Act. The Act, described in its simplest form, creates an excess liability insurer in which physicians may elect to participate. See § 44-2801 et seq. Participating physicians are required to maintain $200,000 base liability coverage. See § 44-2824(1). Any settlement or judgment in excess of the base coverage is then paid from the Fund. See § 44-2825(1). Participating physicians pay a surcharge on their base liability policy premiums, which is used to maintain the Fund. See § 44-2829. Lemon argues that because a portion of any judgment awarded to Lemon might be paid by the Fund, which in turn could cause an increase in surcharges, Hodge's experts' participation in the Act is a proper subject for questioning to show financial bias pursuant to Neb. Rev. Stat. § 27-411 (Reissue 1995), which reads:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The Fund is clearly "insur[ance] against liability."

[11] In a recent medical malpractice case, the Nebraska Supreme Court held that "a plaintiff must establish that an expert has more connection to a defendant's insurer than that of the policyholder or member in order for the evidence to be admissible." See, *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 676, 605 N.W.2d 777, 781 (2000), citing *Mills v. Grotheer*, 957 P.2d 540 (Okla. 1998); *Warren v. Jackson*, 125 N.C. App. 96, 479 S.E.2d 278 (1997); *Otwell v. Bryant*, 497 So. 2d 111 (Ala. 1986); and *Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App. 1978). "[A]bsent evidence that a witness has a direct interest in the outcome of the litigation, such as an agent, owner, or employee of the defendant's insurer, the potential for bias is too remote and is outweighed by the prejudice its admission would cause." 258 Neb. at 676, 605 N.W.2d at 781.

Lemon has shown no connection other than the fact that Hodge and his expert witnesses are subject to the same premium surcharge which is used to maintain the Fund. Applying the rule adopted in *Reimer v. Surgical Servs. of the Great Plains, supra*,

we find the trial court did not abuse its discretion when it did not allow cross-examination as to Hodge's expert witnesses' participation in the Act.

Discovery Issues.

Lemon's next four assignments of error assert that the trial court erred in refusing to allow discovery into the administration of the Fund. The record shows that on December 15, 1997, Lemon filed a motion to disqualify Hodge's counsel. Lemon argued that Hodge's counsel not only represented Hodge, but the Fund as well, thereby creating a conflict of interest sufficient to require disqualification. In support of the motion, Lemon sought to take the deposition of Ward. The Department of Insurance filed a motion to quash and sought a protective order claiming that the notice was vague, was overbroad, and sought to obtain documents protected by the attorney-client privilege. The trial court sustained the department's motion, in part, limiting Lemon's discovery to the issue of whether an attorney-client relationship existed between Hodge's counsel and the Fund. Lemon took Ward's deposition on April 14, 1998. Ward was instructed by his counsel not to answer nearly all of the questions asked on the basis that they were outside the limited scope of discovery allowed by the trial court's order. Lemon then filed a motion to compel discovery after which the trial court ordered Ward to answer three questions concerning whether Ward had received legal advice from any attorney representing the underlying carrier or Hodge. Ward answered all three questions in the negative. Lemon asserts the trial court erred in limiting discovery into the attorney-client relationship, if any, between the Fund, the underlying carrier, and Hodge's counsel, on the theory, as we understand it, that such would "subvert the purpose of the [Act] and benefit the underlying liability insurance carrier to the detriment of the fund, citizens of the state, and victims of medical negligence." Brief for appellant at 42. Lemon concludes that "the fund was created for the benefit of the public. It should be administered in that fashion." *Id.* at 48. Those comments aside, Neb. Ct. R. of Discovery 26 (rev. 1996) sets forth the general provisions regarding allowable discovery. Under rule 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

[12] Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

[13] We focus on what we see as the clear answer to Lemon's claims about discovery. The issues for trial in this case were whether Hodge was negligent in his treatment of Lemon and, if so, whether such negligence proximately caused Lemon injury or death. Lemon argues that the Fund "has deviated from the original concept as provided by the Act" and that "the present administration of the Act and the [Fund] is contrary to the public interest." Brief for appellant at 43. These contentions, and the others we have quoted from Lemon's brief, do not relate to the core issues for trial. Nor has counsel revealed to us how extensive discovery about the Fund, its administration, or settlement of claims would have led to the discovery of admissible evidence. In short, insurance coverage issues do not relate to liability and proximate cause issues, and, therefore, discovery beyond the disclosure of the extent of the coverage is limited. See *Walls v. Horbach*, 189 Neb. 479, 203 N.W.2d 490 (1973). Whether Lemon's quoted assertions are true or merely display counsel's dissatisfaction with the Legislature's statutory scheme in the malpractice area bears no relevance to the core issues to be resolved at trial. Therefore, we find that the trial court did not abuse its discretion in limiting Lemon's discovery concerning the administration of the Fund, including discovery about settlement of claims. We find no merit to the assignments of error concerning discovery.

CONCLUSION

Finding no merit to any of the assignments of error, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRETT A. WEAD, APPELLANT.

609 N.W.2d 64

Filed April 18, 2000. No. A-99-782.

1. **Courts: Trial: Mental Competency: Appeal and Error.** The question of competency to stand trial is one of fact to be determined by the trial court and the means employed in resolving the question are discretionary with the court. If there is sufficient evidence in the record to support the finding of competency, it will not be disturbed on appeal.
2. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel: Jurisdiction.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. The only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
3. **Trial: Pleas: Mental Competency.** The test of mental capacity to plead is the same as that required to stand trial.
4. **Trial: Pleas: Mental Competency: Appeal and Error.** A defendant's plea of guilty or no contest does not preclude the defendant from raising on direct appeal the issue of competency to plead or stand trial.
5. **Trial: Pleas: Mental Competency.** If facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time.
6. **Due Process: Trial: Mental Competency.** Although Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 1998) does not require a judge to hold a mental competency hearing, if a reasonable doubt is raised in the mind of the trial judge regarding the defendant's competency, a hearing to determine competency should be held and, if a competency hearing is held, the hearing must comport with fundamental procedural due process.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Gregory M. Schatz for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

INTRODUCTION

Brett A. Wead appeals his conviction for first degree assault following his no contest plea. Wead's sole assigned error on appeal is that the trial court erred in accepting his no contest

plea without determining his competency to stand trial, after a motion to determine competency had been made by defense counsel, but later withdrawn.

STATEMENT OF FACTS

After Wead was charged with first degree assault, Wead pled not guilty, and defense counsel filed a motion for a determination of Wead's competency to stand trial. The trial court ordered Wead to be evaluated by Dr. Bruce Gutnik. After Wead had been examined by Dr. Gutnik and Dr. Gutnik had determined that Wead was competent to stand trial, Wead, through his counsel, moved to withdraw his mental competency determination motion and his not guilty plea. Wead indicated his intent to plead no contest to the charged offense.

The following colloquy was held between the court and defense counsel: "THE COURT: . . . Did the defendant see Dr. Gutnik? [Defense Counsel]: Yes, Your Honor. THE COURT: And, apparently, I gather, was found to be competent; is that right? [Defense Counsel]: Correct, Your Honor." The trial court allowed Wead to withdraw his motion to determine competency.

The court asked Wead his current age, his educational background, whether he could read and write, and whether he understood the English language. Wead answered affirmatively. The court then explained Wead's rights to him and that he was waiving those rights. Wead responded that he understood. The court found, beyond a reasonable doubt, that Wead understood the nature of the charge against him to which he pled no contest and the possible sentence thereunder; that the no contest plea was made freely, voluntarily, knowingly, intelligently, and understandingly; that the plea is accurate; and that there was a basis in fact for Wead's plea.

The court further found beyond a reasonable doubt that Wead fully understood his rights and freely, voluntarily, knowingly, intelligently, and understandingly waived those rights, and that he understood the consequences of waiving his rights and the consequences of pleading no contest. The court then accepted Wead's no contest plea and found him guilty of the charged offense beyond a reasonable doubt.

A presentence investigation was conducted, and a report was issued. Included in the presentence report was Dr. Gutnik's evaluation of Wead. Dr. Gutnik diagnosed Wead with schizoaffective disorder, dissociative amnesia, alcohol abuse, cannabis abuse, and personality disorder "NOS" with schizotypal and antisocial traits. Further, Dr. Gutnik indicated that Wead may have an intermittent explosive disorder. However, Dr. Gutnik stated that based on the information available to him, in his opinion based upon a reasonable degree of medical certainty, Wead was competent to stand trial and was sane at the time of the alleged crime. Wead was thereafter sentenced to 19 to 20 years' imprisonment with credit for 216 days served. Wead has timely appealed to this court.

ASSIGNMENT OF ERROR

Wead contends that the trial court erred in accepting his no contest plea without determining his competency to stand trial.

STANDARD OF REVIEW

[1] The question of competency to stand trial is one of fact to be determined by the trial court and the means employed in resolving the question are discretionary with the court. *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000); *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982). If there is sufficient evidence in the record to support the finding of competency, it will not be disturbed on appeal. *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

ANALYSIS

The question presented to this court is whether a trial court, after a defendant's motion to determine competency has been withdrawn, still has the obligation to make a competency determination pursuant to this court's dictates in *State v. Johnson, supra*. However, before we may address this assigned error, we must first determine whether Wead's no contest plea waived this alleged error.

[2] The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999). The only exceptions are for

the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988).

[3,4] However, in *State v. Johnson, supra*, this court allowed a defendant to raise competency issues in a postconviction proceeding even though the defendant had pled guilty and had not raised the competency issue on direct appeal. This court stated:

> [W]e do not believe the law is that there is a procedural bar in postconviction proceedings of issues relating to competency to stand trial, and we decline to impose such a procedural bar for these issues in this postconviction proceeding. In reaching this conclusion, we bear in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions.

4 Neb. App. at 801, 551 N.W.2d at 758. It follows that if a defendant is not precluded from raising the issue of competency to stand trial on postconviction, then the defendant likewise is not precluded from raising the issue of competency to stand trial on direct appeal. Since the test of mental capacity to plead is the same as that required to stand trial, *id.*, this standard also applies to issues regarding a defendant's capacity to plead to an offense. Thus, a defendant's plea of guilty or no contest does not preclude the defendant from raising on direct appeal the issue of competency to plead or stand trial, and we find that Wead's no contest plea does not procedurally bar our consideration of the issue of Wead's competency.

[5] The statute providing for a determination by a judge of the mental incompetency of the accused before trial is Neb. Rev. Stat. § 29-1823 (Cum. Supp. 1998), which provides in part:

> (1) If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric, or psychological examination of the accused to be

made as he or she deems warranted and hold such hearing as he or she deems necessary.

If facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time. *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982); *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

[6] Although § 29-1823(1) does not require a judge to hold a competency hearing, if a reasonable doubt is raised in the mind of the trial judge regarding the defendant's competency, a hearing to determine competency should be held. *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974); *State v. Johnson, supra.* Further, *Johnson* requires that if a competency hearing is held, the hearing must comport with fundamental procedural due process.

The leading case in Nebraska regarding a court's duty to determine competency is *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996). Johnson appealed from a denial of postconviction relief following an evidentiary hearing. Johnson alleged his trial counsel was ineffective because he did not raise the issue of competency or insanity with the court. As part of a plea bargain, Johnson pled guilty to one count of incest. During the plea hearing, Johnson's attorney put into evidence a copy of a psychiatrist's report, which said that Johnson was incompetent to stand trial. However, Johnson's attorney did not file a motion for or otherwise request a hearing on competency, and the district court did not hold a separate hearing sua sponte.

This court held that once defense counsel made the trial court aware of the question of Johnson's competency, the power of the trial court under § 29-1823 to examine competency was triggered. Thus, this court determined that although the trial judge made specific findings that Johnson possessed the attributes of competency, that he understood his rights, and that the plea was made " 'freely, voluntarily, knowingly and intelligently,' " the appellate court was required to address the adequacy of the trial court's inquiry into Johnson's competency. *State v. Johnson*, 4 Neb. App. at 786, 551 N.W.2d at 750.

In this court's review of the proceedings during Johnson's plea, we found that the trial judge considered the issue of

Johnson's competency and that the district court apparently intended the admission of the psychiatrist's report, the questioning of Johnson and his counsel, and the court's observations of Johnson to constitute the competency hearing. This court then went on to find that the trial judge's inquiry into Johnson's competency was inadequate as it did not comport with fundamental procedural due process, as the issue of competency was raised by defense counsel and heard that same day by the trial court, but with no advance notice to Johnson that such an issue would be heard, and that given the contents of the psychiatrist's report stating that Johnson was not competent to stand trial, the trial court's determination of competency must have been principally based upon the court's colloquy with Johnson.

In the instant case, although the district court did not make an explicit determination that Wead was competent, the court did find beyond a reasonable doubt that Wead understood the nature of the charge against him to which he pled no contest and the possible sentence thereunder; that the no contest plea was made freely, voluntarily, knowingly, intelligently, and understandingly; that Wead fully understood his rights and freely, voluntarily, knowingly, intelligently, and understandingly waived those rights; and that he understood the consequences of waiving his rights and the consequences of pleading no contest. We find this to be an implicit determination that Wead was competent to enter his no contest plea.

Additionally, in the instant case, the district court did not hold a competency hearing; therefore, we are not presented with the procedural due process issues that were present in *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996). Further, unlike *Johnson*, in the instant case, the psychiatrist's report concluded that Wead was competent to stand trial, and thus, the district court's determination of competency paralleled the conclusion reached by the psychiatrist.

In sum, we find that the district court implicitly found that Wead was competent and that there is sufficient evidence in the record to support the finding of competency. Therefore, Wead's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY, APPELLANT.

609 N.W.2d 390

Filed April 18, 2000. No. A-99-869.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** An appellate court reviews a trial court's ultimate determinations of reasonable suspicion to support an investigatory stop and probable cause to perform a warrantless search de novo and reviews findings of fact for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. ___: ___: ___: ___. Once an appellate court has conducted a de novo review of the lower court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, the appellate court reviews the trial court's findings of fact, giving due weight to the inferences drawn from those facts by the trial judge. In making this review, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, protect citizens of Nebraska from unreasonable searches and seizures.
4. **Warrantless Searches.** A search not supported by a warrant is per se unreasonable unless it is justified by a recognized exception to the warrant requirement.
5. **Warrantless Searches: Proof.** When a search is conducted without a warrant, the State bears the burden of establishing that the search conducted falls within one of the established exceptions to the warrant requirement.
6. **Constitutional Law: Arrests: Warrantless Searches: Probable Cause: Motor Vehicles.** The recognized exceptions to the Fourth Amendment's warrant requirement as applied to warrantless searches of vehicles are probable cause, exigent circumstances, consent, search incident to arrest, inventory, and plain view.
7. **Arrests: Search and Seizure: Motor Vehicles.** An inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and the search is conducted pursuant to standardized inventory criteria or established routine.
8. **Constitutional Law: Search and Seizure: Proof.** The State bears the burden of proving that an inventory search was made pursuant to a standardized criteria or routine required by the Fourth Amendment.
9. **Police Officers and Sheriffs: Search and Seizure: Motor Vehicles: Proof.** Evidence that it is Nebraska State Patrol policy to conduct an inventory search of vehicles before they are towed, but does not establish the procedures for conducting the search or establish whether the procedure includes a policy governing the opening of containers found in vehicles, is inadequate to meet the State's burden of proving that an inventory search was made pursuant to the State Patrol's standardized criteria or established routine.
10. **Police Officers and Sheriffs: Arrests: Search and Seizure: Motor Vehicles.** When a law enforcement officer has made a lawful custodial arrest of the occupant of a motor vehicle, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that motor vehicle, including any container, whether open or closed, within the passenger compartment.

11. ___: ___: ___: ___. Handcuffing an arrestee and placing the suspect away from a recently occupied motor vehicle does not prohibit a contemporaneous search by law enforcement officers.
12. ___: ___: ___: ___. When law enforcement officers are conducting a search of a motor vehicle incident to the driver's arrest, they may inspect passengers' personal belongings found in the passenger compartment of the motor vehicle, because to allow a distinction between packages or containers based on ownership would create an impracticable rule.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Dorothy A. Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Marie Colleen Clarke for appellee.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

INBODY, Judge.

INTRODUCTION

James Ray appeals his conviction for possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1995). His sole assigned error on appeal is that the district court erred in overruling his motion to suppress. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On November 4, 1997, at approximately 7:15 p.m., Nebraska State Patrol Trooper Michael L. Tumbleson was traveling northbound on U.S. Highway 77 approaching the intersection of Old Cheney Road in Lancaster County, Nebraska, when he observed a pickup westbound on Old Cheney Road make a right turn and proceed north on Highway 77 without first coming to a complete stop at the stop sign. Trooper Tumbleson followed the pickup, and after observing the pickup cross the centerline several times, he conducted a stop of the vehicle.

Trooper Tumbleson made contact with the pickup's driver, who was identified as David C. Almery, and the pickup's passenger, subsequently identified as James Ray. When Trooper Tumbleson asked for the pickup's registration, he detected a

strong odor of alcoholic liquor. Almery produced his operator's license, and Trooper Tumbleson returned to his patrol car to run a license and criminal history check on Almery. After learning of an outstanding warrant for Almery, Trooper Tumbleson placed Almery under arrest.

After Almery was arrested, handcuffed, and placed in the patrol car, Trooper Tumbleson contacted Ray. Trooper Tumbleson advised Ray that there was a warrant for Almery's arrest and asked Ray to exit the pickup so that a search of the pickup could be conducted. Trooper Tumbleson then conducted a pat-down search of Ray.

During the pat-down search, Trooper Tumbleson discovered in Ray's right front jeans pocket a ½-inch copper pipe approximately 4 to 6 inches long with two end caps on it and a plastic bag attached. Trooper Tumbleson testified that as he was conducting the pat-down search, he thought the item was possibly a marijuana pipe, but when he asked Ray what the item was, Ray refused to answer. Upon removing the item from Ray's pocket and removing one of the end caps from this pipe, Trooper Tumbleson noted a white powdery substance in the lining, in the cap, and on the plastic bag that had been stuck to the pipe. When Trooper Tumbleson asked Ray what the substance was, Ray refused to answer.

Trooper Tumbleson also discovered a pipefitting with burnt marijuana residue in the right front pocket of Ray's jeans, as well as a film canister in Ray's right front jacket pocket that contained marijuana residue and another film canister containing marijuana in Ray's right front shirt pocket. Following the completion of the pat-down search, Ray was advised that he would receive a citation for possession of marijuana less than 1 ounce and possession of drug paraphernalia.

Trooper Tumbleson returned to his cruiser to fill out Ray's citation, then brought the citation back to Ray, and Ray signed it. At that time, Trooper Tumbleson started searching the pickup. A black knapsack was found on the passenger-side floorboard of the pickup. Trooper Tumbleson asked Ray if the knapsack belonged him, and Ray responded affirmatively. Trooper Tumbleson then asked if there was any contraband inside the knapsack, and Ray responded that "yes, there was contraband"

and that the knapsack contained a mirror, snorting tube, and razor. Trooper Tumbleson opened the knapsack and found a brown leather bag inside, which contained the mirror, snorting tube, and razor. Trooper Tumbleson also located another film canister, one blue tablet with the letters UAD stamped on one side, and a clear plastic bag containing what Trooper Tumbleson believed to be blotter acid. Subsequent testing of the items contained in the knapsack revealed the presence of cocaine on the snorting tube.

On February 9, 1998, an information was filed charging Ray with possession of a controlled substance. Ray filed motions to suppress evidence and statements. On August 14, a hearing was held on Ray's suppression motions, during which the evidence as previously recited was adduced. On December 21, the district court overruled Ray's motions to suppress, except as to the paraphernalia found pursuant to the "'pat down'" search of Ray. The district court specifically found that Trooper Tumbleson's search of the vehicle was constitutional as a search incident to arrest and that the fact that Trooper Tumbleson testified he was conducting an "inventory" search was not determinative. Additionally, the trial court specifically found that Ray's statements to Trooper Tumbleson were freely and voluntarily made.

A stipulated trial was held on February 25, 1999. The only evidence offered at trial was the transcript of Trooper Tumbleson's testimony from the hearing on Ray's motions to suppress, a videotape of the stop, and the laboratory report from the testing of the items found in Ray's possession. Ray preserved his objections raised by his suppression motions. The court found Ray guilty beyond a reasonable doubt and sentenced Ray to 180 days' incarceration. Ray now timely appeals to this court.

ASSIGNMENT OF ERROR

Ray's sole assigned error is that the district court erred in overruling his motion to suppress the contents of the knapsack.

STANDARD OF REVIEW

[1] An appellate court reviews a trial court's ultimate determinations of reasonable suspicion to support an investigatory

stop and probable cause to perform a warrantless search de novo and reviews findings of fact for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Accord *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

[2] Once an appellate court has conducted a de novo review of the lower court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, the appellate court reviews the trial court's findings of fact, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998); *State v. Tierney*, 7 Neb. App. 469, 584 N.W.2d 461 (1998). In making this review, the appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Chitty, supra*; *Tierney, supra*.

DISCUSSION

Before addressing Ray's assigned error, it is important to note what his appeal *does not* involve. Ray does not contend that the initial traffic stop in this case was illegal or that Trooper Tumbleson was not justified in arresting Almery, the driver of the pickup. Further, Ray was not prosecuted for possession of any items located during the course of the pat-down search of his person, and, therefore, the constitutionality of the pat-down search is not at issue. Finally, Ray does not assign as error the district court's finding that Ray's statements to Trooper Tumbleson were voluntary and admissible. Thus, the sole issue before this court on appeal is whether the warrantless search of the knapsack, identified by Ray as belonging to him, was constitutional. In making this determination, although we consider Trooper Tumbleson's subjective belief that he was justified in conducting a search of the vehicle pursuant to the inventory exception to the search warrant requirement, Trooper Tumbleson's subjective belief is not determinative of whether the search was in fact justified pursuant to an exception to the search warrant requirement. Compare *Florida v. Royer*, 460

U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (fact that officers did not believe probable cause existed and proceeded on consensual rationale or stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), would not foreclose State from justifying defendant's custody by proving probable cause); *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436 (8th Cir. 1989) (although officers believed they possessed only reasonable suspicion, court nevertheless may conclude that probable cause existed); *U.S. v. O'Connell*, 841 F.2d 1408 (8th Cir. 1988) (test of probable cause is not law enforcement officer's articulation of his or her subjective theory, but objective view of facts); *United States v. Lester*, 647 F.2d 869 (8th Cir. 1981) (validity of arrest judged by whether probable cause existed, not whether arresting officers gave arrestee right reason for arrest); *Klingler v. United States*, 409 F.2d 299, 304 (8th Cir. 1969) (because probable cause for arrest is determined by objective facts, officer's subjective opinion that he did not think he had " 'enough facts' " upon which to arrest suspect was not material).

[3-5] The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, protect citizens of Nebraska from unreasonable searches and seizures. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). A search not supported by a warrant is per se unreasonable unless it is justified by a recognized exception to the warrant requirement. *Id.* When a search is conducted without a warrant, the State bears the burden of establishing that the search conducted falls within one of the established exceptions to the warrant requirement. See, *id.*; *State v. Adams*, 7 Neb. App. 571, 585 N.W.2d 96 (1998).

[6] The recognized exceptions to the Fourth Amendment's warrant requirement as applied to warrantless searches of vehicles are probable cause, exigent circumstances, consent, search incident to arrest, inventory, and plain view. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The only exceptions that need be considered in this case are the inventory exception and the search incident to arrest exception.

Inventory Search.

Although the district court did not base the finding that Trooper Tumbleson's warrantless search of the vehicle was con-

stitutional on the "inventory" search exception to the search warrant requirement, we briefly address the issue because there was testimony by Trooper Tumbleson regarding impounding and inventorying the vehicle.

[7,8] An inventory search is permissible after an arrest where the search is preceded by lawful custody of the vehicle and the search is conducted pursuant to standardized inventory criteria or established routine. See *Konfrst, supra.* The State bears the burden of proving that an inventory search was made pursuant to a standardized criteria or routine required by the Fourth Amendment. *State v. Filkin*, 242 Neb. 276, 494 N.W.2d 544 (1993). See *Konfrst, supra.*

In *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990), the defendant moved to suppress evidence found in the trunk of her impounded automobile. The officers who conducted the search testified that the vehicle was impounded because the defendant's passenger did not have a driver's license and that an inventory search was conducted to document the contents of the car; however, the State did not present any evidence as to the standard inventory procedures used by the police department. In considering whether law enforcement's search of the automobile was conducted pursuant to the inventory exception, the Nebraska Supreme Court found that since the State failed to present evidence of any standard inventory procedures used by the police department, the search was not reasonable. The court also stated that "[i]t is unnecessary to determine whether those procedures must include a policy governing the opening of containers found in vehicles, because the State failed to present evidence that *any* search procedure was used by the York Police Department." *Id.* at 540, 462 N.W.2d at 112.

[9] In the instant case, Trooper Tumbleson testified at the suppression hearing that he conducted an inventory search of the vehicle prior to its being towed and that state troopers "are required by policy to inventory all vehicles that are going to be towed so that we have inventory of all items that are in that vehicle before it is taken away from the scene, before anything can be removed, until the individual reclaims the vehicle." Although this evidence sets forth that it is State Patrol policy to conduct an inventory search of vehicles before they are towed, it does

not establish the procedures for conducting the search, nor does the evidence establish whether the procedure includes a policy governing the opening of containers found in vehicles. This evidence regarding the State Patrol's impoundment and inventory procedure is inadequate to meet the State's burden of proving that the inventory search was made pursuant to the State Patrol's standardized criteria or established routine. Therefore, the evidence obtained as a result of the search is not admissible pursuant to the inventory exception to the search warrant requirement.

Search Incident to Arrest.

Next, we consider whether Trooper Tumbleson's search of the vehicle was permissible as a search incident to Almery's arrest.

[10,11] When a law enforcement officer has made a lawful custodial arrest of the occupant of a motor vehicle, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that motor vehicle, including any container, whether open or closed, within the passenger compartment. *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Adams*, 7 Neb. App. 571, 585 N.W.2d 96 (1998). Furthermore, handcuffing the arrestee and placing the suspect away from the recently occupied motor vehicle does not prohibit a contemporaneous search. *Adams, supra*; *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996) (holding that search of arrestee's vehicle was valid search incident to arrest even though search performed while arrestee was handcuffed in police car).

In the instant case, Almery was arrested pursuant to an outstanding warrant. Thus, Trooper Tumbleson was authorized to conduct a search of the vehicle incident to Almery's arrest, even though at that point Almery had been handcuffed and placed in the patrol car.

Furthermore, we find the argument that the knapsack should have been excluded from the search incident to the arrest of the driver because the knapsack belonged to the passenger unpersuasive and contrary to established law. In *Wyoming v.*

Houghton, 526 U.S. 295, 119 S. Ct. 1299, 143 L. Ed. 2d 408 (1999), the U.S. Supreme Court considered the question of whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband. After noting that it was uncontested that the police officers had probable cause to believe there were illegal drugs in the car, the U.S. Supreme Court held that officers with probable cause to search a motor vehicle may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In so doing, the Court considered the effect of allowing a distinction among packages or containers based on ownership: A criminal might be able to hide contraband in a passenger's belongings without the passenger's knowledge or permission or a passenger engaged in a common enterprise with the driver and thus having the same interest in concealing the fruits or evidence of their wrongdoing might hide contraband in the passenger's belongings to avoid a search.

> To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to know that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation—in the form of both civil lawsuits and motions to suppress in criminal trials—involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate,

> or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge.

Houghton, 526 U.S. at 305-06.

Additionally, the Court noted that if a passenger exception were to be created, "it is perplexing why that exception should protect only property belonging to a passenger, rather than (what seems much more logical) property belonging to *anyone* other than the driver," *id.* at 306, as the individual privacy would be invaded to the same degree whether or not the individual was present at the time of the search.

[12] Although the Court made these statements in the context of probable cause to search, not a search incident to arrest, we believe that the reasoning is equally applicable in the search incident to arrest context. We hold that when law enforcement officers are conducting a search of a motor vehicle incident to the driver's arrest, they may inspect passengers' personal belongings found in the passenger compartment of the motor vehicle, because to allow a distinction between packages or containers based on ownership would create an impracticable rule.

CONCLUSION

In sum, because we have found that Trooper Tumbleson's search of Ray's knapsack was constitutional based upon a search incident to the arrest of Almery, the district court properly denied Ray's motion to suppress. The order of the district court is affirmed.

AFFIRMED.

EDWARD VIEREGGER AND BRENDA VIEREGGER, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF BLAKE VIEREGGER, A MINOR, APPELLANTS, V. ANDREW ROBERTSON, M.D., AND MICHAEL LEVINE, M.D., APPELLEES.

609 N.W.2d 409

Filed April 25, 2000. No. A-99-058.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions: Appeal and Error.** All jury instructions must be read together and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
3. **Malpractice: Physician and Patient: Proximate Cause: Proof.** In a medical malpractice action, proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
4. **Negligence: Proximate Cause: Liability.** If the effects of a defendant's negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the defendant from liability.
5. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
6. **Health Care Providers: Words and Phrases.** Reasonable care is the care, skill, and knowledge ordinarily possessed and used under like circumstances by other health care providers engaged in a similar practice in the same or similar localities.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for a new trial.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellants.

James A. Snowden and Fred B. Campbell, Jr., of Wolfe, Snowden, Hurd, Luers & Ahl, for appellees.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

SIEVERS, Judge.

This case involves a medical malpractice suit filed by Edward Vieregger and Brenda Vieregger, individually and as parents and

next friends of Blake Vieregger, a minor, against Andrew Robertson, M.D., and Michael Levine, M.D., for injuries Blake suffered during his birth. The jury found for Robertson and Levine. In this appeal, the Viereggers assert that several jury instructions were erroneous.

BACKGROUND

Brenda learned she was pregnant with her second child in February 1992. Brenda suffers from maternal diabetes and was therefore referred to perinatologists Robertson and Levine for the management of her diabetes during her pregnancy, as well as her other obstetrical care and treatment.

Among other complications, maternal diabetes may sometimes cause macrosomatia, a condition where the baby is very large at delivery, weighing over 4,500 grams. This occurs where the mother's blood sugar levels are too high, which causes the unborn baby to produce insulin which acts as a growth hormone. Therefore, monitoring the mother's blood sugar throughout the pregnancy is important. Other risk factors for macrosomatia include maternal obesity at the time of conception, excessive weight gain by the mother during pregnancy, and delivery after the 40th week. Macrosomatia can complicate delivery by contributing to shoulder dystocia, which occurs when the baby's shoulder becomes lodged against the mother's pelvis during delivery.

Because Brenda's glucose levels were above normal, Robertson and Levine instructed Brenda to test her blood sugar level four times a day and to record the results in a logbook in order to monitor her condition. In order to lower Brenda's glucose level, they also adjusted her insulin usage, put her on a 2,200-calorie diet, and referred her to diabetes educational classes. Brenda was fairly consistent about measuring her blood sugars as instructed and brought her logbook for the doctors' review to all of her examinations except one. Brenda's average glucose level was thought to be under good control, and by her 16th week of pregnancy, it was in the normal range. By her 26th week, her level started to drop again, and by her 31st week, her level was described as very good. However, her day-to-day readings from mid-June until the baby's delivery at the end of

September fluctuated, and very high readings occurred every few days. These high readings were very serious and were potentially dangerous for the baby.

Brenda weighed 177 pounds at the time of conception and gained excessive weight during her pregnancy. The evidence revealed that while the average weight gain during pregnancy is 25 pounds, Brenda at one point weighed 228 pounds, a weight gain of more than 50 pounds.

Robertson and Levine performed a series of ultrasounds in order to try to determine the baby's weight. This method is not always accurate, because the measurement is affected by the size of the mother and the fact that all babies are not shaped exactly the same. The baby's estimated fetal weight between the 32d and 37th weeks of gestation was equal to or exceeded the 90th percentile and was considered large for its gestational age. The ultrasound taken a week before the baby's birth indicated that the baby weighed 3,758 grams. Based on this information, Robertson and Levine expected the Vieregger baby to weigh about 4,000 grams at delivery. However, the ultrasound was inaccurate, as Blake weighed 4,590 grams at birth. The Viereggers' expert, Leslie Iffy, M.D., testified that it was his opinion that Brenda's prenatal care did not comply with appropriate standards.

On September 21, 1992, Brenda was admitted to the hospital, and labor was induced with the administration of oxytocin. During labor, the fetal heart rate decelerated on repeated occasions. Iffy testified that the use of oxytocin to induce labor should have been decreased or discontinued, but that in Brenda's case, the amount was increased. He indicated that this was inappropriate and fell below the standard of care.

During delivery, the baby's shoulder became stuck against Brenda's pelvis, which is referred to as "shoulder dystocia." This condition is an obstetrical emergency, which can result in the death of the baby or severe neurological damage. Robertson tried several different methods to deliver the baby. First, he applied lateral traction, or downward pressure, to the side of the baby's head in order to get the shoulder to slip under the pubic bone. When this did not work, Brenda was put in the "McRoberts position," with her knees against her chest, which

also failed. An incision between the vagina and the rectum, an episiotomy, was performed to provide increased room for the baby. This did not work either. Pressure was applied above her pubic bone to try to push the shoulder free. This also failed. At this point, Robertson performed a posterior arm extraction to deliver the baby. At the simplest level of description, he reached in and grabbed an arm and maneuvered it out of the vagina, then rotated the baby out.

Blake suffered bruises and abrasions on the left side of his face and body due to his delivery. Blake also suffered injury to the brachial plexus, a group of nerves which emerge from either side of the spinal column and innervate each arm. This brachial plexus injury has resulted in significant and permanent injury to Blake's right arm.

The Viereggers brought suit against Robertson and Levine, alleging that the two doctors were negligent in treating Brenda during her pregnancy and in delivering Blake. Specifically, the Viereggers asserted that Robertson and Levine failed to effectively maintain Brenda's blood sugars within the acceptable range, failed to prevent the fetal macrosomatia, administered excessive oxytocin, increased the risk of shoulder dystocia, and used excessive force during delivery. Prior to trial, the Viereggers filed a motion in limine to exclude any evidence related to possible contributory negligence on Brenda's part. Robertson and Levine did not plead contributory negligence as a defense, and the Viereggers' motion was sustained by the trial court.

At trial, the Viereggers offered evidence that excessive force was used in the delivery of Blake which fell below the standard of care. Iffy testified that the bruising and abrasions on Blake's face plus the injury to the brachial plexus were evidence that excessive force was used to deliver Blake. Iffy explained that if a doctor pulls the head of a baby with great force in a direction which is away from the shoulder that is stuck, the trunk of the brachial plexus can be pulled from the spine. This is referred to as an "avulsion." Iffy testified that this is "conclusive evidence of brutal force having been used at the time of the delivery."

Robertson and Levine offered evidence that their care of Brenda and delivery of Blake met the standard of care. Their

expert, Thomas Benedetti, M.D., testified that Robertson's delivery of Blake was proper under the circumstances. While he agreed that the brachial plexus injury was caused by shoulder dystocia, he stated that he did not think Robertson "had anything to do with that." Benedetti concluded that both Robertson and Levine complied with the appropriate standards of care in this case.

After receiving various instructions, several of which are at issue and discussed in detail later in our opinion, the jury found in favor of Robertson and Levine. The Viereggers' motion for a new trial was denied, and they have timely appealed.

ASSIGNMENTS OF ERROR

The Viereggers assert that the district court erred in (1) failing to properly instruct the jury on proximate causation, (2) refusing to properly instruct the jury that the negligence of the parent is not imputed to the child, and (3) instructing the jury on the statutory definition of malpractice.

STANDARD OF REVIEW

[1] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). It is the burden of the complaining party to establish that prejudice has occurred. *Everts v. Hardcopf-Bickley, supra*; *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

ANALYSIS

Proximate Cause Instruction.

[2] The Viereggers claim that the trial court erred in not properly instructing the jury on proximate cause. The law is well established that all jury instructions must be read together and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994).

The reading of a jury instruction and not its phraseology is an important consideration, and where the meaning of the instruction is reasonably clear, it is not prejudicially erroneous. *Id.*

The trial court gave the instruction, No. 7, for proximate cause found in NJI2d Civ. 3.41: "A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred." In this case, it is important to note that the burden of proof instruction, No. 2, given to the jury phrased the Viereggers' burden concerning proximate cause as follows:

> 1. That the defendant, Andrew Robertson, M.D., was negligent in one or more of the ways claimed by the plaintiffs;
>
> 2. That any such negligence was *the* proximate cause of the plaintiff Blake Vieregger's injury.
>
> . . . .
>
> 1. That the defendant, Michael Levine, M.D., was negligent in one or more of the ways claimed by the plaintiffs;
>
> 2. That any such negligence was *the* proximate cause of the plaintiff Blake Vieregger's injury.

(Emphasis supplied.)

[3] The Viereggers point to recent case law holding that in a medical malpractice action, "proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff." *Doe v. Zedek*, 255 Neb. 963, 970, 587 N.W.2d 885, 891 (1999). See, also, *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 651, 605 N.W.2d 782, 791 (2000) (citing *Doe* for proposition that in malpractice action, burden of proof is on plaintiff to demonstrate that "the deviation [from the standard of care] was *the* proximate cause of the plaintiff's alleged injuries"). (Emphasis supplied.) But, *Doe v. Zedek, supra*, clearly teaches that a physician's negligence need only be *a* proximate cause, not *the* proximate cause of the plaintiff's injury. We follow *Doe v. Zedek* rather than the apparently misstated formulation of its holding in *Snyder*.

It is instructive to examine Justice Stephan's separate opinion in *Snyder*, pointing out that the use of the "substantial factor"

test to establish proximate cause is primarily in cases where the acts of negligence of two or more persons combine to produce a single injury, although one of them alone could not have caused the result. Justice Stephan, citing *Reimer v. Surgical Servs. of the Great Plains, supra*, says that the use of the "substantial factor" test for establishing proximate cause is consistent with the fact that the rule was developed for cases in which the application of the "but for" rule of causation would allow each negligent defendant to escape responsibility, because the conduct of one or more others would have been sufficient to produce the same result.

Here we are concerned with the problem of an instruction on the burden of proof of proximate cause potentially allowing a culpable defendant to evade responsibility because there are two defendants and the jury was told that the negligence of each doctor had to be *the* proximate cause. Thus, the jury had to find each doctor to be *the* sole cause, whereas in this situation of multiple defendants, the law requires that the negligence of each doctor only be a "substantial factor." An instruction that the burden of proof is to show that a doctor's negligence was *a* cause is what is required.

Moreover, an instruction imposing a burden of proof of *the* proximate cause creates a very real concern when the factual setting is such that a jury could assign blame for a child's injury to a parent. For example, Brenda's diabetes and weight gain could, under the burden of proof instruction to show *the* proximate cause, result in improper considerations by the jury. For example, in the context of searching for *the* proximate cause, the jury could end up reasoning that Robertson and Levine, even though negligent, were not *the* proximate cause because Brenda's weight gain and diabetes had a causative role in the development of an overly large baby, which led to the need for force in the delivery which caused the avulsion. In short, the trial court used an overly restrictive burden of proof instruction on proximate cause, which prevented the jury from considering whether either Robertson's or Levine's negligent conduct was a substantial factor in causing Blake's injury, and additionally, the jury was potentially allowed to consider Brenda's conduct in the causation equation. See *Smith v. Kellerman*, 4 Neb. App. 178,

541 N.W.2d 59 (1995) (discussing "a" cause versus "the" cause).

We turn to the Viereggers' proposed instruction defining proximate cause, which included the definition from NJI2d Civ. 3.41 given by the court plus the following:

> A proximate cause need not be the sole cause. It may be a substantial factor or substantial contributing cause in bringing about the injury or harm.
>
> If the effects of a Defendant['s] negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the Defendants from liability.

The first sentence of the Viereggers' proposed instruction is an attempt to state what *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999), holds, which is that a physician's negligence need not be the cause—it is enough that the doctor's negligence "caused or contributed" to the injury. This is materially different from the instruction given. While *Doe v. Zedek* was decided after this cause was tried, the notion articulated therein is not new to Nebraska negligence law. See, *Terry v. Duff*, 246 Neb. 524, 530, 519 N.W.2d 550, 554 (1994) (instruction approved in malpractice case against defendant physician in which jury was instructed that doctor's negligence had to be " 'the proximate cause or a proximately contributing cause of injury' "); *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985) (when separate and independent acts of negligence by different persons combine to produce single injury, each is liable for damage although one of them alone would not have caused result); *Landmesser v. Ahlberg*, 184 Neb. 182, 187, 166 N.W.2d 124, 128 (1969) ("[s]everal causes acting concurrently may amount to a proximate cause"); *Barry v. Moore*, 172 Neb. 57, 63, 108 N.W.2d 401, 405 (1961) (whether negligence "proximately contributed to cause the accident" was jury question). We conclude the overly restrictive burden of proof instruction coupled with the failure to give an instruction which articulates the rule that a defendant doctor's negligence need only be a proximately contributing cause as articulated by *Doe v. Zedek, supra*, was error.

[4] The last sentence of the Viereggers' proposed instruction undoubtedly derives from *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992), also a medical malpractice case. The *Miles* court stated: "[I]f the effects of a defendant's negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the defendant from liability." *Id.* at 604-05, 489 N.W.2d at 841, citing *London v. Stewart*, 221 Neb. 265, 376 N.W.2d 553 (1985).

In the instant case, the trial court gave instruction No. 18, which provided:

> Where the independent negligent acts or failures to act of more than one person combine to proximately cause the same injury, each such act or failure to act is a proximate cause, and each such person may be held responsible for the entire injury. This is true though some may have been more negligent than others.

This instruction is nearly identical to the second paragraph of the Viereggers' proposed instruction, as quoted above. Therefore, the omission of the *Miles* instruction requested by the Viereggers was remedied by instruction No. 18, which is substantially similar to that requested.

[5] Finally, we determine whether the erroneous jury instruction concerning proximate cause was reversible error. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997). The language of the burden of proof instruction and the proximate cause instruction would cause the jury to view the Viereggers' burden of proof as to the negligence of Robertson and Levine incorrectly, plus the instructions wrongfully enhanced the burden of proof of the Viereggers. In short, it is a different case if a jury is told that "this doctor's negligence must have been *the* cause of the baby's injury" than if told "this doctor's negligence must have caused or contributed to the baby's injury." This is particularly so when there is evidence to suggest that a combination of causative factors may have been at work in the baby's injury.

Lack of Imputed Negligence Instruction.

The Viereggers next assert that the trial court should have instructed the jury that the negligence or acts or omissions of the parents cannot be imputed to the child. The defense of contributory negligence was not asserted by Robertson and Levine, and before the trial, the court sustained the Viereggers' motion in limine to exclude evidence regarding any negligence on the part of Brenda. However, evidence was introduced at trial regarding Brenda and things which she did or did not do which had a causative role in the baby's condition immediately before birth. Such evidence was necessarily admitted for other reasons, for example, to establish the medical conditions that Robertson and Levine were treating and the risks posed to the baby. The evidence was not offered to intentionally blame Brenda for Blake's injury. Examples of such evidence include references to Brenda's weight (a risk factor for macrosomatia) and testimony regarding her consistency in testing her blood sugar at home. We believe that it is readily apparent that in this factual setting, some jurors may well have trouble finely differentiating between the mother's actions or inactions which admittedly impact the fetus and how the doctors were duty bound under the applicable standard of care to properly handle the mother's predelivery care and the child's birth process. The jury must differentiate during its consideration of proximate cause. The mother's weight and diabetes has a natural tendency to become connected with the baby's injury in the minds of some jurors, even though the defense has not even made such a contention. The cautionary instruction sought would guard against a decision on an improper basis and could not have been harmful to the defense which did not assert contributory negligence. Even though contributory negligence was not raised as a defense, the evidence was such that Brenda's conduct was prominent enough in the evidence that the jury could easily become distracted from its effort to answer the real question presented by this case, which was whether Robertson and Levine were negligent and whether any such negligence proximately caused Blake's injury. The requested jury instruction should have been given, and its absence adversely affected the substantial rights of Blake.

Definition of Statutory Malpractice Instruction.

The Viereggers agree that the trial court instructed the jury on the duty of a health care provider based upon NJI2d Civ. 12.01; however, they assert that the court should not have instructed the jury on the statutory definition of malpractice contained in the Nebraska Hospital-Medical Liability Act, codified at Neb. Rev. Stat. § 44-2810 (Reissue 1998). They argue that instruction No. 6 was redundant and confusing to the jury.

The jury was given instruction No. 5, which is from NJI2d Civ. 12.01: "A physician has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other physicians engaged in a similar practice in the same or similar localities." The court also gave the statutory definition of malpractice (or professional negligence) in instruction No. 6, which stated:

> This is an action based upon a claim of malpractice, sometimes called professional negligence. A definition of professional negligence is:
>
> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

[6] In *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994), the Nebraska Supreme Court specifically addressed what instruction should be given to the jury in this situation and disapproved of giving an additional instruction with NJI2d Civ. 12.01. The court stated:

> The Nebraska Jury Instruction does not use the phrase "reasonable care," as does the definition provided in § 44-2810. However, as noted in NJI2d Civ. 12.01 com-

> ment at 688, " 'the care, skill, and knowledge ordinarily possessed and used under like circumstances by other [such health care providers] engaged in a similar practice in the same or similar localities' *will* be reasonable care." (Emphasis supplied.) Thus, the definition of "reasonable care" is inherent in the Nebraska Jury Instruction, and an additional instruction relating negligence to the absence of reasonable care would be redundant and possibly confusing to the jury.

Id. at 432, 513 N.W.2d at 508.

Thus, giving an additional instruction on the statutory definition of malpractice, or professional negligence, was erroneous. NJI2d Civ. 12.01 was the proper instruction, and adding the instruction with the statutory definition was repetitive and could have caused the jury confusion or misled it in its deliberation of this case. *Burns v. Metz, supra*, has resolved this issue. On remand, the NJI2d Civ. 12.01 instruction is the one to be given.

CONCLUSION

The requirement for the plaintiff's burden of proof on proximate causation set forth in *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000), and *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999), was not reflected in the instructions given to the jury. The proximate cause instruction, together with the burden of proof instruction, made the Viereggers' burden of proof greater than the law requires. The trial court should have instructed the jury as requested by the Viereggers in the second sentence of their proposed jury instruction regarding proximate cause, in addition to the standard instruction. Given the evidence adduced at trial, the Viereggers' proposed instruction regarding imputed negligence of the parents should have been given as a protective measure. Furthermore, the trial court erred in giving jury instruction No. 6, containing the statutory definition of malpractice. For these reasons, we reverse the verdict and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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

609 N.W.2d 690

Filed April 25, 2000. No. A-99-968.

1. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard of review is the same.
2. ___: ___. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Sexual Assault: Proof.** The material elements for third degree sexual assault that the State must prove are that the accused subjected another person to sexual contact without consent of the victim.
4. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
5. **Jury Instructions: Appeal and Error.** Jury instructions are generally subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects substantial rights of the complaining party.
6. **Sexual Assault: Words and Phrases.** Without consent means (1) that the victim was compelled to submit due to the use of force or threat of force or coercion, the victim expressed a lack of consent through words, the victim expressed a lack of consent through conduct, or the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor; (2) that the victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and (3) that a victim need not resist verbally or physically where it would be useless or futile to do so.
7. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
8. **Sexual Assault: Proof.** The burden is on the State to prove that a sexual assault victim's conduct was sufficient to show that the accused either knew or should have known that the victim refused consent.
9. **Jury Instructions: Appeal and Error.** An incomplete jury instruction is not reversible error if the complete instruction was not warranted by the evidence or if the incomplete instruction did not prejudice the accused.
10. **Courts: Appeal and Error.** In reviewing decisions of a district court which affirmed, reversed, or modified decisions of a 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.

Appeal from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, LARRY F. FUGIT, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

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

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

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Bhupinder M. Gangahar appeals his third degree sexual assault conviction for kissing and fondling an undercover police officer posing as a new employee hired to work the night shift at a hotel which Gangahar managed.

BACKGROUND

In October 1998, Gangahar was the manager at the Ramada Inn hotel in Sarpy County. The Sarpy County Sheriff's Department was investigating Gangahar after receiving some complaints regarding Gangahar. On October 23, Deputy Kathleen Hatfield went to the hotel posing as a job applicant. Gangahar interviewed and hired Hatfield that same evening, and she began working the next evening.

Hatfield reported to work shortly after midnight on October 25, 1998. She was equipped with an audio recording device and had a video camera in her purse. Investigator Rick Wheeler, of the Sarpy County Sheriff's Department, monitored the audio recording device in an unmarked police car outside the hotel. Hatfield placed the video camera so that it could record the events that occurred behind the hotel front desk.

The video shows that Gangahar put his arm around Hatfield's waist while he instructed her on her duties at the front desk. At some point after the other employees had gone home, Gangahar suggested that Hatfield join him in the sitting room to watch television. Initially, they were at opposite ends of a couch. Then, Gangahar got up to shut off the light and, when he returned, sat next to Hatfield. Gangahar then pulled Hatfield toward himself

and attempted to kiss her. Hatfield put her head down to avoid Gangahar's attempts to kiss her. When Gangahar asked Hatfield, "Do you like that?" she responded by saying, "Well, yeah," and "It's just, I don't know, it's not right to do at work."

Gangahar then got his portable telephone and told Hatfield to follow him. He took Hatfield to one of the hotel rooms. When Hatfield entered the room, she sat on the edge of the bed and kicked off her shoes. Gangahar sat next to her and invited her to move up toward the center of the bed. When Hatfield moved to the center of the bed, Gangahar attempted to kiss her again, but she put her head down each time. Gangahar would stop when Hatfield told him to, but then he would begin again. Gangahar fondled Hatfield's breast over her clothing and placed her hand on his genital area over his clothing. Hatfield then pulled away and told him to stop. Gangahar then put his right leg over Hatfield's left leg and rolled on top of her. She then pushed him away and got up. Gangahar made no attempt to stop Hatfield from leaving the room. Hatfield stated that she never attempted to kiss or touch Gangahar and that she told him no numerous times.

Gangahar was tried and convicted of third degree sexual assault after a jury trial in the Sarpy County Court on April 13, 1999. He was sentenced to 180 days in jail and to pay a $1,000 fine. The district court for Sarpy County affirmed Gangahar's conviction on appeal. Gangahar timely filed this appeal.

ASSIGNMENTS OF ERROR

Gangahar asserts that (1) the evidence is insufficient as a matter of law to support the conviction, (2) the trial court erred by failing to give Gangahar's requested instruction on consent, (3) the trial court erred by allowing the State to introduce evidence of bad acts, and (4) the trial court abused its discretion in imposing the maximum penalty.

ANALYSIS

Sufficiency of Evidence.

[1,2] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the

evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

[3] Gangahar first argues the evidence adduced at trial was insufficient to support his conviction as a matter of law. The material elements for third degree sexual assault that the State must prove to sustain Gangahar's conviction are that he subjected another person to sexual contact without consent of the victim. See Neb. Rev. Stat. § 28-320 (Reissue 1995). The undisputed evidence shows that Gangahar kissed Hatfield, fondled her breast, and placed her hand on his genital area. Thus, the evidence clearly supports the proposition that Gangahar subjected Hatfield to sexual contact. Hatfield testified that she said no and that she did not consent to such contact. Taking Hatfield's testimony most favorably to the State as we must do, we find the evidence is sufficient to support Gangahar's conviction.

Jury Instruction on Victim's Consent.

[4] The proper instruction of a jury is a question of law. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997); *State v. Hawes*, 251 Neb. 305, 556 N.W.2d 634 (1996).

[5] Jury instructions are generally subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects substantial rights of the complaining party. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

[6] Gangahar argues that the trial court erred in instructing the jury on the definition of "without consent." At the jury instruction conference, Gangahar requested an instruction on

the definition of without consent as provided in Neb. Rev. Stat. § 28-318(8) (Reissue 1997), which reads:

> Without consent means:
>
> (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;
>
> (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and
>
> (c) A victim need not resist verbally or physically where it would be useless or futile to do so[.]

Gangahar requested the entire statute be used; however, the trial court, over Gangahar's objection, instructed the jury to use only the language in § 28-318(8)(a)(ii), "the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct."

[7] 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. *Reavis v. Slominski, supra*; *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995).

[8] Gangahar's request was premised on the statutory definition of without consent, and as such, it would be a correct statement of the law. The State admits this in its brief, but argues that the evidence did not require the instruction. Gangahar argues that § 28-318(8)(b) is critical to his defense because subsection (8)(b) imposes a subjective test which requires that any refusal to consent must be "genuine and real and so as to reasonably make known to the actor the victim's refusal to consent." As such, the law places the burden on the State to prove that a victim's conduct was sufficient to show that the accused either knew or should have known that the victim refused consent.

[9] The instruction given by the county court directed the jury to examine only the victim's conduct in determining whether consent was given. However, the language of the statute which was not included in the instruction requires that a jury determine not only whether the victim refused consent, but whether such refusal was sufficient to be genuine and real so as to make it reasonably known to the accused that there was a lack of consent to Gangahar's advances. Consequently, the instruction as given was an incomplete statement of the law. However, an incomplete jury instruction is not reversible error if the complete instruction was not warranted by the evidence or if the incomplete instruction did not prejudice Gangahar. See *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

Initially, we consider whether giving the entire statutory definition of without consent was warranted by the trial evidence. The evidence shows that Hatfield did not protest when Gangahar put his arm around her waist while instructing her on her duties. When Gangahar attempted to kiss her and asked her whether she liked it, Hatfield avoided the kiss but said "Well, yeah," and "It's just, I don't know, it's not right to do at work." When Gangahar directed Hatfield into one of the hotel rooms, she did not protest. When she entered the room, she chose to sit on the bed instead of in a chair. Once she was on the bed, she removed her shoes. When Gangahar invited her to the middle of the bed, she complied. When Hatfield pushed Gangahar away and got off the bed, he made no attempt to keep her from leaving. The statute puts in issue whether Hatfield's words, actions, or inaction made her lack of consent "genuine and real" sufficient for Gangahar to reasonably know that there was a refusal to consent to his advances.

From this evidence, a jury could have concluded that Hatfield's conduct was not sufficient to make her refusal of consent reasonably known to Gangahar. However, the jury was instructed to only consider whether Hatfield refused consent by words or conduct, which the evidence shows she did, but not to consider whether her words and conduct would reasonably put Gangahar on notice that she did not consent. In short, while Hatfield said "no," the statute allows Gangahar to argue that given all of her actions or inaction, "no did not really mean no."

But we emphasize that under the statute, it is not just that Gangahar thought "no did not mean no," but whether a reasonable person would have known that Hatfield's words and conduct were a "genuine and real" refusal of consent. The trial court failed to completely instruct the jury on how Hatfield's conduct was relevant to the issues presented at trial. As such, reversible error occurred because the jury was not instructed to consider whether Hatfield's refusal of consent was genuine, was real, and would be known as such to a reasonable person in Gangahar's position.

Prior Bad Acts Evidence.

[10] Gangahar next asserts the trial court erred in allowing the State to introduce evidence of prior bad acts. In reviewing decisions of a district court which affirmed, reversed, or modified decisions of a 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. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). The record before us does not contain a copy of Gangahar's statement of error filed in the district court. However, if we can tell from the district court's order what was advanced as error in the district court, we can consider those same errors if asserted here. See *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). The final order from Gangahar's appeal to the district court provides no indication that he assigned any error regarding evidence of prior bad acts at that level. Therefore, Gangahar has not preserved for our review the assigned error concerning prior bad acts, and we do not consider it, even though it may arise again on remand.

Finally, Gangahar argues that the sentence imposed by the trial court is excessive. Given our remand for a new trial, we need not consider this claim. Having found prejudicial error in the instructions to the jury, we reverse Gangahar's conviction for third degree sexual assault. However, since the evidence was sufficient for conviction, we remand the matter for a new trial. See *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997).

REVERSED AND REMANDED FOR A NEW TRIAL.

TOM HIGGINS AND LOIS HIGGINS, HUSBAND AND WIFE, APPELLANTS, V. RAUSCH HEREFORDS, APPELLEE.

609 N.W.2d 712

Filed May 2, 2000. No. A-98-1309.

1. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
2. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or the exercise of personal jurisdiction over the objector.
3. **Jurisdiction: Proof.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Due Process: Jurisdiction.** The Due Process Clause of the 14th Amendment operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant.
5. **Jurisdiction: States.** A state may exercise either general or specific personal jurisdiction over a defendant, so long as the defendant has sufficient contact with the forum state.
6. ___: ___. Under the concept of general jurisdiction, a plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, provided that the defendant has engaged in continuous and systematic general business contacts with the forum state.
7. **Actions: Jurisdiction: States.** If a defendant's contacts with a forum state are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.
8. **Jurisdiction: Pleadings: Proof.** When confronted with a special appearance, the plaintiff has the burden of proof to establish facts which demonstrate the court's personal jurisdiction over the defendant.
9. **Jurisdiction: States.** The exercise of specific jurisdiction entails three basic requirements: (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.
10. **Jurisdiction: States: Words and Phrases.** "Purposeful availment" means that the defendant's connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations. The connection cannot be random, fortuitous, attenuated, or the result of another party's unilateral activities.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Keya Paha County: WILLIAM B. CASSEL, Judge. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellants.

Melissa R. O'Rourke, of Morgan, Theeler, Cogley & Petersen, L.L.P., for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Tom Higgins and Lois Higgins, husband and wife, appeal from an order of the district court for Keya Paha County, sustaining a special appearance filed by Rausch Herefords (RH). For the reasons set forth below, we affirm.

BACKGROUND

On June 11, 1998, the Higginses filed a petition alleging that they are residents of Keya Paha County, Nebraska, and own and operate a cow-calf operation in that county. The Higginses alleged that RH is a ranch operation located near Hoven, South Dakota, engaging in business in Nebraska by advertising and selling cattle to Nebraska residents. The Higginses alleged that on or about March 26, 1996, they purchased 30 head of heifers at $400 each from RH for use as replacement breeding heifers in their cow-calf operation. The Higginses alleged that RH warranted that the heifers were fit for the purpose of breeding heifers. The Higginses stated that RH knew or should have known that said heifers had been implanted with Synovex C, which RH knew or should have known could interfere with the heifers' reproductive ability. The Higginses alleged that 23 of the 30 heifers they purchased failed to conceive and were therefore unfit for the purpose for which they had been purchased. The Higginses alleged that as a proximate result, they lost the value of the expected calf crop for 1 year, with an approximate value of $9,200, and had to purchase replacement heifers at an approximate cost of $12,000. The Higginses alleged that in an attempt to mitigate their damages, they fed the 23 heifers at a cost of $5,409.89 and were able to sell them at an average price

of $819.79 per head or $18,855.17. The Higginses requested damages in the amount of $16,954.72, together with the costs of that action.

On July 17, 1998, RH filed a special appearance pursuant to Neb. Rev. Stat. §§ 25-515.01(2) and 25-536 (Reissue 1995), objecting to the court's jurisdiction over RH. RH requested that the district court sustain its special appearance and objection, and dismiss the Higginses' action. The Higginses subsequently filed a motion to file an amended petition.

On September 11, 1998, a hearing was held on RH's special appearance and the Higginses' motion to file an amended petition. At this hearing, both parties entered affidavits into evidence. In one of these affidavits, Vern Rausch stated that his personal mailing address is the same as RH's and that RH is a general farming and ranching operation located in Potter County, South Dakota. Vern stated that RH operates under a joint operators agreement that was put into writing in November 1996 and that the joint operators of RH include Vern; his wife, Sharon Rausch; Vern's brother Jerry Rausch; Jerry's wife, Vicki Rausch; Vern's son Shannon Rausch; and Shannon's wife, Sue Rausch. Vern stated that he did not sell 30 head of heifers to the Higginses on or about March 26, 1996, and that to his personal knowledge and belief, no other representative or joint operator of RH sold the heifers to the Higginses either. Vern stated that on his own knowledge and belief, Tom Higgins (Higgins), on his own initiative, contacted Gary Rausch of rural Onaka, Faulk County, South Dakota, on or about March 26, 1996, and purchased 25 heifers from Mike and Cindy Schlosser and 5 heifers from Gary. Vern stated that Gary is the son of Vern's deceased brother, Duane Rausch, and that the Schlossers are Duane's daughter and son-in-law. Vern stated that these individuals are not part of RH.

The Higginses offered two affidavits of Higgins into evidence. In the first affidavit, Higgins stated that he is the owner of the Higgins Ranch located in Keya Paha County, Nebraska, that he had knowledge that RH sold cattle in Nebraska over a period of years, and that RH advertised in Nebraska regarding its sale of cattle, including, but not limited to, sending direct mail to the Higginses. Higgins stated that he purchased cattle from RH on several prior occasions in a similar fashion.

Higgins stated that on March 12, 1996, he contacted RH at (605) 948-2281 and (605) 447-5860 regarding the purchase of 30 heifers and attached his telephone bill as confirmation of these calls. Higgins stated that in addition, he called RH on an unspecified date on their 800 number and that the only person he talked to was Duane. Higgins stated that he was never informed in any of the negotiations that the heifers were owned by anyone but RH. Higgins stated that upon delivery of the cattle by RH, he received documents from the trucker, which was the first knowledge he had that anyone other than RH had any interest in the cattle. The documents attached to Higgins' affidavit include a handwritten note signed by Duane and Gary instructing Higgins to make out four checks, one to the Schlossers in the amount of $6,200, one each to Joe and Ben Buntrock in the amount of $1,500, and one to Gary and Twila Rausch in the amount of $2,800. A copy of these checks are attached to the Higginses' petition. Furthermore, in his first affidavit, Higgins states that at no time did he go to South Dakota for the purpose of purchasing the cattle at issue and that all negotiations and acceptance of the contract were done in Nebraska.

In Higgins' second affidavit, he stated that three publications had been sent to him directly by RH and that he does not subscribe to any of these publications. Higgins stated that all three of these publications included advertisements for RH. Specifically, Higgins stated that he had received the 1993-1994 South Dakota Hereford and Cattlemen's Directory, the 1997-1998 South Dakota Hereford Directory, and the October 1997 issue of the Hereford America newspaper. Higgins attached several pages from each of these publications and, in addition, offered the actual publications into evidence. The specifics of these advertisements and their relevance to the instant case will be set out in further detail below. Higgins stated that over the years, he had received advertisements from RH regarding the sale of cattle, and that he has personal knowledge that advertisements similar to the attached exhibits have been sent to other residents of Nebraska.

In a responsive affidavit, Vern stated that he had reviewed both of Higgins' affidavits. Vern stated that one of the telephone num-

bers Higgins called, (605) 948-2281, is a number for Harlan Rausch, not a telephone number for RH, and that one of the other numbers Higgins allegedly called, (605) 447-5860, is the home telephone number of Duane and not a telephone number for RH. Regarding the 800 number that Higgins allegedly called, Vern stated that this number is a telephone number to Vern's home and that therefore, Higgins could not have called that number and discussed a sale of heifers with Duane, because Duane did not live in Vern's house at that time and would not have answered Vern's telephone. Vern further stated that the Higginses could not have purchased 30 black and black-white faced cattle in 1996 from RH, because at that time, RH did not own any black and black-white faced cattle, only purebred Herefords.

In an order filed September 21, 1998, the district court sustained RH's special appearance and dismissed the Higginses' petition. The district court also denied the Higginses' motion for leave to file an amended petition without prejudice to commencing a separate action against substitute defendants.

On September 18, 1998, the Higginses filed a motion for a new trial. On October 19, the Higginses filed an amendment to their motion for a new trial, based on newly discovered evidence. Specifically, the Higginses stated that newly discovered evidence shows that Gary is the registered owner of the animals in question. On November 13, the district court filed an order denying the Higginses' motion for a new trial.

ASSIGNMENTS OF ERROR

On appeal, the Higginses alleged that the district court erred in sustaining RH's special appearance and in concluding that the court had no personal jurisdiction over RH.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, the determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on an issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

ANALYSIS

The Higginses contend that the district court erred in sustaining RH's special appearance and in concluding that the court had no personal jurisdiction over RH. RH argues that the trial court did not err and that the Higginses failed to set forth facts demonstrating that RH has had sufficient contacts with Nebraska. We conclude that the district court properly sustained RH's special appearance, but for a reason other than that cited by the district court. The district court stated that it was sustaining RH's special appearance after finding that RH did not sell to the Higginses the cattle in question. We note that the trial court's determination in this regard was inappropriate for this stage of the proceedings. At this stage, we must take the allegations in Higgins' affidavit as true regarding RH's alleged sale of cattle to the Higginses. Even so, we conclude that the district court correctly sustained RH's special appearance, because on this record, there is insufficient evidence to establish general or specific personal jurisdiction over RH.

[1,2] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998). Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or the exercise of personal jurisdiction over the objector. *Id.*

[3] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

The Nebraska long-arm statute, Neb. Rev. Stat. § 25-536 (1995), provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;

(c) Causing tortious injury by an act or omission in this state;

(d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

[4-7] The Due Process Clause of the 14th Amendment operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant. *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), citing *Pennoyer v. Neff*, 95 U.S. 714, 5 Otto 714, 24 L. Ed. 565 (1877). A state may exercise either general or specific personal jurisdiction over a defendant, so long as the defendant has sufficient contact with the forum state. *Dunham, supra*, citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Under the concept of general jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, provided that the defendant has engaged in " 'continuous and systematic general business contacts' " with the forum state. *Dunham*, 2 Neb. App. at 973, 520 N.W.2d at 220, quoting *Helicopteros Nacionales de Colombia, supra.* If the defendant's contacts with a forum state are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert " ' "specific jurisdiction" ' " over the defendant, depending on the quality and nature of such contact. *Dunham*, 2 Neb. App. at 973, 520 N.W.2d at 220, quoting *Helicopteros Nacionales de Colombia, supra.* Accord *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474 (9th Cir. 1986).

We must first decide whether RH's activities qualify as "continuous and systematic" or "substantial" to satisfy general personal jurisdiction. In doing so, we must examine all of RH's activities which impact the forum state, " 'including whether the defendant makes sales, solicits or engages in business, serves the state's markets, designates an agent for service of process, holds a license, has employees, or is incorporated there.' " See *Dunham*, 2 Neb. App. at 974, 520 N.W.2d at 220, quoting *Hirsch, supra.*

In the instant case, there is no evidence that RH has designated an agent for service of process, holds a license in Nebraska, has employees in Nebraska, or is incorporated here. In Higgins' affidavit, he stated that RH sold cattle in Nebraska over a period of years and that RH advertised in Nebraska regarding its sale of cattle, including, but not limited to, sending direct mail to the Higginses. The Higginses also introduced into evidence three publications which the Higginses alleged RH had sent directly to them. Specifically, these three publications are the 1993-1994 South Dakota Hereford and Cattlemen's Directory, the 1997-1998 South Dakota Hereford Directory, and the October 1997 issue of the Hereford America newspaper. These advertisements contain an 800 number that persons interested in purchasing cattle can call.

[8] This is the only evidence on this record that RH makes sales in Nebraska, solicits or engages in business in Nebraska, or serves this state's markets. On this record, there is no evidence as to the specific amount or the frequency of RH's advertising. We note that when confronted with a special appearance, the plaintiff has the burden of proof to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Dunham, supra.*

In regard to the question of general jurisdiction, we look to *Helicopteros Nacionales de Colombia, supra*, in which the U.S. Supreme Court found that sending a corporate executive to the forum State of Texas for contract negotiations, accepting checks drawn on a Texas bank, purchasing equipment from a Texas company for substantial sums, and dispatching personnel to Texas for training did not amount to continuous and systematic contact. Furthermore, in *Dunham v. Hunt Midwest*

Entertainment, 2 Neb. App. 969, 520 N.W.2d 216 (1994), this court examined the relationship of Missouri's Worlds of Fun amusement park to Nebraska. After doing so, this court held that the Missouri amusement park was not shown to have had continuous and systematic business contacts with Nebraska so as to provide a Nebraska court with personal jurisdiction in Nebraska over an injured park patron's actions against the park. This court held that this was true, despite the fact that the park advertised on the radio and television in Nebraska and that park discount coupons were available in Nebraska. In *Dunham*, the park was not authorized to do business in Nebraska, had no employees in Nebraska, and did not maintain an office or do any business in Nebraska.

We conclude that in the instant case, there is insufficient evidence showing that RH had continuous and systematic business contact with Nebraska sufficient to warrant personal general jurisdiction over RH.

[9] The exercise of specific jurisdiction under § 25-536(2), permitting jurisdiction on any basis or contact which does not run afoul of the protections of the Due Process Clause of the 14th Amendment, entails three basic requirements. In *Dunham, supra*, this court laid out those requirements, citing *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987). In *Lake*, 817 F.2d at 1421, the Ninth Circuit outlined them as follows:

> (1) [T]he nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[10] "Purposeful availment" means that the defendant's connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations. *Dunham, supra*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The con-

nection cannot be random, fortuitous, attenuated, or the result of another party's unilateral activities. *Id.* See, also, *Gray v. Lewis & Clark Expeditions, Inc.*, 12 F. Supp. 2d 993 (D. Neb. 1998).

According to the *Burger King Corp.* analysis, whether a Nebraska court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with Nebraska are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself acted in a manner which creates substantial connections with Nebraska, resulting in the defendant's "purposeful availment" of the benefits and protections of Nebraska law.

In the instant case, the question is whether RH's advertisements in the South Dakota Hereford and Cattlemen's Directory, the South Dakota Hereford Directory, and Hereford America and the fact that RH has an 800 number prove that RH purposefully directed its activities at Nebraska residents with the goal of enticing Nebraska residents to purchase cattle from RH. We hold that the evidence on this record is insufficient to prove that RH purposefully directed its activities at Nebraska.

In *Gray, supra*, the court held that a Wyoming corporation had not purposefully availed itself of the laws of Nebraska by conducting river rafting expeditions, advertising in national directories, maintaining an 800 number, and accepting Nancy Gray's reservation and credit card number over the telephone during a call she initiated from Nebraska. The court held that such activities did not demonstrate "purposeful availment" to the laws of Nebraska. More specifically, the court stated:

> In the present case, the only activities by Defendant that potentially could be deemed as directed at Nebraska are: advertising in camping publications that make their way to the state, maintaining an 800 number available to Nebraskans, and accepting Nancy Gray's reservation and credit card number over the phone during a call she initiated.
>
> Advertising in national directories and publishing 800 numbers does not indicate an intent to serve a particular market or area, and demonstrates nothing about whether such business was actually generated. Without evidence of additional sales or facts showing Defendant was the aggres-

> sor in the transaction, this lone contact initiated by Nancy Gray must be characterized as an isolated one that does not show purposeful availment of the Nebraska market. *Welsh v. Takekawa Iron Works Co., Ltd.*, 529 N.W.2d 471, 475 (Minn. App. 1995) (single proven in-state sale is not sufficient to establish jurisdiction over nonresident manufacturer). The present case is distinguishable from the finding of purposeful availment in *Dunham*, where evidence showed the defendant specifically targeted the Omaha, Nebraska, market by advertising on local broadcast stations. *Dunham*, 2 Neb. App. at 970, 520 N.W.2d at 219.

12 F. Supp. 2d at 997.

In the instant case, Higgins appears to argue that RH's sale of cattle was not an isolated incident. Specifically, in his affidavit, Higgins stated that he had knowledge that RH sold cattle in Nebraska over a period of years and that he had purchased cattle from RH on several prior occasions. Higgins' affidavit does not give any indication of the number of Nebraska residents RH may have sold cattle to in the past besides the Higginses. In his affidavit, in essence, Higgins stated that he purchased cattle from RH after receiving certain publications from RH in which RH advertised its sale of cattle. Specifically, Higgins stated that RH had sent him three publications directly: the 1993-1994 South Dakota Hereford and Cattlemen's Directory; the 1997-1998 South Dakota Hereford Directory, and the October 1997 issue of the Hereford America newspaper. Higgins also stated that RH had sent other Nebraska residents similar publications and that RH maintains an 800 number which is available to Nebraska residents.

Although RH's sending of the above publications to the Higginses might suggest at the outset that RH was the aggressor in the sale of cattle to the Higginses, a review of those publications shows otherwise. Although each of the publications allegedly sent by RH to the Higginses contains an advertisement placed by RH, each of those publications is filled with advertisements from various companies selling cattle. There is nothing in those publications which would single out RH in any way. This said, it can hardly be claimed that RH's sending of those publications directly to the Higginses and other Nebraska resi-

dents constitutes RH's purposeful availment of the Nebraska forum. Similarly, RH's 800 number and its previous sales to an undisclosed number of Nebraska residents does not indicate an intent by RH to serve Nebraska.

Additionally, this is not a case like *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 980, 520 N.W.2d 216, 224 (1994), in which this court stated:

> In the case at hand, there can be no doubt on this record that Worlds of Fun has purposefully directed its activities at Nebraska residents with the goal of enticing them to travel to its amusement park in Missouri to spend their entertainment dollars at that location, all to the presumed profit of Worlds of Fun.

[11] Because we conclude that RH did not purposefully direct its activities at Nebraska, we do not discuss the other two requirements set forth in *Lake, supra.* An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

CONCLUSION

For the reasons set forth above, we conclude that the district court did not err in sustaining RH's special appearance and in dismissing RH's petition.

AFFIRMED.

CITY OF BATTLE CREEK, NEBRASKA, APPELLANT,
v. MADISON COUNTY BOARD OF ADJUSTMENT, APPELLEE.
609 N.W.2d 706

Filed May 2, 2000. No. A-99-053.

1. **Zoning: Ordinances.** A board of adjustment is required to make a finding that a variance is warranted because of demonstrable and exceptional hardship as opposed to purposes of convenience, profit, or caprice.
2. **Zoning: Ordinances: Proof.** Neb. Rev. Stat. § 19-910 (Reissue 1997) requires that any grant of a variance be supported by evidence relating to each of the four factors enumerated by that statute: (1) The strict application of the zoning regulation would produce undue hardship; (2) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (3) the authorization of such vari-

ance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (4) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit, or caprice.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded with direction.

David H. Ptak, of Stratton & Ptak, P.C., for appellant.

Joel E. Carlson, Deputy Madison County Attorney, for appellee.

IRWIN, Chief Judge, and HANNON and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

The City of Battle Creek, Nebraska, appeals from the decision of the district court for Madison County, Nebraska, in which the district court affirmed the granting of a zoning variance by the Madison County Board of Zoning Adjustment (Board). For the reasons set forth below, we reverse, and remand to the district court with direction to reverse the decision of the Board.

BACKGROUND

On January 27, 1998, the Board, sitting as the board of adjustment for Battle Creek, granted a variance to Mike and Judy Warneke for construction of a garage on their residential lot. The Warnekes were seeking a variance of 11 feet 6 inches from the 20-foot setback required by the applicable zoning rules. Judy Warneke (Warneke) had testified before the Board and stated that the lot owned by the Warnekes is bordered by platted streets on three sides, creating a unique situation involving essentially "three front yards." The record shows that the property is bordered by Martin Street on the south, Dittrick Street on the north, and Green Acres Drive on the east. At the time of the hearing, Green Acres Drive, although platted, had not been developed; the site was described as pastureland. According to Warneke, since the applicable zoning regulations provide for a minimum 20-foot setback for each front yard and there was insufficient

space behind the house, the Warnekes could not build the garage without a variance.

The mayor of Battle Creek, Mervin Schneider, also testified at the hearing. He stated that the city council was concerned that the variance might set a precedent that would have a negative effect on future development of Battle Creek. Specifically, he stated that it was possible that future growth might require the development of Green Acres Drive and that the granting of a variance to the Warnekes might have a detrimental effect on development of adjacent property and make it difficult to deny future variance requests. Another resident of Battle Creek, a "Mrs. Alvin Schreve," appeared briefly to inquire about the project.

The Board ultimately granted the variance on a unanimous vote. Battle Creek appealed to the Madison County District Court. That court took no testimony, but accepted into evidence 19 exhibits, including a transcription of the proceedings before the Board. On December 18, 1998, the district court entered an order modifying the findings of the Board to reflect the following:

> From a review of all of the facts . . . (a) The strict application of the zoning regulation in the present case would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice. The Court further finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

The district court then affirmed the findings as modified. Battle Creek filed the instant appeal on January 14, 1999.

ASSIGNMENTS OF ERROR

Battle Creek generally complains that the decision by the Madison County District Court was illegal, not supported by the evidence, and accordingly, arbitrary, unreasonable, and clearly wrong. Specifically, Battle Creek asserts that the district court erred in finding that granting the variance was warranted because a hardship existed and that the situation presented by the Warnekes' property was not such as would require amendment of the zoning regulations.

STANDARD OF REVIEW

In reviewing a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if the district court abused its discretion or made an error of law. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992). Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

Neb. Rev. Stat. § 19-910 (Reissue 1997) empowers a board of adjustment to grant a variance where the board finds that

> where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation under this section . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property . . . . *No such variance shall be authorized by the board unless it finds that: (a) The strict application of the zoning regulation would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of*

> *the variance; and (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.* No variance shall be authorized unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

(Emphasis supplied.)

The Nebraska Supreme Court has construed this statute as providing that variances should be granted only if strict application of the regulation, because of the unusual characteristics of the property existing at the time of the enactment of the regulation, would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner. *Barrett v. City of Bellevue*, 242 Neb. 548, 495 N.W.2d 646 (1993); *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992); *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955).

There is no indication in this record that the Board had any exhibits before it. The transcribed proceedings of the Board show that at the conclusion of testimony, the following proceedings occurred:

> [LeRoy] Novotny [Board member]: I guess I'm gonna bring it to a head. I'll make a motion that we grant the variance.
>
> Unknown: Due to the unusual circumstances?
>
> [Arland] Praeuner [Board member]: Yea, due to the unusual circumstances.
>
> Praeuner: I'll second it.
>
> [Duane] Sellin [Board chair]: I think we need to pin point what those unusual circumstances are.
>
> . . . .
>
> Sellin: Due to three front setbacks requirements.
>
> . . . .
>
> Sellin: We have a motion and a second. . . .
>
> . . . .
>
> [Dawn] Maertins [executive secretary of the Board]: The motion is to approve it with the problem of the three

front yards. I'm going to word this different when I get it in there but, with the three front yards.

[Chad] Nabity [zoning administrator]: Do we want to write that motion out right now so we've got it.

Maertins: That would be fine with me.

. . . .

Sellin: Well, the reason we need to have this more or less worded correctly is if there is any complications. This group is a quasi-judicial group and it's actions are final, however, if any somebody wants to take it, they can take it to the District Court and it can go through the Court system. And, that is why we have to be sure that we get the correct wording as to why we are doing it and there are certain requirements before a variance can be granted. And, one of those particular requirements is due to the unusual circumstances which would fall in this case. While you are writing —

Some of these things: No variance shall be authorized unless the board of adjustment finds that the strict application of the resolution would produce an undue hardship. That the hardship is not shared generally by other properties in the same zoning district in the same vicinity, meaning in particular, a whole particular area, one or two would be different. . . . And the granting is based upon reasons demonstrable and exceptional hardship as distinguished from purposes of being convenient or for profit or that type of thing. So, we always have to keep those different things in mind because that's part of the state statutes.

. . . .

Nabity: Lets see, we've got a motion to approve the variance from 11 foot 6 inch setback variance, of 11 foot 6 inches to the front yard setback, due to these findings: the requirement of three front yards; front yard setbacks presents a unique situation which was not created by applicant; um, we had some others and—

. . . .

Sellin: Any other comment on the motion?

. . . .

Sellin: We do have a motion which was made and seconded. With this wording to be inserted. Any further discussion on the motion? . . .

Sellin: The motion is carried and the variance is granted.

[1] The only testimonial evidence consisted of the unsworn statements by Warneke and the mayor, Schneider, and the questions by another resident of Battle Creek, Schreve. It is clear to us, on this record, that the Board did not make findings sufficient to comply with the statutory requirements. Specifically, although the Board appears to have found that application of the zoning standard would produce hardship for the Warnekes, the Board did not make findings as to whether that hardship was "undue," whether it was shared by other properties, whether the variance was a substantial detriment to adjacent property and the community, or whether the grounds for granting that variance were based upon "demonstrable and exceptional hardship," as opposed to "purposes of convenience, profit or caprice." See § 19-910. The Board was required to make such a finding. See *Bowman v. City of York*, 240 Neb. 201, 213, 482 N.W.2d 537, 545 (1992) ("[b]oth the statute and the code define undue hardship as a 'demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice' ").

In considering the appeal from the Board, the district court took additional evidence, as is permitted pursuant to Neb. Rev. Stat. § 19-912 (Reissue 1997). The district court then modified the findings of the Board to conform with the statutorily required findings. The question before us is whether the additional exhibits contain competent evidence which supports the district court's modified factual findings. See *Bowman, supra.* We find that they do not.

Exhibit 1 is the cassette recording of the proceedings; Exhibit 1A is the above-mentioned transcription of that recording. Exhibits 2 through 7 and 9 are documents memorializing various aspects of the proceedings composing the instant appeal. Exhibits 10 through 13 are photographs of the Warnekes' house. Exhibit 14 is a schematic showing the layout of the Warnekes' property and its purported effect on the various "sight triangles" from various angles. Exhibit 15, entitled "Yard and Setback

Diagram," appears to be a generic presentation of setback requirements, and exhibit 16 is a district zoning map. Exhibits 17 and 18 are definitions utilized in the Battle Creek zoning code. Exhibit 19 is the bylaws of the Board.

[2] Section 19-910 clearly requires that any grant of a variance be supported by evidence relating to each of the four factors previously enumerated. This record does not contain such evidence. Assuming without deciding that exhibit 14 arguably addresses the issue of adverse impact upon adjacent property, the fact remains that neither that exhibit nor any of the remaining exhibits make it possible to resolve such fundamental questions as whether the Warnekes have experienced an "undue" hardship, or whether they are seeking the variance for purposes other than "convenience, profit or caprice." Nor do any of them address the comments by the mayor, Schneider, in which he suggested that approval of the variance could have a detrimental impact on the long-term development of Battle Creek. We make no finding on those issues ourselves, but simply point out that there is insufficient evidence in this record for either the Board or the district court to have done so either.

In sum, we find that the decision of the district court is not supported by the evidence, and we accordingly reverse, and remand this matter to the district court with direction to reverse the grant of a variance.

CONCLUSION

For the reasons set forth above, this matter is remanded to the district court for Madison County, with direction to reverse the grant of a variance by the Board.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JIMMY YBARRA, APPELLANT.

609 N.W.2d 696

Filed May 2, 2000. No. A-99-418.

1. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.

2. ___. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Theft: Value of Goods: Proof.** In any prosecution for theft under Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 1995), the value of the property taken shall be an essential element of the offense that must be proved beyond a reasonable doubt.
4. ___: ___: ___. The value to be proved concerning a theft charge is market value of the property taken at the time and place where the property was criminally appropriated.
5. ___: ___: ___. The value of articles stolen from a stock of merchandise may be established by proof of the price at which the articles and other like articles are being offered and sold at the place where the articles were stolen.
6. **Value of Goods: Proof.** There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market.
7. **Value of Goods: Vendor and Vendee.** Price tags alone do not sufficiently prove value of merchandise. A price tag expresses merely the amount at which a seller offers an article for sale, a sum the seller hopes to obtain, and does not necessarily indicate the amount obtainable in the market through payment for the article offered for sale.
8. **Criminal Law: Convictions: Sentences: Courts.** Determining the penalty for a crime after conviction is clearly a function of the court as opposed to the jury under Nebraska jurisprudence.
9. **Criminal Law: Evidence: Courts: Appeal and Error.** It is well established that where there is a conflict in the evidence, it is error for the trial court to determine any question of fact involved in a criminal case.
10. **Trial: Witnesses: Juries.** The jury is the sole judge of the credibility of the witnesses and of the weight to be given to the evidence, and the court cannot assume that the jury is convinced of any constituent element of guilt just because it ought to be.
11. **Double Jeopardy: Sentences.** As a general matter, the Double Jeopardy Clause imposes no absolute prohibition of a harsher sentence at retrial after a defendant has succeeded in having an original conviction set aside.
12. **Double Jeopardy: Convictions: Evidence.** 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.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded with directions to dismiss.

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

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

HANNON, SIEVERS, and INBODY, Judges.

HANNON, Judge.

INTRODUCTION

Jimmy Ybarra was convicted by a jury of shoplifting merchandise valued at $787, in violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1995), a Class IV felony. See Neb. Rev. Stat. § 28-518 (Reissue 1995). Because the only evidence of the value of the merchandise taken was the price at which the merchandise was offered for sale, the trial court, following what it understood the holding of *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), to be, found that Ybarra was guilty of taking property of only less than $200, a Class II misdemeanor, see § 28-518, rather than the Class IV felony as found by the jury, and sentenced him to serve a term of 90 days in jail. Ybarra appeals, alleging generally that the evidence is insufficient to sustain the conviction for shoplifting.

Because after the crime in *Garza, supra*, was committed, the Nebraska Legislature made the value of articles stolen an element of theft crimes and not a mere measure of the penalty, we conclude that the trial court in the instant case erred by following *Garza* in lowering the grade of the offense. We also conclude that under the rule in *Garza* for proving value, the State failed to prove value, now an essential element of the crime of shoplifting, beyond a reasonable doubt. Accordingly, we reverse, and remand with directions to dismiss.

SUMMARY OF EVIDENCE

On November 25, 1998, a complaint was filed in the Scotts Bluff County Court charging Ybarra with theft by shoplifting merchandise valued at more than $500 but less than $1,500 in violation of § 28-511.01(a). As we are required to do, we review the evidence in the light most favorable to the State. See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

Scott Green, a loss prevention associate for the Wal-Mart store in Scottsbluff, observed Ybarra and a companion walking out with a shopping cart full of unbagged merchandise through one set of doors into the vestibule area of the store and stop just before proceeding through the second set of doors.

Green entered through the exit doors into the vestibule area and heard Ybarra under his breath tell his companion, " 'Just go, go.' " At that time, Green stopped the couple and asked for their receipt. Ybarra replied that the receipt was "back at one of the registers" and that he was going outside to smoke a cigarette and get medicine from his companion's car. There was a large amount of women's clothing, blankets, rugs, and toys in the shopping cart and all of the Universal Product Code (UPC) labels had been torn off the merchandise.

At that point, Leigh Amarie Whyte, an assistant manager for Wal-Mart, answered a page to go to the front of the store. She observed Green standing in the vestibule talking with a man and a woman. Whyte took possession of the cart and merchandise, and attempted to enter information about the merchandise into the cash register to determine its value. She was unable to do so because the tags with the UPC's containing the necessary information had been removed from the merchandise. She directed two associates to find matching merchandise with UPC's so she could enter the items into the register to determine a total price of the merchandise. They did so, and thereafter she keyed the necessary information into the register and obtained a printout listing the merchandise and the price the merchandise was offered for sale. Ybarra does not question the sufficiency of this procedure to obtain the Wal-Mart sale price of the subject merchandise. A portion of the receipt was offered into evidence. This procedure provided a list of the merchandise allegedly being shoplifted and the price that Wal-Mart held it for sale on that day was $787.

At trial, Ybarra took the stand. Ybarra testified that he and Mary Sitting Holy went to Wal-Mart to return a few items on November 24, 1998. After shopping for a while, Sitting Holy told him that she was tired and needed to sit down and smoke a cigarette. Sitting Holy pushed the cart to the first door of the vestibule and sat on a bench. He testified that the cart was 2 feet away from the vestibule and that the "buzzer" on the door did not sound when they walked through. Sitting Holy was going to give Ybarra the keys to the vehicle so that he could get her purse, but Green appeared and asked him where he was going. Ybarra

testified that as he was speaking to Green, people started running and pushing him forward out the first door.

At the close of the State's case, Ybarra made a motion for a directed verdict upon the basis of *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), and upon the ground that the evidence was otherwise insufficient. The trial court overruled that motion, as well as a renewal of that motion which was made at the close of all the evidence.

The jury returned a verdict that Ybarra was guilty of theft by shoplifting and found the value of the property taken was $787. The trial court accepted the verdict on the underlying crime and found Ybarra guilty, but because it found the evidence on value was insufficient, it found Ybarra guilty of only the minimum theft offense under § 28-518(4), that is, a Class II misdemeanor, as provided when the value of the thing involved is $200 or less.

ASSIGNMENTS OF ERROR

Ybarra alleges (1) that insufficient evidence was adduced by the State to prove beyond a reasonable doubt that he had committed the crime alleged and (2) that the sentence imposed upon him, although within the statutory limits, was excessive and constituted an abuse of discretion by the trial court.

At the close of the State's case in chief, Ybarra cited and relied upon *Garza, supra*, as one of the grounds for the insufficiency of the State's evidence, vis-a-vis the evidence on the value of the merchandise involved. This motion was renewed at the close of all the evidence without argument. Ybarra does not assign the denial of either of these motions as error.

Immediately upon the return of the jury verdict, the judge applied the teaching of *Garza*, as he saw it, and reduced the conviction from a Class IV felony to a Class II misdemeanor. In the State's brief, it cites and discusses the fact that by 1992 Neb. Laws, L.B. 111, the Nebraska Legislature made value an element of theft offenses, but it does not discuss the effect the change has on the holding in *Garza*. The State did not appeal from the trial court's actions. On the issue of value, the State merely asserted the evidence was sufficient.

[1,2] In Ybarra's brief, he does not cite *Garza, supra*, or specifically argue that the evidence on value was insufficient and that hence the evidence was insufficient to support the convic-

tion. However, Ybarra did use *Garza* to obtain a decrease in the seriousness of the crime. Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

We conclude that the current value of property shoplifted is an element of the crime of shoplifting. We also conclude that the evidence is insufficient to prove the value of the merchandise taken. We further conclude that the absence of sufficient evidence of one of the elements of a crime to which a defendant has been convicted is something we should notice under the plain error doctrine. Therefore, we will consider the effect of the failure of the State to prove the value of the merchandise taken even though it is not argued in Ybarra's brief.

STANDARD OF REVIEW

On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the 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 the jury's province for disposition. *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

ANALYSIS

Sufficiency of Evidence on Issues Other Than Value.

Ybarra assigns the error of insufficiency of the evidence only in general terms, and he argues this assignment only in general

terms, that is, he merely states the general rules applicable to an appellate court in determining the sufficiency of the evidence to sustain the conviction. Ybarra never states or argues which element of the crime charged was not proved.

The evidence on the issue of whether Ybarra shoplifted the goods is circumstantial. However, he did go to the store with Sitting Holy and was leaving with her while she was pushing the merchandise allegedly being shoplifted. This fact, coupled with his actions and words to her when Green approached them and his explanation that the receipts were back at the register, clearly supports a finding that he was with Sitting Holy in committing the crime, if not managing it. This evidence is sufficient to establish all elements of the crime except the value of the merchandise. As previously stated, this court does not reweigh the evidence.

Sufficiency of Evidence on Value.

Section 28-511.01, defining theft by shoplifting, provides in part:

> (1) A person commits the crime of theft by shoplifting when he or she, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession of such property or its retail value, in whole or in part, does any of the following:
>
> (a) Conceals or takes possession of the goods or merchandise of any store or retail establishment;
>
> (b) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment.

Section 28-518 provides:

> (2) Theft constitutes a Class IV felony when the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars.
>
> . . . .
>
> (4) Theft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less.

In *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), Garza was convicted of felony shoplifting on evidence of value very similar to the evidence on value in this case. In *Garza*, the State asserted that price tags alone for items taken by Garza

established value of the property. The *Garza* court found the evidence inadequate and found Garza guilty of only the lowest class misdemeanor, because the value of the property involved was not an element of the crime but the value of the thing involved went only to the penalty.

[3] In L.B. 111, the Legislature amended § 28-518 by adding subsection (8), which provides: "In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt."

This statute changed the holding first announced in *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), that value of property taken was not an element of the crime charged, and it also changed one of the principles upon which the decision in *Garza* was predicated, in that *Garza* used the rule in *Culver* and held that value was not an element of theft crimes. *Garza* was decided by the Supreme Court on August 14, 1992, shortly after L.B. 111 was approved by the Governor on April 15, 1992. L.B. 111 was not mentioned in *Garza*.

We have found some legislative history that sheds some light on the intended effect of L.B. 111, but not a great deal. The only legislative history found with respect to § 28-518(8) is a comment by Senator John Lindsay, stating:

> The amendment would do two things. . . . The second half of this changes a Supreme Court or corrects what happened with a Supreme Court decision and that is that right now . . . the law had previously been assumed to be that when you get charged with a . . . with a theft, one of the elements of that offense that the prosecution has to prove . . . and, remember, we're dealing with criminal statutes, so these are things that the prosecution will have the burden of proving beyond a reasonable doubt. One of the things that the court . . . that the court changed or changed whatever they assumed as the law was that value is something that had to be proven. It's clearly, I think, or the policy should be that is an element of the offense. If someone is charged with a felony, as it currently stands, since the Supreme Court decision, as it currently stands, the prosecution need not prove that the value was in excess of $300,

> even though that's what the statutes require. The statutes require that it be . . . have a value in excess of $300. Because the Supreme Court has interpreted the statutes in that direction, I believe this change is necessitated. What the second half of this amendment then would do is that it would simply require that value is an essential element of the offense that has to be proved. Basically, that part of the amendment would return us back to where, I believe, we thought we were prior to that decision.

Floor Debate, Judiciary Committee, 92d Leg., 2d Sess. 8967-68 (Feb. 13, 1992). The Legislature clearly intended to reserve the issue of value for the jury. See *In re Interest of Shea B.*, 3 Neb. App. 750, 532 N.W.2d 52 (1995) (traces history of value as element of theft crime).

The sufficiency of the evidence to support Ybarra's conviction must be tested in the light of the above law.

Proof of Value in Theft Cases.

[4] The value to be proved concerning a theft charge is market value of the property taken at the time and place where the property was criminally appropriated. *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). Proper proof of market value in theft of personal property cases and the effect of the State's failure to prove it properly was litigated several times during the lengthy period when value was clearly an element of theft crimes. Several convictions were reversed and causes remanded for new trials because the State failed to adequately prove value.

In *Engster v. The State*, 11 Neb. 539, 10 N.W. 453 (1881), the defendant's felony conviction for receiving stolen property was reversed and the cause remanded for a new trial because the court stated there was unsatisfactory evidence of value. In *Brooks v. State*, 28 Neb. 389, 44 N.W. 436 (1889), the judgment of conviction was set aside and the cause remanded when the owner's lengthy testimony did not contain a clear opinion of value. The *Brooks* court quoted *Engster*, which stated, " 'where the value of the property must be or exceed $35 to constitute a felony, such value must be proved, like any other fact upon which a conviction depends, beyond a reasonable doubt. This is a material fact, without proof of which the prosecution must

fail.' " *Brooks*, 28 Neb. at 394, 44 N.W. at 437. In *Rooney v. State*, 51 Neb. 576, 71 N.W. 309 (1897), the testimony of the owner, the only witness on value, was held to be inadequate because his testimony did not show he knew the value, and the felony conviction was reversed and the cause remanded.

In *State v. Stowell*, 190 Neb. 615, 617, 211 N.W.2d 130, 131 (1973), a conviction for stealing a television was reversed when the evidence of value was the owner's testimony that he learned the price of sets of that " 'caliber' " was between $375 and $400, that it was used merchandise, and that he presumed it to be worth $250. In reversing the defendant's conviction, the court stated:

> The value of goods which may be the subject of feloniously receiving stolen property must be $100 or more under section 28-508, R. R. S. 1943. Where the value of property is an element of the offense, the State must prove by competent evidence that the value of the property at the time and place of the alleged offense equalled or exceeded the requisite minimum value.

Stowell, 190 Neb. at 617, 211 N.W.2d at 131-32.

In *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971), the defendant was charged and convicted of receiving stolen property valued at $100 or upward. The evidence of value was an expert's testimony that the market value of the property was $50 wholesale and $75 retail. The owner's testimony was that it cost $225 3 years before the taking. Evidence that an insurance company had reimbursed the victim $170, without evidence as to the basis of the insurance company's reimbursement, together with the other testimony was held to be inadequate to prove a value of more than $100.

[5,6] The value of articles stolen from a stock of merchandise may be established by proof of the price at which the articles and other like articles are being offered and sold at the place where the articles were stolen. *Robinson v. State*, 107 Neb. 591, 186 N.W. 977 (1922). In *Robinson*, the court held that "[a]s to the proof of value, there is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market." 107 Neb. at 592, 186 N.W. at 978. However, in the case at hand, as in *State v.*

Garza, 241 Neb. 256, 487 N.W.2d 551 (1992), there is no evidence that the merchandise was actually sold for that value. See, also, *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992) (holding that police officer's testimony that defendant was seen dragging sack toward parking garage with tag reflecting price at which item was being bought and sold on day of offense was sufficient evidence to prove value).

[7] The *Garza* court held that price tags alone do not sufficiently prove the value of the merchandise. Garza was convicted of felony shoplifting of merchandise having a value of more than $300 but less than $1,000. The price tags offered into evidence showed a total of $537. The State argued that the price tags by themselves established value for the merchandise. The *Garza* court held that "a price tag merely expresses the amount at which a seller offers an article for sale, a sum the seller hopes to obtain, and does not necessarily indicate the amount obtainable in the market through payment for the article offered for sale." 241 Neb. at 264, 487 N.W.2d at 557.

Thus, the court held that price tags on the articles stolen did not reflect current market conditions for the sale of an item and that therefore, the price tags did not support the finding that the stolen property had a value greater than $300. This holding in *Garza* has not been disturbed.

In the instant case, Whyte testified that Wal-Mart prices its items with a UPC. The UPC's assist the cashiers in ringing up the price of the merchandise. Whyte manually typed the UPC's into a register which produced a receipt listing the prices at which each item found in Ybarra's cart was being offered to Wal-Mart customers that day. As in *Garza*, this evidence merely establishes the price that the merchant is willing to sell the merchandise for to its customers, but it does not establish the price at which the merchandise was being bought and sold on November 24, 1998. The State provided no additional evidence as to value. On the issue of proof of value, the present case is not distinguishable from the price tags used in *Garza*.

Upon the basis of the above authority, we conclude that the evidence is insufficient to establish value beyond a reasonable doubt.

Effect of Value as Element of Crime.

[8] One important consideration in *Garza, supra*, was that the court recognized that value was no longer an element of the crime charged, but merely a measure of the penalty. Since determining the penalty for a crime after conviction is clearly a function of the court as opposed to the jury under Nebraska jurisprudence, see, *Haffke v. State*, 149 Neb. 83, 30 N.W.2d 462 (1948), and *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976), the Supreme Court's action in affirming the conviction and merely lowering the penalty naturally followed from a holding that value was not an element of the crime. The controlling issue in this case is the effect of the State's failure to prove value in the light of the present rule: The value of the thing involved in shoplifting and similar crimes is an element of the crime.

The specific inquiry at this point is whether the judge, rather than the jury, in a criminal case, can make a finding of what the evidence shows beyond a reasonable doubt as opposed to a finding that the evidence supports the jury's finding beyond a reasonable doubt. The *Garza* court determined the evidence supported Garza's conviction and then cited the cases which held value was not an element of the crime, but, rather, used to determine the penalty. It also stated: "[T]he evidence shows, beyond a reasonable doubt, that the property stolen by Garza had some intrinsic value that translates into nominal market value." *State v. Garza*, 241 Neb. 256, 265, 487 N.W.2d 551, 557 (1992).

[9,10] This approach at least implies that a trial court cannot make such a finding when value is an essential element of the crime charged.

> It is well-established that where there is a conflict in the evidence it is error for the trial court to determine any question of fact involved in a criminal case. . . . [I]n the trial of an information charging a felony, the presiding judge is without lawful authority to determine an issue, or any of the questions of fact involved in the issue. That power belongs exclusively to the jury, regardless of the state of the evidence. The jury must be fully satisfied of the existence of every fact constituting an element of the crime charged, and it cannot be assumed that it is so satisfied because it ought to be.

Siers, 197 Neb. at 70-71, 248 N.W.2d at 12.

> They [the jurors] are the sole judges of the credibility of the witnesses and of the weight to be given to the evidence, and the court cannot assume that [the jurors] are convinced of any constituent element of guilt because they ought to be. They may entirely discredit any witness though uncontradicted, or refuse to believe all the evidence tending to establish guilt even though it is unopposed and free from conflict.

Zediker v. State, 106 Neb. 473, 476, 184 N.W. 80, 81 (1921).

The above propositions clearly require a holding that the conviction of Ybarra for shoplifting must be reversed. We now turn to the question of the order of this court upon remand.

Proper Remand.

Ybarra was charged and convicted by a jury of a felony. The trial court entered a judgment for only a Class II misdemeanor on its own motion. Under the current statutory scheme, value is an essential element of the crime of theft by unlawful taking. See § 28-518. Once value is established by conviction, the type and class of the offense are determined under the plain language of § 28-518. In determining the proper resolution of this case, we note that in most of the cases we have reviewed above where the Supreme Court found the evidence insufficient on value when value was an element of the crime, the court reversed the convictions and remanded the causes, apparently for a new trial. This result is in accord with the following principles which seem to indicate the cause should be remanded for a new trial.

"[W]here there has been a conviction, an appeal of the case and a reversal . . . the case goes back for retrial on the highest degree charged, even though [the] previous conviction was on a lesser degree." *State v. Hutter*, 145 Neb. 798, 805, 18 N.W.2d 203, 208 (1945).

A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial. See *Clarence v. State*, 89 Neb. 762, 132 N.W. 395 (1911).

[11] The imposition of a particular sentence usually is not regarded as an "acquittal" of a more severe sentence that could

have been imposed. *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). Thus, as a general matter, the Double Jeopardy Clause imposes no absolute prohibition of a harsher sentence at retrial after a defendant has succeeded in having an original conviction set aside. *Id.* However, the above-mentioned principles are not applicable to the present case because of another aspect of Double Jeopardy.

[12] The U.S. Supreme Court has 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." *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

Thus, the Double Jeopardy Clause bars retrial if the reversal of a conviction is necessitated because the evidence was legally insufficient to sustain the conviction. *Burks v. United States, supra*; *Palmer v. Grammer*, 863 F.2d 588 (8th Cir. 1988), *appeal after remand, Palmer v. Clarke*, 961 F.2d 771 (8th Cir. 1992); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). See, *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

In the case before us, the judge did not have the authority to reduce the conviction from a Class IV felony to a Class II misdemeanor based upon the insufficiency of evidence as to the value of the goods taken. The State failed to produce sufficient evidence to prove value, an essential element of theft by shoplifting property for more than $500 but less than $1,500. Accordingly, we reverse, and remand this cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SIEVERS, Judge, concurring.

My colleagues rely upon the Supreme Court's opinion in *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). With all due respect to the members of the Supreme Court who wrote and adopted *Garza* and my colleagues here who rely upon it, I believe that if *Garza* were now reconsidered, a different result

would occur. I believe our decision here is at odds with the language of our shoplifting statute, § 28-511.01.

The statute makes it a crime to deprive the owner of the possession of the property "*or its retail value.*" (Emphasis supplied.) § 28-511.01(1). I believe the emphasis must be on "retail value." Deprivation of retail value can occur by out-and-out theft or by more subtle means which are criminalized in § 28-511.01, including altering the price tag, interchanging price tags with other merchandise, and causing a sales recording device, e.g., scanner, to reflect less than the retail price of the merchandise. The *Garza* dissent addresses the meaning of the words "retail value," the deprivation of which makes up the crime of shoplifting. I believe that proof of the price at which a retail merchant offers an item for sale does in fact establish value, an essential statutory element of the crime of shoplifting. The statute speaks extensively of price tags and criminalizes conduct involving altered price tags. Thus, establishing the price, via a price tag, at which an item is offered for sale at the time of its theft or deprivation is sufficient to prove the element of value. See, *Nix v. State*, 604 So. 2d 920, 922 (Fla. App. 1992) (trial judge is authorized to select either replacement cost or "selling price" as fair market value of goods stolen); *State v. Carroll*, 186 Neb. 148, 181 N.W.2d 436 (1970) (holding that fair and reasonable market value of stolen property may be established in larceny prosecution by evidence of wholesale or retail values or both and if both are sufficient to establish grand larceny, then it is immaterial whether computation of market value is by reference to wholesale or retail prices); *State v. King*, 164 N.J. Super. 330, 336 n.1, 396 A.2d 354, 356 n.1 (1978) (shoplifting statute using term "full retail value," defined as " 'the merchant's stated or advertised price of the merchandise' ").

In his dissent in *Garza, supra*, Justice Boslaugh asserted that the price at which the retail merchant offers shoplifted goods for sale is sufficient evidence of value. I recognize that it is not difficult for the prosecution to ask what probably is only one additional question of the merchant required by the majority in *Garza*. That question would address whether the merchant had sold the same or similar goods for the same price as the price

listed on the stolen goods. Nonetheless, I do not believe that the shoplifting statute requires the reversal of a conviction because the only evidence of value is its price tags or Universal Product Codes (as are now nearly universally used in this age of scanners).

The statutory language of § 28-511.01 allows proof of the element of value by the price tag or UPC of the shoplifted merchandise, because that is the "retail value." If the issue were reconsidered today by the Nebraska Supreme Court, perhaps it would so hold. However, absent such reconsideration, I am bound by principles of stare decisis to follow *Garza*. Thus, while I would affirm, I am bound under *Garza* to vote to reverse. Therefore, I concur in the result reached by my colleagues.

IN RE GUARDIANSHIP OF LAVONE M., A CHILD UNDER 18 YEARS OF AGE. SHEILA M., APPELLANT, V. BARRY ZINO, APPELLEE.

610 N.W.2d 29

Filed May 9, 2000. No. A-99-455.

1. **Guardians and Conservators: Appeal and Error.** A proceeding for the appointment of a guardian in a probate matter is reviewed on appeal for error on the record.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Summary Judgment: Judicial Notice.** A trial court may use appropriate judicial notice in resolving a motion for summary judgment.
4. **Records: Judicial Notice: Rules of Evidence.** An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1995).
5. **Records: Judicial Notice.** As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.
6. **Records: Judicial Notice: Testimony.** Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record.
7. **Evidence: Appeal and Error.** For evidence to be considered by an appellate court, the evidence must have been offered below and must appear in the record on appeal.
8. **Words and Phrases.** An emergency has been defined as any event or occasional combination of circumstances which calls for immediate action or remedy, pressing

necessity, exigency, a sudden or unexpected happening, or an unforeseen occurrence or condition.

9. **Child Custody: Parental Rights.** In a child custody controversy between a biological or adoptive parent and one who is neither a biological nor adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
10. **Child Custody: Parental Rights: Proof.** A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.
11. **Child Custody: Parental Rights.** While a parent has a natural right to the custody of his or her child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances.
12. ___: ___. A parent's natural right is limited by the State's power to protect the health and safety of the children.
13. **Child Custody: Parental Rights: Proof.** The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his or her superior right to custody, the court may place the children in the custody of an unrelated third party.
14. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reasons.
15. **Constitutional Law: Guardians and Conservators: Child Custody: Parental Rights.** A guardianship proceeding is not a proper means to terminate a parent's constitutional right to the custody of her or his children.
16. **Guardians and Conservators: Child Custody: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of a child from a parent and removes the entire bundle of parental rights.
17. **Guardians and Conservators: Child Custody.** Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time.
18. **Guardians and Conservators.** Guardianships are temporary and depend upon the circumstances existing at the time.

Appeal from the County Court for Lancaster County: JEAN A. LOVELL, Judge. Affirmed.

Timothy C. Phillips, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Susan Kubert Sapp, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

G. Roderic Anderson, of Mattson, Ricketts, Davies, Stewart & Calkins, for Lavone M.

HANNON, INBODY, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Sheila M., the natural mother of Lavone M., appeals from an order of the county court for Lancaster County, finding Sheila and Cleveland M., Lavone's natural father, unfit parents and appointing Barry Zino as Lavone's guardian. For the reasons set forth below, we affirm.

BACKGROUND

The record shows that Lavone was born on May 28, 1983. Cleveland and Sheila were divorced on May 14, 1984, and the decree of dissolution granted Sheila custody of Lavone. Shortly after Cleveland and Sheila's separation, Sheila moved in with Zino, her boyfriend. The record shows that Sheila and Zino never married but continued to reside together with Lavone until approximately July 1998, when Sheila moved out. The record shows that after moving out, Sheila attempted to pick Lavone up from summer school on or about July 15 and that Lavone refused to go home with Sheila. Sheila then called the police and reported Lavone as a runaway. The police took Lavone to Freeway Station, a nonprofit shelter for young people run by Cedars Youth Services.

On July 22, 1998, Zino filed a petition for the appointment of a temporary and a permanent guardian for Lavone in county court. In his petition, Zino alleged that the appointment of a temporary and a permanent guardian for Lavone was necessary because (1) Sheila and Cleveland had abandoned Lavone for 6 months or more immediately prior to the filing of the petition; (2) Sheila and Cleveland had substantially and continuously or repeatedly neglected Lavone and refused to give her necessary parental care and protection; (3) Sheila and Cleveland, being financially able, had willfully neglected to provide Lavone with the necessary subsistence, education, or other care necessary for her health, morals, or welfare or had neglected to pay for such subsistence, education, or other care when legal custody of Lavone was lodged with others and such payment ordered by the court; and (4) Sheila and Cleveland were 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 Lavone's health, morals, or well-being. Zino alleged that there was an emergency need for the appointment of a temporary guardian without notice, pending notice and hearing. Zino stated that he was concerned about Lavone's physical and mental well-being if Lavone was not placed in his custody immediately.

On July 22, 1998, Lavone filed a motion, nominating Zino as her guardian pursuant to Neb. Rev. Stat. § 30-2610 (Reissue 1995). Lavone also filed an affidavit on the same date. In Lavone's affidavit, she stated that she has never met, seen, spoken to, or received communication of any type from Cleveland and that she does not know where he lives. Lavone stated that Sheila had abandoned and neglected her repeatedly for the past 15 years and that Zino had performed all of the necessary parental functions for the same period of time. Lavone stated that she had been living at the Freeway Station since July 15, 1998, and that she desired the immediate appointment of Zino as her temporary guardian so that she could return to live with Zino. Lavone stated that she feared for her safety and well-being if she lived with Sheila again and that she believed that Sheila would fail to provide her with adequate food, clothing, shelter, supervision, transportation, education, and medical care. Lavone also stated that if she resided with Sheila, Sheila would leave her unattended for days or weeks at a time.

On July 22, 1998, the county court filed an order, stating that an emergency existed and appointing Zino as Lavone's temporary guardian for a period not to exceed 120 days from the date of the order. The county court also set a hearing on Zino's petition for permanent guardianship and ordered that notice be given to the appropriate persons. Zino filed an acceptance of appointment and letters of appointment on July 22.

Sheila filed an answer and resistance to Zino's petition on August 21, 1998, and denied the allegations set forth in Zino's petition. Sheila stated that Zino had not allowed her to maintain contact with Lavone and that when she moved out of Zino's residence in July 1998, it was not her intention to abandon Lavone.

In an answer dated August 21, 1998, Cleveland stated that Sheila had abandoned and neglected Lavone repeatedly throughout the last 15 years and continually and habitually refused to provide Lavone with food, clothing, transportation, and medical care. Cleveland denied that he had abandoned Lavone and stated that he had maintained contact with Lavone by sending Lavone cards and by paying child support. Cleveland stated that he had been denied the opportunity to act as parent and natural guardian for Lavone as a result of Sheila's actions and the decree of dissolution which denied him the right to visit Lavone. Cleveland denied that Zino was a competent, suitable, and proper person to be Lavone's guardian and stated that it was not in Lavone's best interests for Zino to be Lavone's guardian. Cleveland requested that the court place Lavone with him as her natural parent and guardian because he had been ready, willing, and able to have a relationship with Lavone since her birth.

Zino filed replies on August 25, 1998, to Sheila's and Cleveland's answers.

In a stipulation filed September 28, 1998, Zino, Lavone, and Sheila agreed to continue the temporary guardianship for 6 months from the date of the stipulation, specifically waiving the statutory limits on the length of the temporary guardianship. The stipulation states that the parties neither admit nor deny the allegations in the petition for permanent guardianship. In an order filed September 29, 1998, the county court stated that it had reviewed the parties' stipulation and found its terms to be acceptable.

On February 10, 1999, Sheila filed a motion for summary judgment, stating that the county court lacked subject matter jurisdiction. After a hearing, the county court overruled Sheila's motion.

Trial on Zino's petition for appointment of a permanent guardian for Lavone was held on March 24, 1999. Lavone, Lavone's counselor, Zino, and Sheila testified at trial. Cleveland did not appear at the hearing even though he was given notice. Lavone testified that Zino had always been there for her while Sheila had not. Lavone testified that while Zino and Sheila lived together, Zino saw that she got off to school, helped her with her homework, attended parent-teacher conferences, attended her

special education sessions, purchased groceries, prepared meals, and purchased clothing and medication for her. Lavone testified that during the same time period, Sheila did not prepare meals for her or attend her school conferences. Lavone testified that Sheila would not allow her to have friends over, to go to her friends' homes, or to attend church.

Lavone testified that when Sheila came to pick her up from summer school in July 1998, she refused to go with Sheila and Sheila then called the police, reporting Lavone as a runaway. Lavone testified that the police picked her up and took her to the Freeway Station, where Lavone remained for a little over a week.

Lavone testified that Sheila typically worked from 3 to 11:30 p.m. and that while she lived with Sheila, Sheila would come home drunk in the early morning hours, scream and yell at Lavone and wake her up, and throw and break Lavone's personal items. Lavone testified that Sheila would regularly disappear for 4 or 5 days at a time, sometimes 2 weeks, and that Sheila would not say when or where she was going or when she would be back. Lavone testified that she had no way of contacting Sheila during her absences. Lavone testified that Sheila had taken several of her personal possessions for her own use, that Sheila did not give her any spending money, and that Sheila did not buy her food or clothes. Lavone testified that she did not want a relationship with Sheila and that she wanted Zino to be her guardian. Lavone testified that when she went to the Freeway Station she stated that she would kill herself if she had to live with Sheila, and she testified that she felt the same way on the date of trial.

Zino testified that he bought groceries, prepared meals for Lavone, purchased clothing for Lavone, and helped Lavone with her homework. Zino testified that Lavone has attention deficit disorder and that he actively worked with Lavone's special education teachers. Zino testified that he left his job at Nebraska Modular Homes as a general "technical manual" laborer 3 weeks before trial because he thought Lavone needed him to be at home. Zino testified that he could go back to work at any time if and when he chose to do so. Zino testified that he had seen several positive changes in Lavone in the last 9 months, including a better attitude, better choice of friends, increased interest in school, and attendance at church.

Zino testified that when Sheila resided with him and Lavone, Sheila would not allow Lavone to go to church and refused to buy Lavone clothes or medication for her asthma condition. Zino testified that during that same time period, Sheila came home intoxicated up to three or four times a week. Zino testified that Sheila would often leave home for a few days or a few weeks at a time and that he did not know where Sheila was on these occasions. Zino testified that Sheila had the option to work the day shift and that she refused.

Zino testified that he had slapped Lavone twice, that he then recognized that this form of discipline is inappropriate, and that he attended parenting classes voluntarily to learn more appropriate ways of disciplining Lavone. Zino testified that he had not interfered with Lavone's relationship with Sheila and that he encouraged Lavone's relationship with other members of her family. Zino testified that he did not receive any financial benefit from having Lavone reside with him.

Sheila testified that she separated from Cleveland a few months after Lavone was born and that she moved in with Zino soon after. Sheila testified that she did not work until Lavone went to school and that when Lavone started school, she attended a majority of Lavone's parent-teacher conferences. Sheila testified that she was also involved with Lavone's special needs program and that she, not Zino, helped Lavone with her homework. Sheila testified that she, not Zino, took Lavone to her doctors' appointments and to see two counselors and that she never refused to buy Lavone medication. Sheila testified that she did not tell Lavone that she could not attend church, but that Zino told Lavone that he did not want her attending church functions. Sheila testified that she did not have nor had she ever had a drinking problem. Sheila also testified that she was never gone for weeks on end and that she was only gone overnight on one occasion. Sheila stated that she did not take any of Lavone's possessions for her own use, except when she moved out of Zino's residence. Sheila testified that she took some of Lavone's possessions with her when she moved out because she was expecting Lavone to move in with her. Sheila testified that she worked second shift because she had not had an opportunity to work the day shift.

Sheila testified that while she lived with Zino, Zino disciplined Lavone by physically and verbally abusing her. Sheila testified that Zino struck Lavone more than twice and that Zino hit her as well. Sheila testified that Zino also verbally degraded her and put her down on a continual basis. Sheila testified that Zino often did so in front of Lavone.

Sheila testified that she moved out of Zino's house in July 1998 and that she rented a two-bedroom apartment so that Lavone could live with her. Sheila testified that she told Lavone she was moving out and asked Lavone to live with her. Sheila testified that Lavone initially said yes, but changed her mind when Sheila attempted to pick Lavone up from summer school. Sheila testified that she had tried to contact Lavone since Zino's appointment as Lavone's temporary guardian and that during her conversations with Lavone, she could hear Zino telling Lavone what to say. Sheila also testified that she asked to see Lavone after Zino's appointment and that Zino refused. Sheila testified that she was concerned about Lavone staying with Zino because of Zino's temper and his abusive behavior.

Camie Nitzel, Lavone's counselor, testified that Zino is Lavone's psychological parent, meaning that "while that individual [Zino] may not have parented the child [Lavone] biologically, that person is parenting the child in terms of their emotional and psychological development and being a support person for that." Nitzel testified that she had been counseling Lavone since July 1998 and that in her opinion, there was no evidence of any attachment or bonding between Sheila and Lavone. Nitzel stated that in her opinion, Sheila had emotionally neglected Lavone, and that at the time of trial, Lavone and Sheila could not have a workable relationship. Nitzel testified that it would be detrimental to Lavone if she was sent to live with Sheila. Nitzel testified that Lavone needed to remain with Zino. Nitzel testified that she had seen several positive changes in Lavone in the 9 months prior to trial, specifically that Lavone had set goals for herself, that Lavone was more open, and that Lavone laughed more often.

On rebuttal, Lavone testified that Zino did not tell her that she could not go to church. Lavone testified that Zino did not call her and Sheila names. Lavone also testified that she did not tell Sheila that she wanted to move in with her.

In an order filed March 25, 1999, the county court appointed Zino as Lavone's permanent guardian, stating that the appointment was in Lavone's best interests. The court stated that Sheila and Cleveland were unfit and that the appointment of Zino was necessary as a means of giving medical consents and providing continuing care and supervision of Lavone. The county court also found that there was sufficient evidence to show that Cleveland abandoned Lavone for 6 months or more prior to the filing of the petition and that both Sheila and Cleveland substantially and continuously or repeatedly neglected Lavone and refused to give her necessary parental care and protection. The court found that there was insufficient evidence to show that Sheila and Cleveland, being financially able, had willfully neglected to provide Lavone with the necessary subsistence, education, or other care necessary for her health, morals, or welfare or had neglected to pay for such subsistence, education, or other care when legal custody of Lavone was lodged with others and such payment was ordered by the court. The county court also found that there was insufficient evidence to show that Sheila or Cleveland were unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct was found by the court to be seriously detrimental to Lavone's health, morals, or well-being.

On April 13, 1999, Sheila filed a motion to vacate the county court's judgment for fraud practiced upon the court by Zino in obtaining the judgment. The county court subsequently overruled Sheila's motion.

ASSIGNMENTS OF ERROR

On appeal, Sheila argues that the county court erred in (1) overruling her motion for summary judgment and exercising subject matter jurisdiction in a matter which was under the jurisdiction of the district court, (2) granting Zino both temporary and permanent guardianship of Lavone, and (3) terminating her parental custody rights via a guardianship proceeding.

STANDARD OF REVIEW

[1,2] A proceeding for the appointment of a guardian in a probate matter is reviewed on appeal for error on the record. *In re Interest of Justin C. et al.*, 7 Neb. App. 251, 581 N.W.2d 437

(1998). On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

ANALYSIS

Summary Judgment.

On appeal, Sheila argues that the county court erred in overruling her motion for summary judgment and exercising subject matter jurisdiction in a matter which was under the jurisdiction of the district court. Specifically, Sheila argues that subsequent to Zino's filing of a petition for guardianship in the county court for Lancaster County, Cleveland filed a motion in Lancaster County District Court, requesting that the district court modify the parties' divorce decree and award him visitation with Lavone. Sheila appears to argue that because Cleveland's motion for visitation was pending in district court, the county court was precluded from holding a hearing on Zino's petition for guardianship until Cleveland's motion was disposed of.

The record shows that Sheila filed a motion for summary judgment on February 10, 1999, stating that the county court lacked jurisdiction over the guardianship proceedings. A hearing was subsequently held on Sheila's motion. At that hearing, Sheila asked the county court to take judicial notice of the entire district court file constituting Sheila and Cleveland's divorce action, and none of the parties objected to Sheila's request. Even so, we hold that this was not appropriate judicial notice.

[3-6] A trial court may use appropriate judicial notice in resolving a motion for summary judgment. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). "An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985)." *State v. Ryan*, 233 Neb. 74, 130, 444 N.W.2d 610, 645-46 (1989). Further, in *Gottsch, supra*, the Supreme Court held that " '[a]s a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.' " 235 Neb. at 835-36, 458 N.W.2d at 456. The Nebraska Supreme Court has further held, " 'Papers requested to be noticed must be marked,

identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. . . .' " *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 709, 484 N.W.2d 68, 73 (1992) (quoting *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980)). Although a court has the right to examine its own records and take judicial notice of its own proceedings and judgment in a prior case, this rule is inapplicable in the instant case since Sheila asked the county court to take judicial notice of a prior proceeding or judgment held in the district court, not in the county court. See *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994).

[7] In the instant case, because of the judicial notice, Cleveland's motion for visitation allegedly filed in the district court is not before us. Without commenting on the effect this motion would have on the county court's jurisdiction over the guardianship proceedings, we note that for evidence to be considered by an appellate court, the evidence must have been offered below and must appear in the record on appeal. *In re Interest of Crystal T.*, 4 Neb. App. 503, 546 N.W.2d 77 (1996). Given the record before us, Sheila's assignment of error regarding the county court's denial of her motion for summary judgment is without merit.

Temporary Guardianship.

Sheila contends that the court erred in initially granting Zino temporary guardianship of Lavone because no emergency existed.

Neb. Rev. Stat. § 30-2611(c) (Reissue 1995) states:

> If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six months. In an emergency, the court may appoint a temporary guardian of a minor without notice, pending notice and hearing.

On July 22, 1998, Zino filed a petition requesting that the court appoint him as Lavone's temporary and permanent guardian. In his petition, Zino stated that an emergency existed and that the court should appoint him as Lavone's temporary

guardian without notice, pending notice and hearing. Zino stated that he was concerned about Lavone's physical and mental well-being if Lavone was not placed in his custody immediately. Specifically, Zino stated that both Sheila and Cleveland had abandoned Lavone and were disqualified from acting as her natural guardian. Zino alleged that Sheila had continually and habitually refused Lavone's requests to provide Lavone with food, suitable clothing for the elements, and transportation to church and school; to allow Lavone to see a counselor as recommended by her psychiatrist; and to obtain refills of her asthma and attention deficit disorder medication. Zino alleged that Cleveland had abandoned Lavone for the preceding 6 months and had had no contact with Lavone.

Similarly, in Lavone's affidavit filed on July 22, 1998, Lavone requested that Zino be appointed as her guardian. Lavone stated her belief that if she lived with Sheila again, Sheila would fail to provide her with adequate food, clothing, shelter, supervision, transportation, education, and medical care. Lavone stated that Sheila would leave her unattended for days or weeks at a time. Lavone also stated that she had never met, seen, or spoken to Cleveland or received communication of any type from him and that she was unaware of his whereabouts.

On July 22, 1998, the county court filed an order, stating that an emergency existed and that Zino should be appointed as Lavone's temporary guardian for a period not to exceed 120 days from the date of the order, pending notice and hearing. The county court set a hearing on Zino's petition for permanent guardianship and ordered that notice be given to the appropriate persons.

On September 28, 1998, Zino, Lavone, and Sheila stipulated to a continuation of the temporary guardianship for 6 months from the date of the stipulation, specifically waiving the statutory limits on the length of the temporary guardianship. The stipulation stated that the parties neither admitted nor denied the allegations in the petition for permanent guardianship.

In an order filed September 29, 1998, the county court stated that it had reviewed the parties' stipulation and found its terms to be acceptable.

[8] Sheila argues, "The order awarding Appellee [Zino] temporary guardianship was improper simply because there was no

emergency." Brief for appellant at 11. Elsewhere in Nebraska case law, an emergency has been defined as "'"'[a]ny event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.'"'" *In re Estate of Wilson*, 8 Neb. App. 467, 473, 594 N.W.2d 695, 701 (1999), quoting *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 515 N.W.2d 128 (1994). Given the allegations in Zino's petition and Lavone's statements in her affidavit, this situation clearly fell within the definition of an emergency. Therefore, the trial court did not err in appointing Zino as Lavone's temporary guardian after finding that an emergency existed.

Permanent Guardianship.

Sheila argues that in light of the constitutional right a parent has to the custody of his or her biological child, the county court erred in accepting the evidence at trial as sufficient to deny her that fundamental right. Sheila contends that "[i]n the event that it is determined that the prior guardianship proceedings were valid, and that the exercise of jurisdiction was proper, it is clear that [Sheila] is not an unfit mother." Brief for appellant at 20.

Neb. Rev. Stat. § 30-2608(a) (Cum. Supp. 1998) states:

> The father and mother are the natural guardians of their minor children and are duly entitled to their custody and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other except as otherwise provided in this section.

Section 30-2608(d) states in part, "The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order." Neb. Rev. Stat. § 30-2610 (Reissue 1995) states:

> The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is fourteen years of age or older, unless the

> court finds the appointment contrary to the best interests of the minor.

Section 30-2611(b) states:

> Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

[9,10] In a child custody controversy between a biological or adoptive parent and one who is neither a biological nor adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

> A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

Id. at 982, 554 N.W.2d at 149.

[11-13] While a parent has a natural right to the custody of his or her child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. *In re Interest of Amber G. et al., supra.* A parent's natural right is limited by the State's power to protect the health and safety of the children. *Id.* The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his or her superior right to custody, the court may place the children in the custody of an unrelated third party. *Id.*

[14] In the instant case, given Lavone's and Zino's testimony as set forth in the background section, the county court did not err in appointing Zino as Lavone's guardian in accordance with the above statutes. Clearly, Lavone's welfare and Lavone's best interests will be served by the requested appointment. Although

this is true, we recognize that in appointing Zino as Lavone's permanent guardian, the court found that Sheila is unfit and that Sheila substantially and continuously or repeatedly neglected Lavone and refused to give her necessary parental care and protection. We note that such findings were unwarranted in the instant case given that this is not a juvenile proceeding. Instead, the evidence supports the court's determination that the appointment of Zino as Lavone's guardian is in Lavone's best interests. Therefore, there is no error on this record regarding the county court's appointment of Zino as Lavone's permanent guardian. A proper result will not be reversed merely because it was reached for the wrong reasons. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997).

Termination.

[15-18] Sheila argues that the court's appointment of Zino as Lavone's permanent guardian effectively terminated her parental rights to Lavone. We recognize that a guardianship proceeding is not a proper means to terminate a parent's constitutional right to the custody of her or his children. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). The Nebraska Supreme Court has stated that the appointment of a guardian is not a de facto termination of parental rights which results in a final and complete severance of a child from a parent and removes the entire bundle of parental rights. *Id.* Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time. *Id.*, citing *In re Interest of Amber G. et al., supra.* Similarly, guardianships are temporary and depend upon the circumstances existing at the time. *Id.*, citing *In re Guardianship of Copenhaver*, 124 Idaho 888, 865 P.2d 979 (1993). Clearly, given the above law, the court's appointment of Zino as Lavone's guardian is temporary, Zino is subject to removal at any time, and Sheila's parental rights remain intact. Therefore, Sheila's assignment of error is without merit.

CONCLUSION

For the reasons set forth above, we conclude that the county court did not err in overruling Sheila's motion for summary

judgment or in granting Zino temporary and permanent guardianship of Lavone. The county court's appointment of Zino as Lavone's guardian did not terminate Sheila's parental rights. Therefore, we affirm the county court's orders overruling Sheila's motion for summary judgment and appointing Zino as Lavone's temporary and permanent guardian.

AFFIRMED.

PATTI BATES, APPELLANT, V. DESIGN OF THE TIMES, INC., A NEBRASKA CORPORATION, APPELLEE.

610 N.W.2d 41

Filed May 9, 2000. No. A-99-673.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Nebraska law does not require expert medical opinion to be couched in the magic words "to a reasonable degree of medical certainty."
3. **Physicians and Surgeons: Expert Witnesses.** Expert medical testimony must be sufficient, when examined in its entirety, to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
4. **Negligence.** The law requires a person to use due care so as not to negligently injure another person.
5. **Corporations: Agents.** Knowledge of the board of directors, officers, or agents of a corporation is imputed to the corporation.
6. **Negligence: Licenses and Permits.** Failure to have a cosmetologist's license is not, by itself, negligence.
7. **Negligence: Words and Phrases.** Negligence is defined as a failure to do what reasonable and prudent persons would ordinarily have done, or not done, under the circumstances.
8. **Judgments: Appeal and Error.** A wrong reason for a correct conclusion of the trial court is generally immaterial on appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Steven D. Davidson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

In this negligence action, Patti Bates alleges she suffered a brain stem stroke because her neck was hyperextended during a hair rinsing procedure at a beauty salon, Design of the Times, Inc. (DOTT). Bates claims that the DOTT employee who rinsed her hair failed to notice and then relieve her discomfort while she was in a reclining position with her head over a sink and that as a result, she suffered an occluded vertebral artery, which later developed into a stroke. The Douglas County District Court sustained DOTT's motion for summary judgment, because Bates' expert medical evidence was insufficient to create an issue of fact regarding causation.

I. BACKGROUND

On March 11, 1995, Bates went to DOTT to get a permanent in her hair. As part of the procedure, a chemical solution was rinsed out of Bates' hair by a DOTT employee, M'Lissa Golden. Golden directed Bates to lean back in a chair with her head extended, her face up, and her head over a sink. Bates experienced some discomfort while over the sink, and after approximately 1 to 2 minutes, she lifted her head to relieve the discomfort. Golden placed her hand on Bates' forehead and said, "'You're okay,'" as she pushed Bates' head back over the sink. Bates again felt discomfort, and after 1 or 2 minutes, she again lifted her head from over the sink. When Bates lifted her head a second time, Golden asked, "What are you doing?" Bates told Golden she was lifting her head so that Golden could rinse the nape of her neck, to which Golden responded that she had already rinsed that area. The rinsing procedure lasted from 5 to 8 minutes. When Bates stood up from the chair at the sink, she felt momentary dizziness. Bates testified that she said, "'Whoooooh,'" because of her dizziness, and that Golden assisted Bates back to a styling chair.

The record also shows that Bates experienced dizziness and nausea during the day, prior to her hair appointment. The

evening after the appointment, Bates felt "very lethargic and more tired" than usual. During lunch the following day, Bates began experiencing a severe headache, pain in her right ear, double vision, and facial drooping. She was taken to the hospital where she was diagnosed with a severe migraine and released. The following morning, Bates was seen by Dr. Ronald Cooper, a neurologist. Cooper admitted Bates to the hospital, where she was eventually diagnosed as having suffered a brain stem stroke.

Cooper testified as a medical expert, and his testimony is relied upon by Bates as evidence of causation. During his deposition, Cooper was asked several times, in various ways, if he had an opinion to a reasonable degree of medical certainty as to whether Bates' stroke was causally related to the rinsing procedure she received at DOTT. Cooper's consistent response was that the cause of the stroke "most likely was related to head and neck positioning" during the rinsing procedure at DOTT. Bates also relies on the expert testimony of Dr. William Shiffermiller. Shiffermiller opined that there was a "likelihood" that the rinsing procedure was at least "partially responsible" for Bates' stroke.

DOTT moved for summary judgment, which the Douglas County District Court sustained. The court found that "the opinions of the doctors examined in the context of their entire testimony are not sufficiently definite and relevant to provide a basis of fact for the fact finder's determination of an issue or question." The court also found there was no evidence that the manner in which Bates' hair was rinsed "was done contrary to the standards of the industry" or that the length of the rinsing procedure was the cause of her injury. Bates timely filed this appeal. Other facts are provided as needed in the analysis below.

II. ASSIGNMENT OF ERROR

Bates' sole assignment of error is that the district court erred in granting DOTT's motion for summary judgment.

III. STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from

those facts and that the moving party is entitled to judgment as a matter of law. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Chelberg, supra*; *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Chelberg, supra*; *Farmers Union Co-op Ins. Co., supra.*

IV. ANALYSIS

The district court's order sustaining DOTT's summary judgment motion addresses the issue of causation, finding that the medical experts' testimony was not sufficiently definite to create a factual issue concerning causation. Bates argues that the district court weighed the evidence rather than evaluated the evidence to determine whether a factual issue existed. Cooper stated his opinion on medical causation several times during his deposition, in response to multiple inquiries on both direct and cross-examination. While Cooper did state once that "the positioning of [Bates'] head and neck with medical certainty caused injury to the right vertebral artery that subsequently became occluded," his opinion, considering his testimony in its entirety, is that the "most likely" cause of Bates' stroke was the positioning of her head and neck during the rinsing procedure.

[2,3] Nebraska law does not require Cooper's expert medical opinion to be couched in the magic words "to a reasonable degree of medical certainty." See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Expert medical testimony must be sufficient, when examined in its entirety, to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. *Id.*, citing *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998), and *Shahan v. Hilker*, 241 Neb. 482, 488 N.W.2d 577 (1992). "Medical expert testimony

regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least 'probable,' in other words, more likely than not." *Doe*, 255 Neb. at 975, 587 N.W.2d at 893. Cooper stated that in his expert opinion, the "most likely" cause of Bates' stroke was the positioning of her head and neck during the rinsing procedure. He also testified that there was a high likelihood that the vertebral artery may have been traumatized by the positioning. Finally, he stated that the positioning of her head "certainly caused injury to the right vertebral artery" and the occlusion of that artery caused her stroke. Viewing Cooper's testimony as a whole, it is legally sufficient evidence of the causation of the stroke. See *Rogers v. Spain*, 388 S.W.2d 518, 521 (Mo. App. 1965) (testimony of physician that plaintiff's pain " 'most likely' " would be permanent was not speculative but was to reasonable degree of medical certainty that injuries would be permanent). Therefore, the trial court erred in concluding that the medical testimony of causation was insufficient.

However, the fact that the trial court erred in finding insufficient evidence of causation does not end our analysis. In order to establish Bates' negligence claim, she must provide evidence of each material element—duty, breach, causation, and damages. See *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). In addition to finding insufficient evidence of causation, the trial court indicated that evidence of breach was lacking. Having determined that there was sufficient medical evidence of causation to withstand the motion for summary judgment, we next consider whether the record contains sufficient evidence to create a genuine issue of material fact for the jury's determination on the elements of duty and breach. We note that the record contains sufficient evidence of damages obviating any discussion of that element.

1. Evidence of Duty

[4,5] The law requires a person "to use due care so as not to negligently injure another person." *Merrick*, 246 Neb. at 661, 522 N.W.2d at 406. DOTT argues that there is no duty in the present case because the risk of stroke during the rinsing procedure was unforeseeable. "[F]oreseeability, in the duty context, is

a legal question for the court." *Knoll v. Board of Regents*, 258 Neb. 1, 8, 601 N.W.2d 757, 763 (1999). DOTT argues that the relatively new phenomenon referred to as "beauty parlor stroke syndrome" could not have been foreseen by DOTT in 1995 when Bates was allegedly injured. However, the record shows that Michele Hovorka, the owner of DOTT, was actually aware of beauty parlor stroke syndrome before March 1995. Hovorka stated that a client had brought her an article from a medical journal discussing the risk of strokes associated with beauty parlor rinsing procedures. She also stated that she felt the article was something that she needed to bring to the attention of her employees, so she held a meeting where the issue was discussed. Furthermore, she informed her employees that if a client "complained about it, they were to be rinsed forward." While Golden stated that she personally had no knowledge of potential harm, Hovorka's actual knowledge of beauty parlor stroke syndrome is imputed to DOTT. See *Federal Sav. and Loan Ins. Corp. v. Morque*, 372 N.W.2d 872 (N.D. 1985) (knowledge of board of directors, officers, or agents of corporation is imputed to corporation); *Regal Ins. Co. v. Summit Guar. Corp.*, 324 N.W.2d 697 (Iowa 1982) (generally, knowledge or notice of officer-director of corporation is imputed to corporate entity even if it is never actually disclosed to corporation). Because Hovorka had actual knowledge that there were reports of a risk of stroke from rinsing procedures and she acted on that knowledge by instructing DOTT employees about the risk before Bates was rinsed by Golden, DOTT had a duty to ensure its employees conducted the rinsing procedure in a manner so as to avoid negligently injuring a client.

2. Whether There Was a Breach

Bates offered the testimony of cosmetology expert Martin McGaig as evidence of the breach of duty. McGaig offered four opinions which criticized DOTT's activities relating to the rinsing procedure. We analyze each criticism separately.

(a) Licensing

[6] McGaig opined that Hovorka failed to act in accord with what would be expected of a reasonably prudent cosmetologist by failing to confirm that Golden was appropriately licensed by

the State of Nebraska before permitting her to render cosmetology services to Bates. However, McGaig was also unaware of anything other than failing to have a license which would render Golden incompetent or unqualified to perform the rinsing procedure. Failure to have a cosmetologist's license is not, by itself, negligence. See, *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992); *Suiter v. Epperson*, 6 Neb. App. 83, 571 N.W.2d 92 (1997) (lack of driver's license does not equal incompetency to drive). The only evidence concerning Golden's license is that she did not have one at the time she rinsed Bates' hair because of an administrative issue. There was, however, undisputed evidence that she was fully trained and qualified, and there was no evidence that she did not know how a reasonable person in her position would rinse hair. Therefore, the fact that Golden was unlicensed could not be a breach of duty which proximately caused the injury involved herein.

(b) Indications of Discomfort

[7] McGaig opined that Golden failed to respond as would be expected of a reasonably prudent cosmetologist to Bates' indications of discomfort during the rinsing procedure. However, he stated that the only indications of discomfort upon which he based his opinion was the fact that Bates moved her head twice. While Bates testified that she felt discomfort during the rinsing procedure, she never verbally told Golden or Hovorka that she was in pain or having discomfort. Bates agrees that the only indication from which Golden could know that she was feeling discomfort during the procedure was that she moved her head twice. Bates argues that her conduct of moving her head indicated her discomfort sufficiently to put Golden on notice that she may be in a dangerous position, despite Bates' admitted failure to verbalize any problems to Golden. Without verbalization of discomfort, we conclude that no reasonable person in Golden's position could be expected to know that Bates was in such discomfort that she was being injured, or even that the rinsing procedure needed to be stopped. Any other holding would require Golden to be a mindreader. Negligence is defined as a failure to do what reasonable and prudent persons would ordinarily have done, or not done, under the circumstances. *Farmer*

v. S.M.S. Trucking Co., 180 Neb. 779, 145 N.W.2d 922 (1966). Thus, the question becomes, even giving Bates the favorable inferences from the evidence, whether there is any evidence that Golden acted unreasonably.

There is no evidence that Golden improperly placed or positioned Bates' head over the sink. She followed the standard procedure for rinsing, which was to place the client in a chair, leaning back, with the client's head extended over the sink, face up. McGaig agreed that Golden did not deviate from the proper procedure when rinsing Bates' hair. Furthermore, he stated that many customers complain of some discomfort during the procedure, but Bates did not even do that. The only allegation of negligence against Golden is failing to reposition Bates' head after Bates voluntarily moved her head. The evidence shows only that Bates lifted her head twice. When Bates lifted her head the second time, she verbally indicated that she did so, not because of discomfort, but so that Golden could rinse the nape of her neck. How could any reasonable person conclude from this action and statement that the customer was suffering discomfort such that the law would impose a duty to reposition her? A reasonable person would believe that Bates, particularly after Golden told Bates that she had already rinsed the nape of Bates' neck, made no complaint of discomfort. And Bates then voluntarily repositioned her head over the sink, without any further indication of discomfort. The only reasonable conclusion and inference for Golden was that Bates was not experiencing any discomfort. In conclusion, there is no evidence that Golden was negligent when she failed to reposition Bates' head, given that Bates had done so twice herself without any complaint of pain and Bates' only statement was that she was moving her head so that the nape of her neck could be rinsed.

(c) Rinsing Time

Next, McGaig opined that it was inappropriate to rinse Bates' hair for more than 5 minutes and that 3 minutes of rinsing would have been adequate. But McGaig agreed that the product used on Bates' hair suggested rinsing for a full 5 minutes. Moreover, the textbook relied upon and used by McGaig at his beauty college recommends that rinsing be done for 3 to 5 minutes, at a

minimum. Finally, McGaig knew of no medical problems associated with "over rinsing." While we view the evidence most favorably to Bates, we bear in mind that this is a hair rinse—not rocket science or microsurgery where time and space and distance are crucial. But, even accepting the notion that 8 minutes of rinsing was negligence, there is no evidence whatsoever that the extra 3 minutes of rinsing was in any way causally related to Bates' stroke. Cooper's testimony is that the way Bates' head was positioned during the rinsing procedure was the most likely cause of the injury to her vertebral artery, not that the cause was that she was positioned too long over the sink. And, Cooper offered no testimony as to what effect, if any, an extra 3 minutes of rinsing had upon Bates' injury. Without some evidence that the allegedly negligent additional 3 minutes was causally related to the injury, the evidence of extra rinsing time does not provide any evidence of a breach of duty which is causally related to the injury.

(d) Independent Time

Finally, McGaig opined that Golden was allowed independent time with Bates contrary to DOTT's policy. Hovorka stated that "independent time" is time when an employee is "actually doing cutting services on clients that they're getting paid for." There was no evidence of "cutting" here. Hovorka stated that when an employee such as Golden is shampooing or rinsing a client, they are not engaged in independent time because they are not "producing revenue on their own, doing a client from start to finish." There is no evidence that Hovorka was required to be at Golden's side throughout the rinsing procedure or that had she done so, the customer would have been treated differently.

V. CONCLUSION

[8] We find that there is no evidence whatsoever of a breach of duty which had a causal connection with Bates' stroke and that thus, there is no genuine issue of material fact for trial. We affirm the decision below, despite the fact that the trial court erroneously found insufficient evidence of medical causation. But the trial court did find insufficient evidence of breach of duty which proximately caused the stroke. That conclusion is correct and requires that summary judgment for DOTT be sus-

tained. Moreover, to the extent that the trial court's decision was incorrect about the medical evidence, we remember that " '[a] wrong reason for a correct conclusion of the trial court is generally immaterial on appeal.' " *Employers Mutual Casualty Co. v. Brazda*, 152 Neb. 633, 637, 42 N.W.2d 195, 197 (1950).

AFFIRMED.

IRWIN, Chief Judge, dissenting.

I agree with the majority's opinion finding that there was a duty on the part of DOTT because Hovorka had actual knowledge that there was a risk of stroke from rinsing procedures and that she responded to that knowledge by instructing DOTT employees about the risk before Golden rinsed Bates' hair. DOTT had a legally recognized duty to ensure its employees performed the rinsing procedure in a manner that would avoid negligently injuring a client. I further agree that Cooper's expert testimony was sufficient to establish that the positioning of Bates' head caused injury to the right vertebral artery and that the occlusion of that artery caused her stroke.

I disagree with the majority's conclusion that a reasonably prudent cosmetologist, *as a matter of law*, should not be expected to conclude that Bates' actions indicated discomfort. It must be kept in mind that it was DOTT, not Bates, who had the superior knowledge that positioning a person's head in a laid back posture over the sink could lead to a stroke. It was Golden who was instructed by her employer of the danger of the rinsing process and that if a client "complained about it, they were to be rinsed forward."

It must also be remembered that when Bates' head had been over the sink for 1 to 2 minutes, she lifted her head, and that Golden pushed Bates' head back over the sink and told her, "You're okay." Golden made no inquiry of Bates at that time. Subsequently, when Bates lifted her head a second time, she was met with the remark, "What are you doing?" being leveled at her by Golden. While understanding that the second time she lifted her head from over the sink she stated she was doing so in order to allow Golden to rinse the nape of her neck, this does not eliminate all probative value of the first movement of the head, or the second movement from over the sink, or their combined probative value.

It does not seem out of the realm of reasonableness that Bates, although experiencing discomfort, decided to endure this uncomfortable process, rather than complain to Golden who had already told her that she was "okay" or to have her head pushed over the sink once again. After all, it was DOTT, not Bates, who knew that discomfort while positioned over the sink in this fashion could be indicative of vertebral occlusion and the onset of a stroke.

It has been repeatedly stated that summary judgment is an extreme remedy. It should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985).

On a motion for summary judgment, the question is whether there is any genuine issue of material fact and not how that issue should be decided. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. *Piper v. Hill*, 185 Neb. 568, 177 N.W.2d 509 (1970).

There exists a genuine issue of material fact as to whether Bates' action would put a reasonable cosmetologist on notice that a customer was experiencing pain or that appropriate and reasonable inquiry was called for given these facts.

WANDA K. MACE, NOW KNOWN AS WANDA K. STRANATHAN, APPELLEE, V. JERRY D. MACE, APPELLANT.

610 N.W.2d 436

Filed May 16, 2000. No. A-99-270.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subse-

quent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.

4. **Attorney Fees.** Factors to be considered in awarding attorney fees include the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Phillip G. Wright, of Quinn & Wright, for appellant.

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

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Jerry D. Mace appeals from the district court's order modifying a decree which dissolved his marriage to Wanda K. Mace, now known as Wanda K. Stranathan. On appeal, Jerry challenges the court's modification of child support and day-care expenses and the court's award of attorney fees to Wanda. Because we conclude that the court did not abuse its discretion in awarding day-care expenses, we affirm that portion of the modification order. Because we conclude that the court abused its discretion in awarding attorney fees to Wanda when she did not provide any evidence to establish the amount of the fees incurred, we reverse the court's order awarding Wanda attorney fees. Because we conclude that the court abused its discretion in not considering whether a deviation was warranted because of the birth of a subsequent child of Jerry's, we reverse, and remand for further proceedings.

II. BACKGROUND

Jerry and Wanda were married on December 11, 1982. Three children were born as a result of the marriage: Christopher, born June 14, 1984; Michael, born June 7, 1988; and Anita, born March 25, 1992. On July 28, 1992, the court entered a decree dissolving the parties' marriage. In the decree, Wanda was

awarded custody of the children and Jerry was ordered to pay child support in the amount of $825 per month.

On March 30, 1998, Jerry filed an application to modify the decree. In the application, Jerry alleged that he had suffered a work-related injury which resulted in a reduction of his net monthly income. On April 29, Wanda filed a cross-application to modify the decree. Wanda asserted that her income had increased, that the Nebraska Child Support Guidelines had been modified, that Jerry's income had increased, and that Jerry should be paying a portion of day-care expenses.

On January 29, 1999, the district court entered an order of modification. In the order, the court found that Jerry had not suffered a work-related injury, but that he did suffer from a medical condition which prohibited him from earning significant overtime. The court modified Jerry's child support obligation to $775 per month, ordered Jerry to pay 70 percent of Wanda's work-related day-care expenses, and ordered Jerry to pay $1,500 of Wanda's attorney fees. Jerry filed a motion for new trial, which was denied on February 12. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Jerry has assigned four errors, which we consolidate for discussion to three. First, Jerry asserts the district court erred in the calculation of child support. Second, Jerry asserts the district court erred in ordering him to pay day-care expenses. Third, Jerry asserts the district court erred in awarding Wanda attorney fees.

IV. ANALYSIS

1. Standard of Review

[1-3] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999); *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999); *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent con-

clusions with respect to the matters at issue. *Elsome v. Elsome, supra*; *Rauch v. Rauch, supra*. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Elsome v. Elsome, supra*; *Rauch v. Rauch, supra*. A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Dueling v. Dueling, supra*.

2. Child Support

Jerry first contends the district court erred in the calculation of his child support obligation. Jerry alleges the court erred in including overtime income in the calculation and in not properly applying the holding of this court from the case of *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998).

(a) Jerry's Overtime Income

The district court found that Jerry suffered from a medical condition which causes some disability and which has some effect on Jerry's income-producing capability. Specifically, the court found that Jerry's medical condition, a problem with his lower back, prevents him from earning any substantial overtime pay. The court adopted Wanda's child support worksheet and set Jerry's net monthly income at $1,925. The worksheet offered by Jerry alleged his net monthly income to be approximately $1,550.

Jerry alleges the court erred in accepting Wanda's worksheet because "it is apparent that her calculation included an estimate for overtime." Brief for appellant at 9. At trial, Wanda testified that her worksheet was based upon Jerry's employment at ConAgra, Inc., which is where he was working at the time the application to modify was filed. The evidence established that when Jerry was working at ConAgra, his hourly wage was $12.59. Based on Jerry's working 40 hours per week at this wage rate, his annualized gross monthly income would be $2,182.27. Wanda's worksheet estimated Jerry's gross monthly income at $2,182. As such, it is apparent that Wanda's work-

sheet did not include overtime, but only Jerry's earning capacity based on full-time employment.

Because the evidence does not support Jerry's assertion that the court included estimated overtime income in the child support calculation, we do not find an abuse of discretion in the court's child support award. This assigned error is without merit.

(b) Application of *Prochaska v. Prochaska*

Jerry also asserts the district court erred in the child support calculation by not properly allowing him a credit for support that he is paying to a child born in a subsequent relationship. Specifically, Jerry asserts that this court's holding in *Prochaska v. Prochaska, supra*, supports allowing a deviation from the guidelines to allow him a deduction for a child, Kirsty, born during a subsequent marriage. Jerry testified that he remarried on July 3, 1996, and that Kirsty was "age five" at the time of trial, in January 1999. Jerry testified that Kirsty was born "as a result of" his relationship with his new wife, that he cared for Kirsty, and that he provided support for Kirsty. However, in response to a question from his own attorney, Jerry acknowledged that he had not ever adopted Kirsty.

In an order titled "Opinion and Findings," the district court found that "[i]t is not clear from the evidence that Jerry is the natural father" of Kirsty. The court acknowledged the holding of *Prochaska v. Prochaska, supra*, but held that Jerry's testimony failed to establish a legal duty of support for Kirsty that would warrant a deviation from the guidelines.

From our review of the opinion in *Prochaska v. Prochaska, supra*, it is apparent that the court in that case was presented with a record that established that the child at issue was, in fact, the child of the husband and his new wife.

The evidence presented in the case at bar established that the child in question, Kirsty, was born prior to Jerry's remarriage. He testified he did support Kirsty, although he had never "adopted" her. Importantly, however, Jerry testified that Kirsty was born "as a result of" his relationship with his new wife. From this evidence, we disagree with the district court that Jerry failed to establish a legal duty to support Kirsty. He established that he was, in fact, Kirsty's natural father. The testimony at trial

indicates that Jerry, Kirsty, and Kirsty's mother are living together as a family. As such, the district court should have considered whether a deviation from the guidelines was warranted under the holding in *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998). The judgment is accordingly reversed, and the case is remanded for further proceedings on this issue.

3. Day-Care Expenses

Jerry next asserts the district court erred in ordering him to pay 70 percent of Wanda's work-related day-care expenses. Jerry asserts that day-care expenses were contemplated in the decree, but that the court simply did not order them, and that Wanda failed to establish that she had any expenses at the present time.

We disagree with Jerry's assertion that the fact that the decree makes mention of potential employment by Wanda necessarily means that the court contemplated day-care expenses at that time. This court has previously recognized that the mere fact that parties anticipate future changes of employment and the potential for some day-care expenses to arise is not sufficient for a holding that such expenses are reasonably contemplated. *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995). Many items within the realm of contemplation at the time of dissolution are uncertain or speculative and are not appropriately considered until their actual occurrence. *Id.*

The evidence presented indicates that at the time of the initial decree, Wanda was not awarded day-care expenses. The decree makes no mention of day-care expenses whatsoever. Wanda testified that she had, since the time of the decree, held various jobs where she incurred day-care expenses. She testified that she did not incur any day-care expenses as a result of the job she had at the time of the hearing, but that she had taken the job specifically because she had not been awarded day-care expenses. We note that if Wanda does not incur any expenses, then Jerry will not have to pay anything additional as a result of this modification.

In the court's opinion and findings, the court agreed that Jerry should be ordered to pay a proportionate share of the day-care expenses and "further note[d] that this should be required under

the Guidelines." The court stated that "Jerry has offered no good or sufficient reason why such a provision should not be included."

We recognize that paragraph N of the guidelines was amended effective January 1, 1996, to provide that child-care expenses incurred due to employment shall be divided between the parents in proportion to their parental contribution. In this case, there is evidence that Wanda may secure a job necessitating day-care expenses. The court did not abuse its discretion in granting Wanda a modification and awarding day-care expenses.

4. Attorney Fees

Finally, Jerry asserts that the court erred in awarding Wanda attorney fees. The record reveals that Wanda requested attorney fees and offered an exhibit supporting her allegation that she had incurred approximately $3,000 in attorney fees. However, the court sustained an objection to the exhibit, and it was not received into evidence. In the opinion and findings, the court noted that the exhibit was kept out of evidence because "there was no showing the fees and expenses set forth on the exhibit were necessary or fair and reasonable." Wanda offered no other evidence to establish what attorney fees she incurred. Nonetheless, the court determined that Wanda was entitled to an award of $1,500 for attorney fees.

[4] Factors to be considered in awarding attorney fees include the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Reinsch v. Reinsch*, 8 Neb. App. 852, 602 N.W.2d 261 (1999).

The court had before it no evidence concerning the length of time required for preparation of the case or the customary charges of the bar. On the evidence presented to us, the court's award of $1,500 appears arbitrary, and there is nothing in the record upon which we can meaningfully review such an award. Because Wanda did not present any evidence upon which the court could make a meaningful award of fees, we reverse the modification order to the extent it orders Jerry to pay $1,500 of Wanda's attorney fees.

V. CONCLUSION

We find an abuse of discretion by the trial court in the computation of Jerry's child support obligation, and we reverse, and remand for a consideration of whether a deviation is warranted as a result of Jerry's subsequent child. We reverse the court's modification order to the extent Jerry was ordered to pay attorney fees. We affirm the modification order to the extent Wanda was awarded day-care expenses.

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

COLLECTION BUREAU OF GRAND ISLAND, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CREDIT MANAGEMENT, APPELLEE, V. CASEY FRY, APPELLANT.

610 N.W.2d 442

Filed May 16, 2000. No. A-99-573.

1. **Judgments: Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach an independent conclusion without reference to the findings of the trial court.
3. **Jurisdiction: Records: Appeal and Error.** An appellate court has a duty to determine issues of jurisdiction which are apparent from the record.
4. **Courts: Jurisdiction: Pleadings.** A county court shall certify proceedings to a district court of the county in which an action is pending (1) when the pleadings or discovery proceedings indicate there is an amount in controversy in excess of $15,000 or (2) when the relief requested is exclusively within the jurisdiction of the district court.
5. **Courts: Jurisdiction.** Neb. Rev. Stat. § 25-2706 (Reissue 1995) gives a county court the mechanics to transfer to a district court any case pending in the county court when that court lacks jurisdiction to hear it.
6. ___: ___. Neb. Rev. Stat. § 25-2706 (Reissue 1995) states that a county court shall certify the proceedings, but the statute does not purport to give a party the power to transfer a case from county court to district court when that party alleges the county court lacks jurisdiction.
7. ___: ___. A county court cannot remove a case off of its docket under Neb. Rev. Stat. § 25-2706 (Reissue 1995) without an order evidencing transfer to the district court.
8. **Jurisdiction: Appeal and Error.** If a trial court lacks jurisdiction to adjudicate the merits of a claim, an appellate court also lacks jurisdiction.

9. **Judgments: Jurisdiction: Appeal and Error.** When a trial court lacks jurisdiction, an appellate court still has the authority to direct the trial court without jurisdiction to vacate the judgment it entered without jurisdiction.
10. **Actions: Pleadings.** Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought.
11. **Actions: Appeal and Error.** When a case presents an action at law, it will be reviewed as an action at law, notwithstanding the fact that the parties briefed the appeal as one in equity.
12. **Actions.** Where none of the extraordinary powers of a court of equity are required in order to give either party the relief sought, and a court of law can afford complete relief, the action is one at law.
13. **Judgments.** Where a plaintiff seeks only a judgment for money, the case is clearly one at law.
14. **Equity: Words and Phrases.** Certain expressions and perhaps different meanings of the term "equity" have caused confusion among many members of the bar as to whether a given action is one in equity or one in law.
15. **Quantum Meruit: Unjust Enrichment.** Notwithstanding the terminology that quantum meruit and unjust enrichment are equitable doctrines, the mere fact that recovery is sought under them does not change a suit for money into an action in equity.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Appeal dismissed, and cause remanded with directions.

Bruce E. Stephens, of Stephens & Sutter, for appellant.

Glen A. White and William Wroblewski for appellee.

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

INTRODUCTION

The Collection Bureau of Grand Island, Inc., doing business as Credit Management (Collection Bureau), the assignee of a claim by BTR Commercial Refrigeration, filed an action in the county court for York County against Casey Fry and his landlord, Mike Batterton, to collect for repairs and service to the heating system in the house Fry rented from Batterton. After the pleadings were completed in the county court, Collection Bureau filed a document purporting to transfer the case to district court, pursuant to Neb. Rev. Stat. § 25-2706 (Reissue 1995), upon the basis that the county court lacked jurisdiction because the case was seeking recovery from Batterton on the

basis of unjust enrichment and hence was an equity action. Without a judicial order, copies of pleadings were filed in the district court. That court sustained Batterton's demurrer and dismissed him as a defendant and then tried the case against Fry in a bench trial, which resulted in a judgment for $403 plus court costs and attorney fees against Fry. Fry appealed to this court, arguing several errors, including the sufficiency of the evidence to support the verdict. Because there is no statutory authority for a case such as this case to be transferred from the county court to the district court and because this case was not transferred correctly, we conclude that the district court was without jurisdiction and that hence, this court is without jurisdiction. We therefore dismiss this appeal with directions for the district court to vacate its judgment and return the case to the county court for further proceedings.

BACKGROUND

Collection Bureau filed a petition in the county court for York County, Nebraska, naming Fry and Batterton as defendants, suing them for services supplied by way of repair of the heating system in the house Fry rented from Batterton. In addition to the allegations of venue, that the services were rendered to the house, that notice of the goods and services had been provided to Fry and Batterton, and of the assignment, the allegations which might support recovery against Fry were that he lived in the house and that he was in the process of purchasing it. The petition also alleged that at the time the services were provided at Fry's request, Batterton owned the house, and Collection Bureau prayed for judgment against both Fry and Batterton. There were hearings and a ruling on demurrers in the district court.

The transcript filed with this court shows no transcript of proceedings to transfer the case to the district court by the county court, but the transcript contains what appears to be complete copies of the three petitions filed in the county court and the demurrers thereto, but not the county court's ruling thereon. The transcript also contains Fry's answer, which is essentially a general denial. The transcript then shows that the district court proceeded to a hearing on Batterton's demurrer, granted it, and later dismissed Batterton as a defendant. Later, a bench trial was had.

Naturally, we wondered how and why the case was transferred from the county court to the district court. Upon inquiry to the lower courts, we obtained a document from the clerk of the district court purportedly filed by Collection Bureau's attorney entitled "Motion to Certify Proceedings to the District Court." This motion refers to § 25-2706 and states that it was made "for the reason that Plaintiff's action against Mike Batterton of unjust enrichment sounds in equity, and is therefore exclusively within the jurisdiction of the District Court." We find no other action by the county court after the above "motion" was filed, not even a certificate of the clerk of the county court to the effect that the pleadings filed in the district court were true copies of those filed in the county court. The only other documents in the transcript are the district court's order granting Batterton's demurrer, a later dismissal of the case against Batterton, and the order appealed from wherein Collection Bureau was granted judgment against Fry.

ASSIGNMENTS OF ERROR

Fry appeals, alleging several errors which would ordinarily merit consideration. However, since we conclude that the district court lacked jurisdiction to consider this case and that this court therefore lacks jurisdiction, we will not list them. Instead, we go immediately to the controlling jurisdictional question.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court; however, findings of the lower court as to underlying factual disputes, if any, in regard to the jurisdictional issue will be upheld unless they are clearly erroneous. *Walksalong v. Mackey*, 250 Neb. 202, 549 N.W.2d 384 (1996).

[2] On questions of law, an appellate court has an obligation to reach an independent conclusion without reference to the findings of the trial court. See *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

[3] Although no party in this appeal has raised the issue of jurisdiction, "[t]his court has a duty to determine issues of jurisdiction which are apparent from the record." *J.L. Healy Constr.*

Co. v. State, 236 Neb. 759, 762, 463 N.W.2d 813, 816 (1990). Accordingly, we must determine whether the case was properly transferred from county court to district court and thence whether the district court and this court have jurisdiction.

ANALYSIS

Collection Bureau stated in its motion that it moved "to certify the proceedings to the District Court" pursuant to § 25-2706, on the basis that its action against Batterton of unjust enrichment sounded in equity and was therefore exclusively within the jurisdiction of the district court.

[4] Section 25-2706 provides in pertinent part:

> The county court shall certify proceedings to the district court of the county in which an action is pending (1) when the pleadings or discovery proceedings indicate there is an amount in controversy in excess of fifteen thousand dollars or (2) when the relief requested is exclusively within the jurisdiction of the district court. The county court shall certify the proceedings to the district court and file the original papers of such action and a certified transcript of the docket entries with the clerk of the district court. The action shall then be tried and determined by the district court as if the proceedings were originally brought in such district court, except that no new pleadings need be filed unless ordered by the district court.

[5] We note that from what we learned after inquiry to the trial courts, no judge took any action on the "motion" that Collection Bureau filed. We also note that the above statute starts by providing that the "county court shall certify proceedings" when the amount in controversy exceeds the $15,000 jurisdictional limit of county courts, as provided in Neb. Rev. Stat. § 24-517(4) (Reissue 1995), or when the case is exclusively within the jurisdiction of the district court (pursuant of judicial decision, the Legislature has not given the county court general equity jurisdiction). See *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991), which interprets § 24-517(4) in that regard. Therefore, § 25-2706 merely gives a county court the mechanics to transfer to a district court any case pending in the county court when that court lacks jurisdiction to hear it.

[6] Of course, there is nothing wrong with a party pointing out to a court that that court is probably without jurisdiction. However, § 25-2706 states that a county court shall certify the proceedings, but the statute does not purport to give a party the power to transfer a case from county court to district court when that party alleges the county court lacks jurisdiction. At the very least, the records of the district court in the instant case do not show that the county court attempted to divest itself of jurisdiction. Therefore, even if we were to assume that the county court was without jurisdiction, the record does not show that the district court properly acquired jurisdiction by a proper transfer.

[7] It is clear that a county court cannot remove the case off of its docket under § 25-2706 without an order evidencing transfer to the district court, or otherwise dismissing the case. These procedural matters alone would require a holding that the district court did not acquire jurisdiction.

[8,9] It is axiomatic that if a trial court lacks jurisdiction to adjudicate the merits of a claim, this court also lacks jurisdiction. *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993). We would therefore be required to dismiss this appeal for lack of jurisdiction on a procedural basis. Notwithstanding our lack of jurisdiction, when a trial court lacks jurisdiction, this court still has the authority to direct the trial court without jurisdiction to vacate the judgment it entered without jurisdiction. *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999).

We find a further and more fundamental reason why we think the case was not properly transferred to district court is because the case clearly is not an equity action. This is simply an action at law against Fry and Batterton to collect money for services rendered. The county court clearly has jurisdiction of this $403 lawsuit.

[10,11] "Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought." *White v. Medico Life Ins. Co.*, 212 Neb. 901, 902, 327 N.W.2d 606, 608 (1982). In *White*, the Supreme Court held that when a case presents an action at law, it will be reviewed as an action at law, notwithstanding the fact that the parties briefed the appeal as one in equity.

[12] In *Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co.*, 178 Neb. 226, 132 N.W.2d 758 (1965), the Nebraska Supreme Court addressed the application of equity standards as opposed to the application of law standards. The court observed that the relief sought by both parties was a money judgment and said, "Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law." *Id.* at 228, 132 N.W.2d at 760.

[13,14] As indicated above, where a plaintiff seeks only a judgment for money, the case is clearly one at law. The powers of a court of equity are not necessary to collect money. We realize that certain expressions and perhaps different meanings of the term "equity" have caused confusion among many members of the bar as to whether a given action is one in equity or one in law.

Equitable is defined as "characterized by equity or fairness; just and right; fair; reasonable: *equitable treatment of all citizens.*" Webster's Encyclopedic Unabridged Dictionary of the English Language 482 (1989).

Equity is defined as:

> [T]he quality of being fair or impartial; fairness; impartiality . . . . that which is fair and just. . . . the application of the dictates of conscience or the principles of natural justice to the settlement of controversies. . . . a system of jurisprudence or a body of doctrines and rules developed in England and followed in the United States, serving to supplement and remedy the limitations and the inflexibility of the common law. . . . an equitable right or claim.

Id.

These definitions show how the cases below use the above-defined terms in their generic form and not for the purpose of conveying that the action is truly one for a court of equity.

The following excerpts are quoted from Nebraska case law to emphasize where this court or the Nebraska Supreme Court said that an action was based on equitable grounds, but the court either expressly or without discussing the question considered a recovery based upon the theory of quantum meruit or unjust enrichment in a law action.

> The theory of quantum meruit is premised on the existence of a contract implied by law. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). An action sounding in contract is an action at law. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997); *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 528 N.W.2d 297 (1995).

Tracy v. Tracy, 7 Neb. App. 143, 147, 581 N.W.2d 96, 101 (1998).

> Generally, the principle of quantum meruit is a contract implied in law theory of recovery *based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another*. . . .
>
> Where benefits have been received and retained under circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the recipient to pay the reasonable value of the services.

(Emphasis supplied.) *Id.* at 148-49, 581 N.W.2d at 101.

> In its second amended petition Professional Recruiters alleged unjust enrichment, or quasi-contract, in the alternative to its express contract theory. A plaintiff is permitted to plead both express contract and quasi-contract in the same petition. . . .
>
> ". . . Nebraska clearly recognizes cases based on causes of action on both a quantum meruit theory and an express contract. . . ."
>
> . . . .
>
> "'A quasi contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another.'" . . . "It has been said that where benefits have been received and retained under such circumstances that it would be *inequitable and unconscionable* to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value."

(Emphasis supplied.) *Professional Recruiters v. Oliver*, 235 Neb. 508, 514-15, 456 N.W.2d 103, 107-08 (1990).

[15] The purpose for setting forth the above authority is that notwithstanding the terminology that quantum meruit and unjust enrichment are equitable doctrines, the mere fact that recovery is sought under them does not change a suit for money into an action in equity. That is not to say that in a given case, the doctrines might not be applied in an equity case, but only that their application does not make a case one in equity.

We therefore conclude that the instant case was not certifiable to the district court, that the district court did not acquire jurisdiction of the case, and that all orders issued by it in the case appealed from are void. We therefore dismiss this appeal for lack of jurisdiction and remand the cause to the district court with directions to vacate its judgment and return the case to the county court for further proceedings. The parties' motions for attorney fees are denied.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

JOSEPH VOPALKA, APPELLANT, V. EDDIE ABRAHAM AND WALTER MINSHALL, APPELLEES.

610 N.W.2d 433

Filed May 16, 2000. No. A-99-893.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Limitations of Actions: Pleadings: Time: Dismissal and Nonsuit: Service of Process.** A civil action shall stand dismissed without prejudice as to any defendant not served within 6 months from the date the petition was filed as mandated by Neb. Rev. Stat. § 25-217 (Reissue 1995).
4. **Service of Process: Parties.** The voluntary appearance of a party is equivalent to service.
5. **Limitations of Actions: Pleadings: Time: Dismissal and Nonsuit: Service of Process.** The phrase "shall stand dismissed" from Neb. Rev. Stat. § 25-217 (Reissue 1995) means that an action is dismissed if 6 months pass from the filing of the petition without service upon the defendant.

6. **Dismissal and Nonsuit: Words and Phrases.** The language "shall stand dismissed" is mandatory and self-executing.
7. **Dismissal and Nonsuit.** The only way to ensure that an unserved action stands dismissed is to hold that such dismissal occurs by operation of law, without predicate action by the trial court.
8. **Dismissal and Nonsuit: Service of Process: Jurisdiction.** When a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, District Judge, Retired. Reversed and remanded with direction to dismiss.

Michael B. Kratville for appellant.

Thomas A. Otepka, of Woodke, Otepka & Gibbons, P.C., for appellees.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Joseph Vopalka filed a petition against Eddie Abraham and Walter Minshall, but failed to serve either of them within 6 months of filing the petition. The district court for Douglas County granted Abraham and Minshall's motion for summary judgment on this basis. Because the result is clear, we ordered the case submitted without oral argument pursuant to Neb. Ct. R. of Prac. 11 (rev. 1996).

BACKGROUND

Vopalka filed a petition in the district court for Douglas County on April 7, 1998, alleging that he suffered injuries as the result of being struck by a truck operated by Minshall and owned by Abraham. Neither Minshall nor Abraham was served a summons or a copy of the petition. On January 12, 1999, Minshall and Abraham each executed a voluntary appearance, which were filed on January 25, 1999. Then Minshall and Abraham filed an answer to Vopalka's petition on March 10, 1999, and Vopalka subsequently filed a reply on March 11, 1999.

Minshall and Abraham filed a motion for summary judgment on July 13, 1999. The court sustained the motion for summary

judgment on the basis that Vopalka failed to serve either Minshall or Abraham within 6 months of the date that the petition was filed. Vopalka has timely appealed.

ASSIGNMENTS OF ERROR

Vopalka asserts that the district court erred in (1) granting Minshall and Abraham's motion for summary judgment and (2) not finding that Minshall and Abraham had waived any defense related to the untimely service of process.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999); *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

ANALYSIS

There is no dispute that Minshall and Abraham were not served within 6 months of the date Vopalka filed his petition. Vopalka argues that since Minshall and Abraham filed voluntary appearances and an answer in this case that they have waived any defect in service of process. Minshall and Abraham argue that since "service" was not obtained until 9 months after the filing of Vopalka's petition, the action stood dismissed by operation of law after 6 months from its filing.

[3,4] Neb. Rev. Stat. § 25-217 (Reissue 1995) provides that "[t]he action shall stand dismissed without prejudice as to any defendant not served within six months from the date the peti-

tion was filed." See, also, *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999). The voluntary appearance of a party is equivalent to service. Neb. Rev. Stat. § 25-516.01(1) (Reissue 1995); *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

In the present case, the petition was filed on April 7, 1998, which gave Vopalka until October 7, 1998, to obtain service of process on Minshall and Abraham. The voluntary appearances of Minshall and Abraham were filed on January 25, 1999, over 9 months after the date the action was filed. Applying the rule that a voluntary appearance is equivalent to service of process, Minshall and Abraham were not "served" until January 25, 1999, more than 6 months from the date Vopalka filed his petition.

[5-7] The phrase "shall stand dismissed" from § 25-217 means that an action is dismissed if 6 months pass from the filing of the petition without service upon the defendant. *Cotton, supra*; *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999). Furthermore, the language "shall stand dismissed" is mandatory and self-executing. *McDaneld*, 8 Neb. App. at 166, 589 N.W.2d at 177 ("[t]he only way to ensure that an unserved action stands dismissed, as the statute requires, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court").

[8] Therefore, pursuant to *Kocsis, Cotton*, and *McDaneld*, the original petition in the present case was dismissed without prejudice by operation of law as of October 7, 1998, because it was not timely served on Minshall and Abraham within 6 months of its filing. When a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal, and if made, they are a nullity, as are subsequent pleadings. *Cotton, supra.*

In sum, the district court had no power after October 7, 1998, to enter any orders in this case, except to formalize the dismissal. The district court therefore erred in hearing and granting Minshall and Abraham's motion for summary judgment. The subsequent pleadings in this case, namely Minshall and

Abraham's answer and Vopalka's reply, are also nullities. We therefore reverse the district court's order granting Minshall and Abraham's motion for summary judgment and remand the cause with direction to enter an order that Vopalka's petition stands dismissed pursuant to § 25-217.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

RONALD HAGAN ET AL., APPELLANTS, V. UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

610 N.W.2d 751

Filed May 23, 2000. No. A-99-374.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence that might be adduced at trial.
3. ___: ___: ___. When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
4. **Standing: Jurisdiction: Parties: Courts.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding.
5. **Standing: Jurisdiction.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
6. ___: ___. As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
7. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Reversed and remanded with direction.

Amy Svoboda, of Gregory J. Beal & Associates, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., for appellees.

HANNON, INBODY, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Ronald Hagan, Troy Brandt, and Todd Hatcher, hereinafter referred to collectively as "the plaintiffs," appeal from an order of the district court for Chase County, Nebraska, sustaining a demurrer to the plaintiffs' amended petition for declaratory judgment filed against the following: Upper Republican Natural Resources District (NRD); Champion Valley Enterprises, L.L.C. (Champion), a Nebraska limited liability company; and Steven Leibbrandt and Tim Leibbrandt, individually. For the reasons set forth below, we reverse, and remand with direction.

BACKGROUND

On January 26, 1999, the plaintiffs filed an amended petition for declaratory judgment. In their petition, the plaintiffs alleged that each of them resides within the boundaries of NRD and that each of them is an irrigator and a landowner within that same district. The plaintiffs also alleged that at all relevant times, NRD had adopted or implemented a " 'moratorium,' " prohibiting or limiting new wells which would draw upon ground water resources in significant quantities within the geographical boundaries of the moratorium area. The plaintiffs stated that Champion and the Leibbrandts are all similarly situated within this moratorium area.

The plaintiffs also alleged that they are in the area subject to the water use moratorium, as distinguished from all other irrigators or members of the public, generally, and that other irrigators or members of the public outside NRD are not subject to the moratorium.

The plaintiffs stated that prior to July 7, 1998, both Champion and the Leibbrandts, hereinafter referred to as the "applicants,"

applied to NRD for water sufficient to operate hog confinement facilities on properties owned by them. The record shows that subsequently, NRD denied the applicants' requests for variances. The plaintiffs allege that on or about July 7, 1998, NRD entered into separate settlement agreements with each of the applicants, the effect of which was to grant each applicant a variance, allowing them usage of ground water which was originally the subject matter of their application for a variance.

The plaintiffs further alleged that each of them individually applied during the summer of 1998 to NRD for an allocation of ground water for irrigation purposes and that NRD denied each of their requests. The plaintiffs stated that as a result of NRD's denial of their requests for variances, they cannot develop their agricultural land through the use of irrigation or use additional quantities of water should they desire to increase the number of acres of land they irrigate. The plaintiffs alleged that this severely limits the amount of income that can be produced by their land and discriminates against them.

The plaintiffs alleged that each of them has a direct interest and property right in the ground water of the aquifer beneath lands owned by them. The plaintiffs also alleged that each of them suffered injury, personally, as well as collectively, by NRD's denial of a variance to each of them to use water from the aquifer, while giving preferential treatment to the applicants.

In addition, the plaintiffs alleged that the applicants draw water from the same aquifer as the aquifer that underlies their land and that therefore, the plaintiffs are injured in that the water table of the aquifer will decline further by virtue of the withdrawal of the water by the applicants.

In their amended petition, the plaintiffs sought an order declaring the settlement agreements entered into between NRD and each applicant to be unlawful and unconstitutional under the "law of the State of Nebraska, the Constitution of the United States and Amendments thereto, the Constitution of the State of Nebraska and Amendments thereto," by reason of the following factors:

> a. That [NRD] is without statutory or lawful authority to enter into such an agreement;

> b. That [NRD] did not lawfully enter into such agreement by reason of the fact that they have a variance committee which is supposed to approve variances, and this agreement was not approved by such committee and has the actual and net legal effect of granting a variance;
>
> c. That the agreements not only give the [applicants] preferential treatment, but go even further so as to exempt them from having to comply with regulations, and purports to exempt them from lawful, rules and regulations promulgated or which may be promulgated by [NRD] in the future . . . .
>
> d. That said agreements violate the express statutory mandate and provisions of law creating and governing natural resource districts . . . .
>
> e. That said agreements violate the provisions of the Republican River Compact because it allows illegal use of groundwater that depletes surface flows, which are allocated through the Compact. . . .
>
> f. That said agreements were entered into contrary to the express provisions of the said NRD's own rules and regulations . . . .
>
> g. That the agreements deny the Plaintiffs in this action equal protection of the law . . . .
>
> h. That said agreements are unlawful and unconstitutional because they deny plaintiffs due process of law . . . .

The plaintiffs prayed for a declaratory judgment declaring such settlement agreements null and void in their entirety and for any fees and costs.

On January 27, 1999, NRD filed a motion to strike and make more definite and certain. On the same date, each applicant filed a demurrer to the plaintiffs' amended petition.

In an order filed March 9, 1999, the trial court sustained the applicants' demurrers to the plaintiffs' amended petition and dismissed the plaintiffs' amended petition. The trial court stated:

> [T]he Plaintiffs in the Amended Petition do not claim any benefit they might receive by the Court ruling in their favor. They do not claim any particular right, status, or other legal or equitable interest that they might have which is separate or distinct from the general public which would be served if the court ruled in their favor.

> . . . The Plaintiffs attempt to claim special status or injury as irrigators and neighbors, but, that status is not different than all the members of the general public residing within the jurisdiction of the natural resource district. Even the prayer of the Plaintiffs' petition does not request any relief that would benefit the Plaintiffs if the Court ruled in their favor. In short, the Plaintiffs have no standing to bring this action.

The trial court stated that there was no possibility that the plaintiffs could further amend their petition to allege facts which would show standing to bring this action. The trial court also stated that NRD's motion to make more definite and certain and to strike had been rendered moot by its ruling on the applicants' demurrers.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs argue that the trial court erred in (1) finding that they did not allege sufficient facts in their amended petition to show that they have standing and (2) considering whether the amended petition requested any relief that would benefit them if the court ruled in their favor. Because we find that the trial court erred in holding that the plaintiffs lack standing to bring their declaratory action, we do not address the plaintiffs' second assignment of error.

STANDARD OF REVIEW

[1-3] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999). In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence that might be adduced at trial. *Sweeney v. City of Gering*, 8 Neb. App. 675, 601 N.W.2d 238 (1999). When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences

of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Id.*

ANALYSIS

[4-7] Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id.* As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.* Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. *Id.*

On appeal, the plaintiffs argue that the district court erred in sustaining the demurrers filed by each of the applicants. Specifically, the plaintiffs contend that they have standing to bring the instant action. NRD and the applicants contend that the district court did not err in sustaining the applicants' demurrers and dismissing the plaintiffs' amended petition. Citing *Ritchhart, supra*, NRD and the applicants argue that the trial court did not err in concluding that the plaintiffs lack standing because they do not have a legal or equitable interest separate or distinct from the general public.

In *Ritchhart, supra*, Kimberly Ritchhart brought an action against the city of Omaha's mayor, fire chief, and communications chief, alleging that the agreement of the fire chief and the communications chief to waive their right to appeal to the personnel board, upon discharge, violated her right to have the city's public safety functions performed without political influence or control. The district court overruled the defendants'

demurrer, in which the defendants alleged that Ritchhart lacked standing, and permanently enjoined the mayor from enforcing the waiver. The defendants appealed. The Nebraska Supreme Court reversed, holding that Ritchhart had no interest in the outcome of the litigation which was not shared equally by all residents of the state, and lacked standing to maintain the action. The *Ritchhart* court also stated that it would not adopt the "'essential services'" exception to the standing requirements. 256 Neb. at 809, 594 N.W.2d at 294.

In doing so, the Nebraska Supreme Court stated:

> In the case at bar, neither Ritchhart's pleadings nor her brief identify any special injury independent and aside from that shared by the general public. Ritchhart did not plead an illegal expenditure of public funds or an increase in the burden of taxation, and concedes on appeal that "[t]his case is not a taxpayer's action, and has never been alleged or argued as such." Brief for appellee at 5. Thus, according to the well-established principles of standing set forth by this court, Ritchhart would not have standing to maintain this action.

Ritchhart, 256 Neb. at 806, 594 N.W.2d at 292.

The plaintiffs in the instant case contend that they have standing because they reside within NRD and have rights to the water underneath their land. Specifically, in their amended petition, the plaintiffs alleged that the applicants have drawn water from the same aquifer as the aquifer that underlies their land and that therefore, the plaintiffs are injured in that the water table of the aquifer will decline further by virtue of the withdrawal of the water by the applicants. The plaintiffs further argue that NRD granted the applicants preferential treatment in reaching settlement agreements with them after initially denying their request for variances. The plaintiffs also alleged that each of them had applied for variances of their own which NRD denied. The plaintiffs alleged that as a result, they cannot develop their agricultural land through the use of irrigation or use additional quantities of water should they desire to increase the number of acres of land they irrigate.

Initially, we dismiss the plaintiffs' argument that NRD's denial of their own individual requests for variances was error,

given that the plaintiffs had the opportunity to appeal and did not do so. Even so, we conclude that the plaintiffs, as alleged, have a legal interest in NRD's grant of additional water to the applicants, given the limited water supply in the district and the fact that NRD granted the applicants' request for variances outside the routine procedures.

In support of their position that they have standing in the instant action, the plaintiffs cite *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996), and *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960). In *Ponderosa Ridge LLC*, Ponderosa Ridge, a Nebraska limited liability company, applied for a permit to transfer ground water from a well located in Banner County, Nebraska, to Laramie County, Wyoming. The appellees, Banner County, Eldon Lundberg, Wayne Palm, Dale Ward, and North Platte Natural Resources District, filed objections, and the director of the Department of Water Resources denied the application.

As an initial matter on appeal, the Nebraska Supreme Court considered whether all of the objectors had the requisite standing to challenge Ponderosa Ridge's application before the director. The Supreme Court concluded:

> The record establishes that the individual objectors Lundberg and Ward had water use interests to protect; however, we are not directed to, nor do we find, any evidence that the individual objector Palm had any such interests. Neither have we been directed to, nor do we find, any evidence that the objectors Banner County and North Platte Natural Resources District had any such interests. Indeed, Banner County advised the director that it was appearing on behalf of its residents, and North Platte Natural Resources District stated that it was not "trying to be adversarial, necessarily, to any particular party," but, rather, that it was appearing to protect the public interest.

Ponderosa Ridge LLC, 250 Neb. at 948, 554 N.W.2d at 156.

Accordingly, the Nebraska Supreme Court concluded that only Lundberg and Ward had the requisite standing to challenge Ponderosa Ridge's application before the director because they had water use interests to protect.

Similarly, in *Ainsworth Irr. Dist., supra*, the Nebraska Supreme Court held that owners of land within an irrigation district would be legally affected by an appropriation of water and had a legal interest entitling them to appear and object to an irrigation district's application for authority to appropriate water from a river for irrigation purposes.

Likewise, in the instant case, the plaintiffs argue that because they also have water use interests to protect, the trial court erred in finding that they lacked standing to bring this action. We agree. First, we recognize that this is not a case in which the applicants filed applications for variances and the plaintiffs intervened as objectors. Rather, the plaintiffs in the instant case object to the fact that although NRD initially denied the applications for variances, NRD entered into subsequent settlement agreements with these same applicants, in effect granting them the use of additional water initially requested in their applications. In their petition, the plaintiffs alleged that in effect, NRD granted the applicants a variance outside the proper procedures.

Clearly, although not exactly the same facts as *Ponderosa Ridge LLC, supra*, and *Ainsworth Irr. Dist., supra*, the plaintiffs in the instant case, as residents and water users in the district at issue, have an interest in protecting the limited water supply under their lands. Furthermore, the plaintiffs have a corresponding legal interest in NRD's allotment of this water in accordance with the required rules. Although we make no comment on whether NRD violated its own rules in entering into settlement agreements with the applicants, we independently conclude, after accepting the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, that the facts as alleged in the plaintiffs' amended petition show that the plaintiffs have standing to bring the instant suit.

CONCLUSION

Therefore, we conclude that the trial court erred in sustaining the applicants' demurrers to the plaintiffs' amended petition and in dismissing the plaintiffs' amended petition as a result. We reverse the trial court's order and remand this cause to the dis-

trict court with direction to reinstate the plaintiffs' second amended petition.

REVERSED AND REMANDED WITH DIRECTION.

BOONE COUNTY BOARD OF EQUALIZATION, COUNTY OF BOONE, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION, APPELLEE.

611 N.W.2d 119

Filed May 23, 2000. No. A-99-1004.

1. **Jurisdiction: Words and Phrases: Appeal and Error.** Subject matter jurisdiction is a question of law for the court. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
2. **Administrative Law: Statutes: Jurisdiction: Appeal and Error.** The right of appeal in this state is clearly statutory, and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. And if these statutes create such a right, the mode and manner of appeal is statutory and such jurisdiction can only be conferred in the manner provided by statute.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

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

David R. Medlin, Boone County Attorney, for appellant.

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

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

INTRODUCTION

The Boone County Board of Equalization petitioned the Nebraska Tax Equalization and Review Commission for an adjustment to certain property value assessments in Boone County. After a hearing in which evidence was presented, the commission found that the Boone County Board had failed to meet its burden of proof in justifying an adjustment, and therefore, the commission denied the Boone County Board's petition. The Boone County Board now appeals, alleging that the commission erred in (1) denying its petition, (2) making numerous findings of fact, and (3) failing to find that the Boone County Board was entitled to a presumption that it had faithfully performed its official duties. Before discussing the merits of the Boone County Board's appeal, the commission argued that this court does not have jurisdiction to hear the appeal. We agree with the commission on the jurisdictional issue and dismiss the appeal accordingly.

PROCEDURAL BACKGROUND

PROCEDURAL STRUCTURE GENERALLY

We believe a short review of the general procedural structure of the commission's equalization proceedings would be helpful. Pursuant to Neb. Const. art. IV, § 28, the commission is empowered "to review and equalize assessments of property for taxation within the state." Specifically, "[t]he commission shall annually equalize the values of all real property as submitted by the county assessors on the abstracts of assessments and equalize the values of real property which is valued by the state." Neb. Rev. Stat. § 77-5022 (Supp. 1999). The commission does so by determining whether it is necessary to "increase or decrease the value of a class or subclass of real property of any county or tax district . . . so that all classes or subclasses of real property in all counties fall within the acceptable range [as provided by statute]." Neb. Rev. Stat. § 77-5023 (Cum. Supp. 1998). The commission meets as soon as it has received the above-described assessments and has the power to adjourn from time to time until the equalization process is complete. § 77-5022.

On or before April 5 of each year, the Property Tax Administrator (PTA) is required to "prepare statistical and narrative reports informing the commission of the level of value and the quality of assessment of the classes and subclasses of real property in the state." Neb. Rev. Stat. § 77-5027 (Cum. Supp. 1998). According to § 77-5027, "[t]he commission shall, pursuant to section 77-5026, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve equalization." According to Neb. Rev. Stat. § 77-5026 (Cum. Supp. 1998), "if the commission finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the commission shall . . . set a date for hearing." § 77-5026. "At the hearing the legal representatives of the county may appear and show cause why the value of a class or subclass of the property of the county should not be adjusted. At the hearing, the commission may receive testimony from any interested person." *Id.*

After such a hearing, the commission is required to enter an order by May 15 based on information presented to it. Neb. Rev. Stat. § 77-5028 (Cum. Supp. 1998). "The order shall specify the percentage increase or decrease and the class or subclass of property affected or the corrections or adjustments to be made to the class or subclass of property affected." *Id.*

Procedural Posture of Case

On April 5, 1999, the commission received into evidence the PTA's assessment required by § 77-5027. The PTA's report explained that it "appear[ed] a new [third] market area ha[d] developed" in Boone County and that for the class of agricultural land, the county "recognize[d] three market areas." Using three market areas for the county, the PTA opined that the level of value for agricultural land in Boone County was within the acceptable range provided in § 77-5023.

Based on the PTA's assessment, the commission entered a "Findings and Order" on April 13, 1999, concluding that "a just and equitable assessment of property in the County may be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by the County" and

that therefore "no adjustment by class or subclass by a percentage [was required to] be made for Boone County for tax year 1999." Accordingly, no show cause hearing was ordered as to the assessment practices of Boone County for tax year 1999.

On July 22, 1999, the Boone County Board then filed a petition with the commission pursuant to Neb. Rev. Stat. § 77-1504.01 (Supp. 1999). Section 77-1504.01 provides that a county board of equalization may petition the commission to consider an adjustment to a class or subclass of real property within the county after the county board hears protests from county residents pursuant to Neb. Rev. Stat. §§ 77-1502 (Cum. Supp. 1998) and 77-1504 (Supp. 1999). The commission is required to act on such petitions by August 10, and hearings conducted pursuant to § 77-1504.01 are to be in the manner described for hearings under § 77-5026. See § 77-1504.01.

The commission heard the Boone County Board's petition on August 3, 1999, and issued its "Findings and Orders" that same day. In its order, the commission recognized that the Boone County Board's petition was filed pursuant to § 77-1504.01 and that the commission had jurisdiction under the same. Having found that the Boone County Board had failed to meet the appropriate burden of proof for an adjustment, the commission denied the relief requested and dismissed the petition. The Boone County Board now appeals that decision.

ASSIGNMENTS OF ERROR

The Boone County Board alleges, summarized, that the commission erred in (1) denying the petition, (2) making numerous findings of fact, and (3) failing to find that the Boone County Board was entitled to a presumption that it had faithfully performed its official duties.

STANDARD OF REVIEW

[1] Neb. Rev. Stat. § 77-5019(5) (Supp. 1999) instructs that "review [by the Court of Appeals of the commission's decision] shall be conducted by the court for error on the record of the commission." However,

> [s]ubject matter jurisdiction is a question of law for the court. . . . When reviewing a question of law, an appellate

> court reaches a conclusion independent of the lower court's ruling. . . .
>
> Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.

Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 354, 591 N.W.2d 524, 528 (1999).

ANALYSIS

[2] "It is a well-recognized rule that the right of appeal is statutory and the requirements of a particular statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of an action." *Karnes v. Wilkinson Mfg.*, 220 Neb. 150, 151, 368 N.W.2d 788, 789 (1985).

> "The right of appeal in this state is clearly statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. And if these statutes create such a right, the mode and manner of appeal is statutory and such jurisdiction can only be conferred in the manner provided by statute."

Lydick v. Johns, 185 Neb. 717, 719, 178 N.W.2d 581, 582-83 (1970) (quoting *Peck v. Dunlevey*, 184 Neb. 812, 172 N.W.2d 613 (1969)).

Section 77-5019(1) governs the procedure for appeals and judicial review of the commission's actions as follows:

> Any party aggrieved by a final decision in a case appealed to the commission and any county or other political subdivision aggrieved by an order of the commission issued pursuant to section 77-5028 shall be entitled to judicial review in the Court of Appeals. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

[3] With respect to statutory interpretation, the Nebraska Supreme Court's well-settled rule is as follows:

> In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate

> court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. . . . In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Ferguson v. Union Pacific RR. Co., 258 Neb. 78, 87, 601 N.W.2d 907, 915 (1999).

Under § 77-5019(1), two instances exist under which a party may appeal a decision of the commission to this court. The first occurs when the commission renders a final decision in a case which originated elsewhere and was appealed to the commission through the proper procedures. Appeal means to "seek review (from a lower court's decision) by a higher court." Black's Law Dictionary 94 (7th ed. 1999). The second occurs when a person, county, or other political subdivision is aggrieved by an order of the commission rendered pursuant to § 77-5028. We will consider the availability of each avenue separately.

Decisions Appealed to Commission

Neb. Rev. Stat. § 77-5007 (Supp. 1999) states in part:

> The commission has the power and duty to hear and determine appeals of:
>
> (1) Decisions of any county board of equalization equalizing the value of individual tracts, lots, or parcels of real property so that all real property is assessed uniformly and proportionately;
>
> (2) Decisions of any county board of equalization granting or denying tax-exempt status for real or personal property or an exemption from motor vehicle taxes and fees;
>
> (3) Decisions of the Property Tax Administrator determining the taxable property of a railroad company, car company, public service entity, or air carrier within the state;
>
> (4) Decisions of the Property Tax Administrator determining adjusted valuation pursuant to section 79-1016;
>
> (5) Decisions of any county board of equalization on the valuation of personal property or any penalties imposed under sections 77-1233.04 to 77-1233.06;

> (6) Decisions of any county board of equalization on claims that a levy is or is not for an unlawful or unnecessary purpose or in excess of the requirements of the county;
>
> (7) Decisions of any county board of equalization granting or rejecting an application for a homestead exemption;
>
> (8) Decisions of the Department of Motor Vehicles determining the taxable value of motor vehicles pursuant to section 60-3005;
>
> (9) Decisions of the Property Tax Administrator made under section 77-1330;
>
> (10) Any other decision of any county board of equalization; and
>
> (11) Any other decision of the Property Tax Administrator.

The Boone County Board was clearly not appealing to the commission from a lower tribunal; rather, it sought an adjustment of the commission's own April 13, 1999, order. The Boone County Board sought that adjustment through a petition made directly to the commission. This case does not present a situation where the commission was reviewing any of the decisions listed in § 77-5007. Accordingly, we find that we do not have jurisdiction to review the commission's August 3 order under the first avenue of appellate jurisdiction described in § 77-5019(1).

The Boone County Board argues that its "decision" to petition the commission under § 77-1504.01 is a decision that can be appealed under § 77-5007(10), which gives the commission authority to hear and determine appeals of "[a]ny other decision of any county board of equalization." We find this argument without merit. Section 77-1504.01 provides a county board of equalization the right to file a "petition." The Boone County Board's petition under § 77-1504.01 is not an appeal to the commission of the "decision" by the Boone County Board to petition the commission; rather, the petition itself sought relief on its merits as provided for in § 77-1504.01. See, also, *United States Treasury v. Synthetic Plastics Co.*, 341 F.2d 157 (1965) (term " 'decision' " in statute permitting appeal from decision of Trademark Trial and Appeal Board meant "dispositive decision in which a right has been adjudicated").

ORDERS UNDER § 77-5028

To determine whether we have jurisdiction under the second avenue of § 77-5019(1), we must determine whether the Boone County Board is appealing an order by the commission entered pursuant to § 77-5028. As described above, § 77-5028 requires that the commission enter an order by May 15 on hearings conducted pursuant to Neb. Rev. Stat. § 77-5024 (Cum. Supp. 1998) or § 77-5026. The former section pertains to review and changes by the agricultural and horticultural land valuation board. The latter section empowers the commission to increase or decrease the value of a class or subclass of any real property after a hearing when the commission finds that a just, equitable, and legal assessment of the property in the state cannot be made without the increase or decrease. The instant case does not pertain to any actions by the agricultural and horticultural land valuation board. Further, no hearing under § 77-5026 was held with respect to Boone County. Rather, the commission's April 13, 1999, order determined that no such adjustments as allowed under that section were necessary for Boone County in tax year 1999.

Neither situation provided for in §§ 77-5024 and 77-5026 occurred in this case. Under the procedural system set up by these statutes, the commission's August 3, 1999, order could not be pursuant to § 77-5028. If there is no order pursuant to § 77-5028, then the second avenue for appellate jurisdiction by this court is unavailable as well.

In further consideration of the unavailability of § 77-5019(1)'s second avenue of appellate jurisdiction, we note that both the parties and the commission agree that the Boone County Board acted pursuant to § 77-1504.01 and not pursuant to § 77-5026. In its August 3, 1999, order, the commission explained that jurisdiction was pursuant to § 77-1504.01. Section 77-1504.01 requires that the commission take action on petitions under this section by August 10. Actions under § 77-5028 must be completed by May 15. "The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." *Ferguson v.*

Union Pacific RR. Co., 258 Neb. 78, 88, 601 N.W.2d 907, 916 (1999). We believe that no stretch of logic could be made under the procedural structure provided which would give the Boone County Board a right to appeal the commission's order rendered pursuant to § 77-1504.01. Appealable orders under § 77-5028 are to be made almost 3 months before orders under § 77-1504.01. Whether done intentionally or otherwise, the Legislature did not provide for judicial appellate review of the latter orders, and it is not within our power to provide otherwise.

The Boone County Board argues that because § 77-1504.01 states that "[h]earings conducted pursuant to this section shall be in the manner prescribed in section 77-5026," the commission's orders under § 77-1504.01 are appealable similarly to orders issued under § 77-5026. We disagree. The reference made in § 77-1504.01 to § 77-5026 clearly incorporates the notice requirements, the county's ability to have legal representatives present evidence, and the commission's authority to receive testimony from any interested person. This reference cannot be used as a "back door" for appellate jurisdiction when all other avenues of appellate jurisdiction are clearly and specifically outlined by other sections. Simply because hearings under § 77-1504.01 are to be carried out in the manner described for hearings under § 77-5026 does not graft the right to appeal from § 77-5026.

We also believe our holding today is consistent with the remarks made when the 1999 amendments were made to § 77-5019(1). According to the legislative history of the amendments, § 77-5019(1) was amended "to expand the parties who may appeal an equalization decision to include any political subdivision aggrieved by an equalization order (or inaction)." Statement of Intent, L.B. 140, Committee on Revenue, 96th Leg., 1st Sess. (January 21, 1999). The chairperson of the commission at the time, in testifying before the Committee on Revenue, explained that the amendment was to correct the then current problem that there was no right to appeal from the statewide equalization proceedings between April 5 and May 15. As we explained above, the proceedings under § 77-1504.01 are distinct from the equalization proceedings referenced by the chairperson in both nature and time for jurisdictional purposes

on appeal to this court, and we believe the chairperson's comments reaffirm that belief.

CONCLUSION

For the reasons stated above, we find that appellate jurisdiction is lacking in this case, and we therefore dismiss the Boone County Board's appeal.

APPEAL DISMISSED.

BOBBY G. DELLINGER, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT ET AL., APPELLEES. BOBBY G. DELLINGER, APPELLANT, V. A.L.M. CORPORATION AND JOHN WICHMAN, INDIVIDUALLY, APPELLEES.

611 N.W.2d 132

Filed May 30, 2000. Nos. A-99-210, A-99-211.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
2. **Negligence: Damages.** For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty.
3. **Negligence: Contractors and Subcontractors: Liability.** Generally, one who employs an independent contractor is not liable for the contractor's negligence.
4. ___: ___: ___. The employer of an independent contractor may be liable if the employer retains control over the contractor's work, or if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
5. ___: ___: ___. Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.
6. **Negligence: Contractors and Subcontractors: Employer and Employee.** Nondelegable duties include the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, a duty imposed by statute or rule of law, and the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers.
7. **Negligence: Words and Phrases.** A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Phillip G. Wright and Michael F. Gutowski, of Quinn & Wright, for appellant.

Timothy A. Clausen, of Klass, Stoos, Stoik, Mugan, Villone & Phillips, L.L.P., for appellee Omaha Public Power District.

Stephen G. Olson II and Jason R. Yungtum, of Hansen, Engles & Locher, P.C., for appellee Foley Company.

Michael T. Gibbons, of Woodke, Otepka & Gibbons, P.C., for appellees A.L.M. Corporation and John Wichman.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Bobby G. Dellinger appeals from a judgment entered in favor of Omaha Public Power District (OPPD), Standard Sheet Metal, Inc. (Standard), Foley Company (Foley), A.L.M. Corporation (A.L.M.), and John Wichman in this action for injuries sustained while Dellinger was employed by Foley's subcontractor, Standard, on a construction project on OPPD property. We find that OPPD did not maintain sufficient control over the construction project to be liable for Dellinger's injuries, that the injuries were not the result of a peculiar risk sufficient for Foley to be liable for Dellinger's injuries, and that A.L.M. and Wichman did not breach any duty owed to Dellinger. Accordingly, we affirm the judgment of the district court.

II. BACKGROUND

According to the record, Dellinger was a sheet metal worker for over 30 years. On August 19, 1992, Dellinger was working on a project on OPPD property in Nebraska City, Nebraska. Foley had contracted with OPPD, and Foley was the general contractor on the project.

On August 19, 1992, Dellinger was working on the roof of an OPPD powerhouse. Dellinger testified that he was using a wheel hoist to pull cable up to the roof. As Dellinger was guiding the

cable, the wheel hoist came loose from an I-beam. Dellinger grabbed the cable with his right hand to keep it from falling and experienced pain in his arm, neck, and back.

On November 8, 1994, Dellinger filed an amended petition alleging negligence on the part of OPPD and Foley. On December 27, 1996, Dellinger filed an amended petition alleging negligence on the part of A.L.M. and Wichman. The two cases were consolidated for trial, and a jury trial was waived.

On September 24, 1998, the parties filed a stipulation of facts. The parties stipulated that OPPD and Foley entered into a contract for work to be performed at the Nebraska City power plant, that Foley entered into a subcontractor agreement with Standard to build "explosion panels," and that the incident which formed the basis of Dellinger's claim occurred on August 19, 1992. The parties stipulated that Dellinger was performing his job duties for Standard and that the wheel hoist involved in the incident was owned by Standard.

On January 15, 1999, the district court entered a judgment in these consolidated cases. The court found that OPPD did not retain control of the project or of Foley and did not exercise actual control during the project. The court found that Foley did not maintain control of work done by Standard or Standard's employees. The court also found that A.L.M. and Wichman did not exercise any control, but were hired by OPPD to conduct inspections for quality control purposes only. The court found that neither OPPD nor Foley failed to provide a safe workplace and found that no special risk or danger was involved in this case. The court entered judgment in favor of the defendants.

On January 25, 1999, Dellinger filed a motion for new trial. The court overruled the motion on February 3. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Dellinger has assigned three errors. First, Dellinger asserts that the district court erred in finding that OPPD did not retain sufficient control to have a nondelegable duty to provide a safe workplace. Second, Dellinger asserts that the district court erred in finding that Foley did not have a nondelegable duty to ensure the wheel hoist was safe. Third,

Dellinger asserts that the district court erred in finding that A.L.M. and Wichman owed no duty to Dellinger.

IV. ANALYSIS

1. Standard of Review

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[2] For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is to conform to the legal standard of reasonable conduct in light of the apparent risk. *Id.* A duty in negligence cases may be defined as an obligation to which the law will give recognition and effect to conform to a particular standard of conduct toward another. *Id.* The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.*

2. OPPD

[3,4] Generally, one who employs an independent contractor is not liable for the contractor's negligence. *Parrish v. Omaha Pub. Power Dist., supra.* However, the employer of an independent contractor may be liable if the employer retains control over the contractor's work, or if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Id.* As such, a property owner who employs a general contractor may be held liable for injuries to a subcontractor's employee where the property owner retains suf-

ficient control over the work done on the premises, or if there is a nondelegable duty to protect the subcontractor's employee from harm. See *id.*

In the present case, Dellinger's assigned error challenges the district court's finding that OPPD did not retain control over the work. Dellinger does not assign anything concerning any nondelegable duty owed by OPPD, and we, accordingly, will not further consider any nondelegable duties OPPD may have owed to Dellinger.

In *Parrish v. Omaha Pub. Power Dist., supra*, the Supreme Court held that OPPD, as owner of the premises, could be held liable for injuries to a subcontractor's employee if OPPD was found to have retained control over the contractor's work. Generally, the court has required that the owner retain control of the premises before liability is imposed and that an owner might be considered to maintain adequate "possession" if the owner's involvement in overseeing the construction is substantial. See *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973). See, also, *Parrish v. Omaha Pub. Power Dist., supra*. In the present case, the district court specifically found that OPPD did not retain such control. The contract between OPPD and Foley specifically delegated all safety issues to Foley. The contract also specifically provided that all work was under the charge and control of Foley. OPPD retained only the right to inspect the work to see if it conformed to the contract. Further, Dellinger produced no evidence to indicate that OPPD actually retained any control over the worksite or the project being done. The evidence supports the district court's conclusion that OPPD merely retained the right to inspect for compliance with the contract, but did not retain sufficient control of the work to give rise to a legal duty to protect Dellinger from harm. This assigned error is without merit.

3. Foley

[5,6] Dellinger asserts that the district court erred in finding that Foley did not have a nondelegable duty to protect him from harm. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties neg-

ligently performed. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence. *Id.* Nondelegable duties include the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, a duty imposed by statute or rule of law, and the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Parrish v. Omaha Pub. Power Dist., supra.*

(a) Safe Workplace

A general contractor in control of the premises where work performance under a contract with the owner is being carried out owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. *Parrish v. Omaha Pub. Power Dist., supra.* Moreover, when a general contractor assumes a contractual duty for the safety of workers at a construction site, the contractor's duty cannot be delegated to a subcontractor. *Id.*

The district court specifically found that neither OPPD nor Foley failed to provide a safe place for Dellinger to work. The evidence presented in this case supports the court's conclusion. Although the contract between Foley and OPPD imposed the obligation for safety on Foley, Dellinger was not injured by an unsafe workplace, but was injured because he was using a wheel hoist that was apparently not properly secured. The wheel hoist was owned, maintained, and used exclusively by employees of Dellinger's employer, Standard. There is no evidence to indicate that Foley breached any nondelegable duty to provide a safe workplace. See *Hand v. Rorick Constr. Co., supra* (instrumentality causing injury was not unsafe premises but equipment owned, controlled, and erected by subcontractor).

Additionally, to impose liability on a general contractor for injury to a subcontractor's employee, the general contractor must have supervised the work that caused the injury to the employee, had actual or constructive knowledge of the danger

which ultimately caused the injury, and had the opportunity to prevent the injury. *Parrish v. Omaha Pub. Power Dist., supra.* In the present case, Dellinger testified that he alerted people at the safety meetings about the deficiencies of the wheel hoist. However, Dellinger provided no confirmation of this allegation, and indeed, other witnesses when asked about Dellinger's complaints testified that they never heard him complain about the wheel hoist. As such, the evidence supports the district court's conclusion that Dellinger failed to demonstrate Foley should be held liable for failing to provide for his safety concerning the wheel hoist. This assigned error is without merit.

(b) Statute or Rule of Law

Dellinger has cited us to no statute or rule of law which imposes a nondelegable duty on Foley. As such, we need not further consider this basis for nondelegable duties.

(c) Peculiar Risk

Dellinger asserts that Foley owed a nondelegable duty for safety because the work being done involved a peculiar or special risk of danger. If a general contractor hires an independent contractor to perform work which the general contractor should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

[7] A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions. *Id.* In *Parrish*, the Nebraska Supreme Court acknowledged that steel construction work involves risks which are considered peculiar risks. See, also, *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994) (holding that painting inside of underground tank using highly combustible paint fumes creates peculiar risk); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183,

202 N.W.2d 157 (1972) (holding that steamfitter work near opening on floor deck exposing vertical reinforcing rods creates peculiar risk); *Kubisz v Cadillac Gage*, 236 Mich. App. 629, 601 N.W.2d 160 (1999) (holding that welding container that previously held diesel fuel involved peculiar risk). However, we believe the facts of the present case, and the injuries suffered by Dellinger, are distinct from the injuries attendant the peculiar risks associated with steel construction work.

In *Lunde v. Winnebago Industries, Inc.*, 299 N.W.2d 473 (Iowa 1980), the Iowa Supreme Court appropriately turned the focus in peculiar risk analysis toward whether the risk in fact realized by the plaintiff was actually a peculiar risk inherent in the nature of the specific work being done, as opposed to collateral acts of negligence by coemployees. See, also, *McDaniel v. Business Inv. Group, Ltd.*, 709 N.E.2d 17 (Ind. App. 1999) (holding that actual injury sustained must result from particularized harm identified by peculiar risk). Similarly, in *Parrish v. Omaha Pub. Power Dist., supra*, the Nebraska Supreme Court noted that liability for peculiar risks extends to the general contractor's failure to ensure that precautions are taken against special hazards inherent in the work of the subcontractor. A clear example of applying this inherent risk analysis is the California case *Anderson v. Chancellor Western Oil Develop. Corp.*, 53 Cal. App. 3d 235, 125 Cal. Rptr. 640 (1975).

In *Anderson v. Chancellor Western Oil Develop. Corp.*, the California Court of Appeals acknowledged that there were some risks peculiar to the drilling of oil wells. However, the injury suffered by the plaintiff occurred as a result of a failure to fasten one end of a board on a scaffold-like structure. The court determined that although there were peculiar risks involved in the work being done, the injury sustained by the plaintiff was not as a result of a peculiar risk, but, rather, was caused by a collateral act of negligence.

The present case is startlingly comparable to the *Anderson* case. In cases such as the present case, where the injury can be traced to an act of negligence rather than a peculiar risk associated with the work being done, we find the analysis of the Iowa and California courts to be useful. In the present case, although there were certainly peculiar risks associated with the steel con-

struction work Dellinger was doing, the actual risk realized by him was the result of the failure to properly secure the wheel hoist to an I-beam. This harm was not the result of any risk peculiar to the job being done, and there is no evidence that Foley breached any nondelegable duty arising as a result of the peculiar harms involved in this project. This assigned error is without merit.

4. A.L.M. AND WICHMAN

Dellinger asserts that the district court erred in finding that A.L.M. and Wichman owed no duty to Dellinger. The district court found that A.L.M. and Wichman were merely other individual contractors and that they owed a duty only to take reasonable care not to cause injury to Dellinger. The evidence at trial indicated that OPPD entered a contract with A.L.M. to hire Wichman, an A.L.M. employee, to look for conformance to the contract and the finished product and that Wichman's inspection for safety was only concerning gross violations that Wichman noticed. Dellinger provided no evidence that the wheel hoist constituted a gross safety violation, and provided no evidence that Wichman or A.L.M. owed any specific duty regarding safety. The evidence supports the district court's findings in this regard, and this assigned error is without merit.

V. CONCLUSION

The evidence supports the district court's finding that OPPD did not retain sufficient control over the project or the premises to impose a legal duty to Dellinger. The evidence supports the district court's finding that Foley did not breach any nondelegable duty owed to Dellinger. The evidence supports the district court's finding that A.L.M. and Wichman owed no duty to Dellinger. As such, we affirm the district court's judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY LEE STEVENSON, APPELLANT.

611 N.W.2d 126

Filed May 30, 2000. No. A-99-620.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Postconviction: Judges: Recusal.** Neb. Rev. Stat. § 27-605 (Reissue 1995) does not prohibit a judge who presided over a defendant's plea and sentencing from later testifying at an evidentiary hearing on a defendant's motion for postconviction relief where the judge is not the presiding judge at the evidentiary hearing on postconviction relief.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
5. **Effectiveness of Counsel: Proof.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Pleas.** When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty.

Appeal from the District Court for Pierce County: ROBERT B. ENSZ, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Douglas J. Stratton, of Stratton, Ptak & Kube, P.C., for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

INTRODUCTION

Randy Lee Stevenson appeals the order of the Pierce County District Court denying his motion for postconviction relief fol-

lowing an evidentiary hearing. For the reasons set forth herein, the order of the district court is affirmed in part and in part reversed, and the cause is remanded for further proceedings.

STATEMENT OF FACTS

In 1997, Stevenson was charged in Pierce County District Court with various felonies and misdemeanors. Stevenson pled not guilty to the charged offenses, and thereafter, there was considerable negotiation between Stevenson, through his attorney, and the county attorney regarding the possibility of a plea agreement being reached. Letters were exchanged between the county attorney and defense counsel, and defense counsel and Stevenson. These letters indicate a misconception that Stevenson would receive good time on a sentence enhanced by a habitual criminal conviction.

A plea agreement was eventually reached, which provided, in essence, that in case No. 7401, the State would amend the information and charge Stevenson with two counts, one for third degree assault and the other for first degree criminal trespass, both Class I misdemeanors, and would recommend concurrent sentences on these two counts. In case No. 7417, the plea agreement provided that Stevenson would plead guilty to second degree assault, a Class IV felony, and admit to being a habitual criminal, that the State would recommend a sentence of 10 years' imprisonment, and that this term of incarceration would be concurrent with the sentences imposed in case No. 7401. In case No. 7417, although the charging language regarding the assault reflected that the charge was second degree assault, a Class IV felony, the information was erroneously captioned as a third degree assault.

The plea hearing was held on December 8, 1997. The court advised Stevenson that third degree assault was a Class IV felony, which was in error because third degree assault is a misdemeanor and the assault charge against Stevenson was actually a second degree assault charge. In any event, the court informed Stevenson that Class IV felonies are punishable by up to 5 years' imprisonment and a $10,000 fine, but the habitual criminal charge served to enhance the punishment on the Class IV felony to a mandatory minimum of 10 years' impris-

onment to a maximum of 60 years' imprisonment. The court explained Stevenson's rights to him and that he was waiving those rights, and Stevenson responded that he understood. Stevenson then entered his guilty pleas in cases Nos. 7401 and 7417.

Before the court accepted Stevenson's guilty pleas, defense counsel informed the prosecutor that the caption in case No. 7417 was incorrect in that it stated third degree assault instead of second degree assault. The court gave the State leave to amend the caption on the information in case No. 7417 to correctly read second degree assault. The court then asked Stevenson, "Now that the Information has been amended in 7401 [sic] to allege that Randy Lee Stevenson committed the crime of third degree assault, do you wish to change your plea or do you wish to remain with the guilty plea?" Stevenson responded, "Guilty, Your Honor."

After hearing factual bases to support Stevenson's guilty pleas, the court accepted the pleas. Stevenson waived a presentence investigation, and sentencing proceeded. The prosecutor made comments to the court regarding the sentences, and in particular, stated:

> I have talked with some of the individuals involved in these two cases and they are aware of the plea agreement I was proposing to the defendant, and I don't see any great objections when you look at the total package of approximately six years plus the defendant will be serving. I think that's more than adequate.

In case No. 7401, Stevenson was sentenced by the court to 4 months' and 2 days' imprisonment each on the misdemeanor convictions, with the sentences to run concurrently and with credit for time served. In case No. 7417, which was the second degree assault conviction enhanced by the habitual criminal charge, Stevenson was sentenced to 10 years' imprisonment. A journal entry prepared by the prosecutor and signed by the sentencing judge was filed on December 12, 1997, and reflected that sentencing had occurred on December 8. A portion of this journal entry relating to case No. 7417 stated: "For purposes of truth in sentencing, the defendant shall serve six (6) years imprisonment before being eligible for complete discharge."

However, the commitment order signed by the judge stated that Stevenson was sentenced to a term of 10 years' imprisonment.

While at the Nebraska Diagnostic and Evaluation Center, Stevenson was informed by a Department of Correctional Services employee that he would be serving the entire 10-year sentence and would not be released until December 7, 2007. Stevenson filed a direct appeal, which was dismissed without opinion by this court in *State v. Stevenson*, 7 Neb. App. xxi (case No. A-98-384, June 30, 1998), for lack of jurisdiction.

On September 1, 1998, Stevenson filed a verified motion to vacate and set aside his convictions and sentences, alleging, inter alia, ineffective assistance of counsel in that trial counsel gave him inadequate advice regarding the issue of self-defense, failed to object to errors in the information, and failed to properly advise Stevenson regarding the amount of good time Stevenson would receive on his sentence. An evidentiary hearing on Stevenson's motion for postconviction relief was held on April 28, 1999. Testifying at the hearing were Stevenson; Verlyn Luebbe, county attorney at the time of Stevenson's plea and sentencing; Judge Richard P. Garden, the judge who presided over Stevenson's plea and sentencing; and Rodney Smith, Pierce County Public Defender, who was appointed to defend Stevenson.

The parties agreed that Stevenson's verified motion was to be marked as an exhibit, and Stevenson testified that the information contained therein was true and accurate and formed the basis of his motion for postconviction relief. Stevenson testified that there was a discussion among Judge Garden, Luebbe, Smith, and himself when the parties were in the courtroom prior to the plea hearing, but Stevenson claims the discussion was regarding the fact that Stevenson would not get parole on his sentence. Stevenson claims that he asked if he was to receive good time and that Judge Garden responded affirmatively and showed him a sheet of paper wherein it set forth that on a 10-year sentence, 6 years would be served if good time is taken into account. Stevenson also testified that he understood that he was going to serve 6 years on a 10-year sentence and that had he been properly advised as to the calculation of good time, he would have proceeded to trial on the merits of the pending charges in both cases Nos. 7417 and 7401.

Luebbe testified that he believed that a discussion took place sometime on December 8, 1997, prior to sentencing, in which Stevenson was advised of the correct calculation regarding good time and that the change of plea hearing was delayed so that Stevenson and Smith could discuss the matter in light of the parties' earlier erroneous beliefs regarding Stevenson's qualifying for good time credit. Luebbe testified that after Smith and Stevenson conferred, he was informed that they were going to proceed with the plea agreement. Judge Garden testified, over objection by Stevenson, that he advised Stevenson and Smith that Stevenson was not entitled to good time on the mandatory minimum sentence required under the habitual criminal statute.

Smith testified with regard to the off-the-record discussion had by the parties regarding the change in the good time law. Smith testified that it was his recollection that Judge Garden did indicate that there had been a change in the good time law, but that Stevenson's and Smith's concerns were about what the effect on Stevenson's utilization of good time for parole purposes if the habitual criminal sentence followed the other sentences. Smith also testified that he did not recall discussing with Stevenson the effect of good time with regard to the habitual criminal statute. However, Smith stated that Stevenson told him more than once that if his sentence was going to be enhanced by the habitual criminal charge, he did not have anything to lose by going to trial, but that Smith was able to convince him that there could be a disadvantage.

On May 11, 1999, the district court denied Stevenson's motion for postconviction relief in its entirety. Stevenson has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Stevenson contends that the following errors were made by the district court in the proceeding on his motion for postconviction relief: (1) improperly allowing the sentencing judge to testify at the evidentiary hearing on his motion for postconviction relief, (2) failing to grant his motion for postconviction relief for the reason that the trial court erred in allowing the information to be amended after the court's acceptance of Stevenson's guilty plea, (3) applying the wrong standard in

determining whether Stevenson's trial counsel was ineffective, and (4) failing to find that his counsel was ineffective in providing inadequate advice regarding the issue of self-defense and the amount of good time Stevenson would receive on his sentence and failing to object to errors in the information.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999).

[2] Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

DISCUSSION

Testimony by Sentencing Judge

Stevenson's first assigned error is that the district court improperly allowed the judge who had presided over his plea and his sentencing to testify at the evidentiary hearing on his motion for postconviction relief. In support of this argument, Stevenson cites Neb. Rev. Stat. § 27-605 (Reissue 1995), which provides that "[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

[3] It is apparent that in the instant case, the judge who had presided over Stevenson's plea and sentencing was not the same judge who was presiding over the evidentiary hearing on Stevenson's motion for postconviction relief. Section 27-605 does not prohibit a judge who presided over a defendant's plea and sentencing from later testifying at an evidentiary hearing on a defendant's motion for postconviction relief where the judge is not the presiding judge at the evidentiary hearing on postconviction relief. Compare *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990) (mere assertion by convicted defendant that he may wish to call trial judge as witness in postconviction hearing does not, by itself, provide grounds for disqualifying trial

judge from presiding over postconviction proceeding). Thus, no violation of § 27-605 occurred, and this assignment of error is without merit.

AMENDED INFORMATION

[4] Second, we address Stevenson's claim that the trial court erred in allowing the information to be amended after the court's acceptance of Stevenson's guilty plea. It is well settled that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Reeves, supra*; *State v. Smith, supra*. Since this issue could have been raised on direct appeal, and a direct appeal was not timely filed, this assignment of error is not properly before this court and will not be considered.

APPLICATION OF WRONG STANDARD REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Next, we address Stevenson's claim that the district court applied the wrong standard in determining whether Stevenson's trial counsel was ineffective. More specifically, Stevenson claims that after the district court found that Stevenson's trial counsel was ineffective, the court applied an erroneous prejudice standard, i.e., whether there was a reasonable possibility that but for trial counsel's performance, the result of the proceeding would have been different. Stevenson contends that the trial court should have used the following prejudice standard in its consideration of his ineffective assistance of counsel claim: After showing deficient performance, the prejudice prong is satisfied upon a reasonable probability that but for counsel's errors, the defendant would have insisted upon going to trial rather than pleading guilty.

[5,6] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Ditter*, 255 Neb. 696, 587 N.W.2d 73 (1998); *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993). Next, the defendant must

show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Ditter, supra*; *State v. Johnson, supra*. When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Ditter, supra*; *State v. Johnson, supra*.

In the instant case, the district court, in considering the prejudice prong of Stevenson's ineffective assistance of counsel claim, stated:

> The second question then is whether such deficient performance prejudiced the defense, or in other words, demonstrated a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Dawn, 246 Neb. 384, 519 N.W.2d 249 (1994).
>
> Judge Garden was not bound by the plea agreement, and he so advised the defendant by explaining the range of sentences which defendant could receive and assertaining (sic) that there were no deals as to the sentence to be imposed. Knowing this, the defendant proceeded with entry of a plea and sentencing. The sentencing was beyond the control of defendant's counsel. The written plea agreement discloses that the sentence to be proposed by counsel was no more than a recommendation. The defendant was then at the mercy of the sentencing judge. The judge was free to impose a sentence anywhere within the statutory range, which sentence could conceivably have been greater than the ten years which the defendant received. The record does not show a reasonable possibility that but for his counsel's deficient performance the result of the proceeding would have been different.

It is clear from the language used by the district court that when considering the prejudice prong of Stevenson's ineffective assistance of counsel claim, the court did not consider whether there was reasonable probability that but for counsel's errors, Stevenson would have insisted on going to trial rather than pleading guilty. Because the district court applied the wrong standard in evaluating Stevenson's ineffective assistance of

counsel claim, we reverse the court's order regarding this claim and remand the cause for further proceedings to allow the district court to make a determination regarding the validity of Stevenson's ineffective assistance of counsel claim using the correct standard.

INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, because we have determined that the district court applied the wrong standard in considering Stevenson's ineffective assistance of counsel claim and are reversing and remanding on this issue, we need not address the merits of Stevenson's claim that he received ineffective assistance of counsel. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

CONCLUSION

In sum, the district court did not err in allowing the judge who presided over Stevenson's plea and sentencing to testify at the evidentiary hearing on Stevenson's motion for postconviction relief, and the district court's determination is affirmed in that regard. However, because the district court applied the wrong standard in its consideration of Stevenson's ineffective assistance of counsel claim, this matter must be reversed and the cause remanded for further proceedings to allow the district court to make a determination regarding the validity of Stevenson's ineffective assistance of counsel claim using the correct standard.

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

STATE OF NEBRASKA, APPELLEE, v. MICHAEL R. GUTIERREZ, APPELLANT.

611 N.W.2d 853

Filed May 30, 2000. No. A-99-1022.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** A reasonable investigation of a traffic stop may include asking for a driver's license and registration, requesting a driver to sit in the patrol car, and asking the driver about his or her destination and purpose. An officer may engage in similar routine questioning of the vehicle's passengers. If the responses of those questioned give rise to suspicions unrelated to the traffic offense, the officer may broaden his or her inquiry. The officer may also run a computer check to establish whether the vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the car.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** An officer making a traffic stop may order the driver and passengers to get out of the vehicle pending completion of the stop.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** If an officer has a reasonable, articulable suspicion that a person is involved in criminal activity unrelated to a traffic violation, the officer may expand the scope of the traffic stop and continue to detain the person for additional investigation.
6. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
7. **Police Officers and Sheriffs: Probable Cause: Warrantless Searches: Weapons.** Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of the outer clothing of a person stopped on *Terry* grounds to discover weapons which might be used to assault the officer.
8. **Search and Seizure: Weapons.** If a pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed.
9. **Investigative Stops: Probable Cause: Warrantless Searches: Controlled Substances.** A "second pass" to palpate a subject's clothing for drugs is improper in the context of a stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Appeal from the District Court for Dakota County: MAURICE REDMOND, Judge. Affirmed.

William L. Binkard for appellant.

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

IRWIN, Chief Judge, and MOORE, Judge.

IRWIN, Chief Judge.

I. INTRODUCTION

Michael R. Gutierrez appeals his convictions for possession of a controlled substance, possession of a firearm by a felon, and two counts of carrying a concealed weapon. On appeal, he contends that his motion to suppress should have been granted and that evidence seized as a result of the allegedly unconstitutional search and seizure of his person and the vehicle in which he was a passenger should not have been admitted at his jury trial. For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

At about noon on April 3, 1998, Officer Chad Sheehan of the South Sioux City Police Department observed a gray Chevrolet Celebrity in the parking lot of an apartment complex located on East 18th Street in South Sioux City. Police information indicated that this apartment complex was the site of some drug activity. Sheehan saw the Celebrity, which was driven by a female, pull up next to a white Chevrolet S-10 Blazer. Sheehan drove his vehicle around the block. After he again drove by the entrance to the apartment complex, the Celebrity pulled out of the complex and followed him. In Sheehan's rearview mirror, Sheehan saw the vehicle stop at a stop sign and then make a right turn; the vehicle's driver failed to use the right-turn signal. Based on his observation of a traffic infraction, Sheehan initiated a stop of the vehicle. It took the vehicle's driver approximately two blocks to stop the vehicle. We note that at some point, which is not clear from the record, Sheehan issued the driver a written warning for failure to signal.

While the vehicle was pulling over, Sheehan noticed the passenger "making some type of movement that appeared that he was trying to conceal something underneath the seat in which he was seated on." While Sheehan walked toward the vehicle, he

could see the male passenger "bent over and appeared to be placing something under . . . his left leg." Based on Sheehan's training and experience, this movement caused Sheehan concern because the passenger could be "attempting to conceal a weapon or some other type of contraband."

While Sheehan obtained the driver's identification, the driver seemed a bit nervous and her hands were "jittery." When Sheehan approached the vehicle, the passenger, whom Sheehan later identified to be Gutierrez, was wearing dark sunglasses and was sitting with his hands on his knees. Gutierrez' hands and knees were shaking, and he did not make eye contact. When Sheehan asked Gutierrez for identification, Gutierrez indicated that he did not have any. Sheehan then asked Gutierrez to exit the vehicle. Sheehan had Gutierrez stand to the back of the vehicle and place his hands on the vehicle. Sheehan asked Gutierrez to identify himself. Gutierrez stated that he was "Michael Lopez."

Next, Sheehan "quickly patted [Gutierrez'] waist just to ensure that he didn't have anything in the front of his waist band or in the back of his waist band." According to Sheehan, he conducted a pat-down search because he felt that the passenger "had probably concealed something under the seat, and for my safety in dealing with him, since I was the only officer at the scene initially, I wanted to make sure that that wasn't going to be the last traffic stop that I made." Sheehan asked Gutierrez his date of birth, age, where he was coming from, and where he was going. Gutierrez first indicated that he was born on April 3, 1971, and that he was 37. He then indicated that he was born April 3, 1961. Gutierrez stated that he was coming from a motel, that he was going home, and that he lived with the driver, who was his girl friend.

Next, Sheehan returned to the vehicle to speak with the driver. Sheehan asked the driver what the passenger's name was. She replied that it was "Michael Gutierrez." Sheehan also asked her where they were coming from and where they were going. The driver responded that they had come from a friend's home at Interstate Apartments and that she was taking Gutierrez to the airport so he could fly back to California. While Sheehan was speaking to the driver, another police officer arrived.

When the second police officer arrived, Sheehan conducted a "more thorough pat search" of Gutierrez' person. He did a more thorough pat search at this time because he felt "safer with the backup officer there." The pat down consisted of searching over Gutierrez' clothing. Sheehan patted Gutierrez' arms, underneath his arms, and his waistband. When patting the waistband, Sheehan discovered a pouch on the belt. Sheehan "squeezed" the pouch and felt "sharp objects" inside the pouch. "By feeling them, [Sheehan] thought that perhaps they were throwing stars . . . ." Sheehan described a throwing star as a weapon used in martial arts that is in the shape of a star which is sharp on all points and is generally used by throwing it at an object or person. Sheehan then opened the pouch and found three four-pointed throwing stars. As a result, Sheehan placed Gutierrez under arrest for possession of a concealed weapon.

Following the arrest, Sheehan searched Gutierrez' person and the vehicle. On Gutierrez' person, Sheehan found a white baggie containing a rock of methamphetamine, a black digital scale, a package of "zigzag rolling papers," shotgun shells, and $4,180 in cash. Gutierrez also indicated that he had some marijuana and another $462 in cash. Under the passenger seat of the vehicle, Sheehan found a .45-caliber semiautomatic handgun inside of which was a fully loaded magazine. In the trunk of the vehicle inside a suitcase containing male clothing, Sheehan found a beeper contract in Gutierrez' name and a box of .45-caliber semiautomatic ammunition. In the suitcase, Sheehan also found "nunchucks" and a large wooden-handled lock-blade knife.

On May 11, 1998, Gutierrez was charged by information in the district court for Dakota County with possession of a controlled substance, namely methamphetamine; possession of a firearm by a felon; and two counts of carrying a concealed weapon. On October 8, Gutierrez filed a motion to suppress in which he alleged that the seizure and search of his person and the vehicle in which he was a passenger were unconstitutional. After a hearing on the motion to suppress held November 3, the district court denied the motion. We note that the district court made detailed findings of fact as required by *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). The district court concluded that after initiating the stop of the vehicle, Sheehan could

properly conduct a pat-down search of Gutierrez for weapons because he had a reasonable suspicion that Gutierrez was armed. The district court found that the subsequent searches of Gutierrez' person and the vehicle were permissible searches incident to arrest.

A jury trial was conducted on June 10, 1999. At trial, Gutierrez preserved the issues raised in his motion to suppress. After hearing the evidence, the jury found Gutierrez guilty of all counts. On July 27, Gutierrez was sentenced to imprisonment of 20 to 48 months for possession of a controlled substance, 48 to 72 months for possession of a firearm by a felon, and 8 months for each count of carrying a concealed weapon. The district court ordered that the sentences be served concurrently and granted credit for time served of 480 days. Thereafter, Gutierrez timely appealed.

III. ASSIGNMENT OF ERROR

Gutierrez assigns that the district court erred in denying his motion to suppress and admitting the evidence seized as a result of the allegedly unconstitutional search and seizure of his person and the vehicle in which he was a passenger.

IV. ANALYSIS

1. Standard of Review

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

2. Initial Stop

[2] Gutierrez does not challenge the validity of the initial traffic stop. It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *Anderson, supra*; *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). Sheehan's observation that the driver of the

vehicle failed to use a turn signal when turning right provided probable cause to stop the vehicle.

3. Continued Detention

Gutierrez argues that Sheehan was not justified in continuing to detain him when the purpose of the stop was to issue the driver a warning for failing to signal, which should have taken only a few minutes. We note that the parties do not dispute that Gutierrez was seized for the purposes of the Fourth Amendment.

[3,4] When Sheehan stopped the vehicle in this case, he was entitled to conduct an investigation "'"reasonably related in scope to the circumstances that justified the interference in the first place."'" *Anderson*, 258 Neb. at 634, 605 N.W.2d at 131 (quoting *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994)). A reasonable investigation of a traffic stop may include asking for a driver's license and registration, requesting a driver to sit in the patrol car, and asking the driver about his or her destination and purpose. *Anderson, supra.* An officer may engage in similar routine questioning of the vehicle's passengers. If the responses of those questioned give rise to suspicions unrelated to the traffic offense, the officer may broaden his or her inquiry. *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995). A law enforcement officer may also run a computer check to establish whether the vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the car. *Anderson, supra.* In addition, an officer making a traffic stop may order the driver and passengers to get out of the vehicle, pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997).

[5,6] If an officer has a reasonable, articulable suspicion that a person is involved in criminal activity unrelated to a traffic violation, the officer may expand the scope of the traffic stop and continue to detain the person for additional investigation. See, *U.S. v. Carrate*, 122 F.3d 666 (8th Cir. 1997); *Anderson, supra.* The Nebraska Supreme Court has explained: "'"'"[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amend-

ment."' "' . . ." *Anderson*, 258 Neb. at 637, 605 N.W.2d at 133 (quoting *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997)). See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 868, 20 L. Ed. 2d 889 (1968). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Anderson, supra*; *Soukharith, supra*.

Based upon our de novo review of the record, we conclude that under the totality of the circumstances, Sheehan had a reasonable suspicion based on sufficient articulable facts to expand the scope of the traffic stop and continue to detain Gutierrez for additional investigation. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). After Sheehan initiated the traffic stop, he observed Gutierrez, the passenger in the vehicle, make a movement that Sheehan interpreted as an attempt to conceal something under his seat. After the vehicle stopped, Sheehan observed, as he approached the vehicle, that Gutierrez was bent over and "appeared to be placing something under . . . his left leg." Based on his training and experience, Sheehan was concerned that Gutierrez was "attempting to conceal a weapon" or other contraband. Sheehan's continued questioning of Gutierrez and the driver after Sheehan lawfully removed Gutierrez from the vehicle caused Sheehan further concern due to Gutierrez' confusion about his alleged birth date and the driver's and Gutierrez' inconsistent responses. We note that consistent with the Nebraska Supreme Court's holding in *Anderson, supra*, we do not give great consideration to Sheehan's testimony regarding the nervousness of the driver and Gutierrez, the placement of Gutierrez' hands on his knees, and the lack of eye contact by Gutierrez. Nevertheless, those things together with observation of movements like those made by Gutierrez give a police officer a reasonable suspicion that the person is armed or in possession of contraband. Thus, the officer may expand the scope of the traffic stop to further investigate and protect himself or herself.

4. Pat-Down Search

[7-9] We next address the propriety of the pat-down searches of Gutierrez in which Sheehan discovered the throwing stars which led to Gutierrez' arrest. It is well established that pursuant

to *Terry, supra*, an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of the outer clothing of a person stopped on *Terry* grounds to discover weapons which might be used to assault the officer. See, *In re Interest of Andre W.*, 256 Neb. 362, 590 N.W.2d 827 (1999); *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). However, if the pat-down search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid and its fruits will be suppressed. *Craven, supra*. A "second pass" to palpate the subject's clothing for drugs is improper in the context of a *Terry* stop. *State v. Chitty*, 5 Neb. App. 412, 559 N.W.2d 511 (1997).

We conclude that the pat-down searches conducted by Sheehan in the present case were reasonable and proper under the totality of the circumstances. While Sheehan was conducting the traffic stop alone, he conducted a cursory pat-down search for weapons in which he patted the front and back of Gutierrez' waistband. When another police officer arrived, Sheehan completed the pat-down search for weapons. At this time, he patted Gutierrez' arms, under his arms, and his waistband. The pat-down search remained on the outside of Gutierrez' clothing and was limited to searching for weapons. Based on our review of the evidence, Sheehan's pat-down search did not expand to an impermissible search for drugs or other contraband.

5. Arrest and Subsequent Searches

During the pat-down search, Sheehan felt the sharp points of what he believed to be a weapon called a throwing star. Sheehan then opened the pouch attached to Gutierrez' belt and retrieved three throwing stars. We note that Sheehan did not contend below or on this appeal that the search exceeded the scope of permissible pursuant to the plain-feel doctrine. See *In re Interest of Andre W., supra*. At this point, Sheehan had probable cause to arrest Gutierrez for possession of a concealed weapon. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997) (officer has probable cause to arrest without warrant when he or she has knowledge based on reasonably trustworthy information which justifies prudent belief that suspect is committing or has committed crime). Incident to Gutierrez' arrest, Sheehan could

properly search Gutierrez' person, see *State v. Brooks*, 5 Neb. App. 463, 560 N.W.2d 180 (1997), and the vehicle in which he was a passenger, see *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

V. CONCLUSION

For the reasons stated above, we conclude that the evidence obtained as a result of the pat-down search and the subsequent searches of Gutierrez' person and the vehicle was admissible at trial. Therefore, we conclude that the district court did not err in denying Gutierrez' motion to suppress and admitting this evidence at trial.

AFFIRMED.

SIEVERS, Judge, participating on briefs.

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780 L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE, V. JAMES C. DiPRIMA, APPELLANT.

611 N.W.2d 637

Filed June 6, 2000. No. A-99-497.

1. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
2. **Contracts: Parol Evidence.** The admission of evidence without objection in proof of an oral agreement which is in violation of the parol evidence rule furnishes no basis for enforcement of the oral agreement.
3. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a type of contract by which a guarantor promises to make payment if the principal debtor defaults.
4. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Contracts: Parol Evidence.** When parties have executed a completely integrated written document purporting to express the terms of their agreement, the parol evidence rule renders ineffective any evidence of a prior or contemporaneous oral agreement which adds to, alters, varies, or contradicts the terms of the written document.
6. **Contracts: Evidence.** Where negotiations between parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings or where the language employed is vague or ambiguous.

8. **Contracts.** Whether a contract is ambiguous is a question of law.
9. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
10. **Contracts.** The title of a document is not controlling as to its legal effect.
11. ___. A contract is to be construed as a whole, and if possible, effect is to be given to every part of the contract.
12. **Contracts: Principal and Agent: Liability.** In order to exempt an agent from liability upon an instrument executed by the agent within the scope of the agent's agency, the agent must not only name his or her principal, but must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If the agent expresses this, the principal is bound and the agent is not.
13. ___: ___: ___. An agent who contracts on behalf of a disclosed principal in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility is not liable to the other contracting party.
14. **Contracts: Principal and Agent: Liability: Corporations: Proof.** It is the agent's duty to disclose his or her capacity as agent of a corporation, and the agent bears the burden of proof of showing that he or she was acting in his or her corporate, not individual, capacity.
15. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
16. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
17. **Guaranty: Debtors and Creditors.** Generally, the fact that a creditor may take additional security to insure payment of a principal obligation does not release or discharge the guarantor.
18. ___: ___. When the additional security taken by the creditor is a new guaranty, the prior guaranty is not extinguished by the execution of the subsequent guaranty unless the subsequent guaranty was executed as a substitute for the earlier one.
19. **Contracts: Words and Phrases.** The words of a contract must be given their plain and ordinary meaning.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

John C. Wieland and C.G. Jolly, of Frazier, Wieland, Bataillon & Katz, for appellant.

Ann M. Grottveit and Donald J. Buresh, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

James C. DiPrima appeals a judgment of the district court for Douglas County in favor of 780 L.L.C., a Nebraska limited liability company. The district court concluded that 780 L.L.C. was entitled to enforce a guaranty against DiPrima individually in the amount of $17,980.54. On appeal, DiPrima contends that the district court erred in admitting parol evidence to determine the capacity in which he signed the guaranty, in finding that he signed the guaranty in his personal capacity, in determining his liability to be for 6 months' rent, in failing to find that a subsequent guaranty of a David Dunn did not release him from all obligations under his guaranty, and in failing to fix his maximum personal liability under the guaranty to $4,056. For the reasons stated below, we affirm.

II. FACTUAL BACKGROUND

In August 1993, DiPrima was president of M.B.D. Midwest, Inc., a company seeking to set up Mail Boxes Etc. stores in Nebraska. DiPrima began negotiating with Rick Lee Scott, a listing agent for Miracle Hills Partnership, to lease some commercial property in Omaha for a Mail Boxes Etc. store. We note from the record that since the events relevant to this lawsuit, Miracle Hills Partnership has changed the nature of its organizational structure from a partnership to a limited liability company and is now doing business as 780 L.L.C. as evidenced in the record by an "Agreement of Merger."

On August 23, 1993, M.B.D. Midwest and Miracle Hills Partnership executed a lease for the property. A document entitled "Personal Guarantee" was also executed. In relevant part, it reads:

> PERSONAL GUARANTEE
>
> The undersigned hereby unconditionally guarantee unto the Landlord the payment of the rent and the performance of all of the covenants under the Lease by the Tenant and hereby waive notice of any default under the Lease and agree that this liability shall not be released or affected by an extension of time for payment or by any forbearance by the Landlord. The undersigned's liability shall not exceed

an amount equal to the sum of the following six months total rents.

Dated This 30 day of Aug, 19993 [sic]
By: James C. DiPrima Pres [signature in space provided]
MBD MiDWEST [handwritten in space provided]
Name
14627 INDUSTRIAL RD [handwritten in space provided]
Street Address
OMAHA NE [handwritten in space provided]
City/State/Zip

In January or February 1994, M.B.D. Midwest took possession of the property under the lease and began to pay rent. DiPrima had left his employment with M.B.D. Midwest in November 1993. It appears that at some point, Miracle Hills Partnership obtained a guaranty of some kind from Dunn, because "DiPrima left the company and someone else took his place." M.B.D. Midwest continued to pay rent until March 1997 and then vacated the premises 3 or 4 months later. According to the managing partner of Miracle Hills Partnership, the balance due from M.B.D. Midwest under the lease is $20,261.26 for the period from March 26 to September 30, 1997.

On June 9, 1997, 780 L.L.C. initiated a lawsuit against DiPrima and Dunn. In its amended petition, which is the operative petition in this case, 780 L.L.C. named only DiPrima as a defendant. In its amended petition, 780 L.L.C. alleged that M.B.D. Midwest was in default under the lease for failing to make lease payments in April, May, and June 1997 and that DiPrima was liable for the default in lease payments by M.B.D. Midwest pursuant to his "personal guarantee" of the obligations of M.B.D. Midwest under M.B.D. Midwest's lease with Miracle Hills Partnership. 780 L.L.C. prayed for judgment against DiPrima in the amount of $59,203.

On January 20, 1999, a trial was held on the amended petition. At trial, parol evidence regarding discussions between DiPrima and Scott that occurred prior to the execution of the guaranty at issue was admitted without objection. This evidence will be set forth in the analysis section below. After hearing the evidence, the district court entered judgment in favor of 780 L.L.C. and against DiPrima in the amount of $17,980.54 plus

costs. It is clear from the order that the district court considered the parol evidence. From this order, DiPrima timely appealed.

III. ASSIGNMENTS OF ERROR

For DiPrima's assignments of error, he contends that the district court erred in admitting parol evidence to determine the capacity in which he signed the guaranty, in finding that he signed the guaranty in his personal capacity, in determining his liability to be for 6 months' rent, in failing to find that a subsequent guaranty of Dunn did not release him from all obligations under his guaranty, and in failing to fix his maximum personal liability under the guaranty to $4,056.

IV. ANALYSIS

1. Admission of Parol Evidence

(a) Waiver of Objection to Parol Evidence

DiPrima first assigns that the district court erred in admitting parol evidence regarding the discussions between Scott and DiPrima prior to the execution of the guaranty at issue. 780 L.L.C. argues that DiPrima waived any objection to the receipt of such evidence when he failed to object to its admission at trial. We disagree.

[1,2] It is true that the general evidentiary rule is that the failure to make a timely objection waives the right to assert prejudicial error on appeal. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). However, in *Perry v. Gross*, 155 Neb. 662, 665, 53 N.W.2d 73, 76 (1952), the Nebraska Supreme Court recognized that

> the parol evidence rule is not merely one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement. The admission of evidence without objection in proof of an oral agreement which is in violation of the parol evidence rule furnishes no basis for enforcement of the oral agreement.

We recognize that in *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995), the Supreme Court concluded that the fail-

ure to object to the admission of certain parol evidence resulted in the waiver of the right to raise any alleged error regarding its admission on appeal. However, in *Barks*, the Supreme Court neither addressed nor overruled *Perry, supra*. We note that the rule in *Perry* is consistent with the holdings in a majority of other states which have addressed this issue. See, e.g., *Brewer v. Devore*, 960 S.W.2d 519 (Mo. App. 1998); *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997); *State Nat. Bank v. Academia, Inc.*, 802 S.W.2d 282 (Tex. App. 1990); *Magnetic Copy Servs. v. Seismic Specialists*, 805 P.2d 1161 (Colo. App. 1990); *Howell Mill/Collier Assoc. v. Pennypacker's*, 194 Ga. App. 169, 390 S.E.2d 257 (1990); *Matter of Estate of Kalouse*, 282 N.W.2d 98 (Iowa 1979).

We apply the rule in *Perry* to the case before us. As a matter of substantive law, a party's failure to object to the admission of parol evidence does not waive the proper application of the parol evidence rule. We stress that the better practice is to object to parol evidence at trial. We conclude that DiPrima did not waive his right to challenge the use of the parol evidence to vary the writing because of his failure to object to the admission of the parol evidence at trial. We therefore consider the merits of DiPrima's assertion that the parol evidence was improperly received and used by the trial court.

(b) Ambiguity of Guaranty

[3,4] We first note that a contract may not be modified through the use of parol evidence unless the contract is shown to be ambiguous. Therefore, in order to determine whether the parol evidence was properly admitted in the present case, we must address whether the guaranty was ambiguous. We note that a guaranty is a type of contract by which a guarantor promises to make payment if the principal debtor defaults. *Northern Bank v. Dowd*, 252 Neb. 352, 562 N.W.2d 378 (1997). A guaranty is interpreted using the same general rules as are used for other contracts. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

[5,6] When parties have executed a completely integrated written document purporting to express the terms of their agreement, the parol evidence rule renders ineffective any evidence of a prior or contemporaneous oral agreement which adds to,

alters, varies, or contradicts the terms of the written document. *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993); *Five Points Bank v. White*, 231 Neb. 568, 437 N.W.2d 460 (1989). Where negotiations between parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Rowe, supra*; *Silverman v. Arbor Street Partnership*, 213 Neb. 628, 330 N.W.2d 904 (1983).

[7-9] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings, *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994), or where the language employed is vague or ambiguous, *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). Whether a contract is ambiguous is a question of law. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999).

[10,11] We note that the body of the document does not indicate whether the guaranty was to be that of DiPrima or of M.B.D. Midwest. However, the document is entitled "Personal Guarantee," which suggests that it is a guaranty of an individual signing on his or her own behalf. Based upon our research, we conclude that the title of a document is not controlling as to its legal effect. See *Columbia Club v. American Fletcher Realty*, 720 N.E.2d 411 (Ind. App. 1999); *Wayne J. Griffin Elec. v. Dunn Const.*, 622 So. 2d 314 (Ala. 1993); *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977); *St. Germain & Son, Inc. v. Taunton Redevelop. Auth.*, 4 Mass. App. 46, 340 N.E.2d 916 (1976).

> [T]he designation that a party gives to an instrument, i.e., the title of a document or the caption of a provision, does not alter the meaning of the contents of the document—it does not control the interpretation or construction of the document, the legal effect of the document, or the relationship of the parties; and it does not determine the nature or

> character of the document. . . . Rather, the written instrument must be construed in its entirety—single provisions or sentences are not to be disassociated from others referring to the same subject matter.

(Citation omitted.) *Wayne J. Griffin Elec.*, 622 So. 2d at 317. The above propositions are consistent with Nebraska jurisprudence which provides that a contract is to be construed as a whole, and if possible, effect is to be given to every part of the contract. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). Therefore, in the instant case, we determine that the fact that the document is entitled "Personal Guarantee" is not controlling, but may be considered along with the rest of the language in the document.

Additionally, it appears that DiPrima signed the document in a manner suggesting that he was attempting to bind the corporation only: The signature lines suggest that DiPrima named M.B.D. Midwest as the entity executing the document with DiPrima signing on its behalf. We must determine the effect, if any, of the manner of his signature.

[12-14] In order to exempt an agent from liability upon an instrument executed by the agent within the scope of the agent's agency, the agent must not only name his or her principal, but must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If the agent expresses this, the principal is bound and the agent is not. *Lincoln Equipment Co. v. Eveland*, 173 Neb. 174, 112 N.W.2d 755 (1962). An agent who contracts on behalf of a disclosed principal in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility is not liable to the other contracting party. *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992); *Micro/Mini Systems, Inc. v. Boyle*, 4 Neb. App. 841, 552 N.W.2d 302 (1996). It is the agent's duty to disclose his or her capacity as agent of a corporation, and the agent bears the burden of proof of showing that he or she was acting in his or her corporate, not individual, capacity. *Id.*

Regarding the effect of form of a signature by an agent, it is generally understood that in "the absence of a contrary manifes-

tation in the document, the following signatures and descriptions, among others, create an inference that the principal and not the agent is a party: The principal's name followed by the agent's name preceded by a preposition such as 'by' or 'per.' " Restatement (Second) of Agency § 156 at 372 (1958). See, also, 3 Am. Jur. 2d *Agency* § 171 (1986). Accordingly, the manner of DiPrima's signature creates an inference that he signed the document on behalf of the corporation and not in his individual capacity.

Construing the document in its entirety, we conclude as a matter of law that it is inconsistent and, therefore, ambiguous. The title on the document is inconsistent with the manner in which DiPrima signed the document. The title of the document suggests it is a guaranty by DiPrima individually. The manner in which it is signed suggests it is a guaranty of M.B.D. Midwest. Such an inconsistency creates an ambiguity which permits the admission of parol evidence to explain the true intent of the parties. Therefore, we conclude that the district court properly admitted and used the parol evidence.

2. Effect of Guaranty

Next, DiPrima assigns that the district court erred in concluding that the guaranty was a personal guaranty binding DiPrima in his individual capacity. The court stated:

> While it is clear that [DiPrima] was attempting to limit his personal liability he has not contradicted the evidence regarding the requirement by the lessor of a personal guarantee [sic] except in his deposition and, therefore, despite identifying himself as signing on behalf of the corporation the Court finds that the intent of the parties was for the guaranty to be personal. To find otherwise would defeat the purpose of the execution and delivery of the guaranty document.

[15,16] If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). See, also, *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994). In a bench trial of a law action, a

trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999); *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

Based upon our review of the record, the parol evidence shows as follows: Scott, the listing agent for Miracle Hills Partnership, testified that when the managing partner of Miracle Hills Partnership requested a "personal guaranty," DiPrima did not have a problem with that. In DiPrima's deposition, DiPrima denied that he had signed the guaranty personally. In recapping his discussion with the listing agency, DiPrima stated:

> At the beginning, I told Mr. Scott that none of these leases that I was negotiating had personal guarantees. He [later] indicated we had to have a guarantee. And I told him I didn't want to do a guarantee. He said, "Well, what if we guarantee it for a period of time," and I said, "Well, what period of time." And he said, "Six months," and I said "Okay."

Based upon our review of the record, we conclude that the district court was not clearly wrong in finding that it was the intention of the parties that the guaranty be a personal guaranty. We note that such a conclusion is consistent with the parol evidence and provides a reasonable interpretation of the guaranty. To conclude that the guaranty was that of the corporation would render its effect fairly meaningless, because the corporation was already liable based on its lease agreement. See, *Home Federal Sav. & Loan Ass'n v. Ramos*, 229 Cal. App. 3d 1609, 284 Cal. Rptr. 1 (1991); *McKesson Chemical Co. v. Tideland Chemical*, 471 So. 2d 812 (La. App. 1985) (concluding that guaranty of corporation's debt was that of agent and not that of corporation because guaranty should not be interpreted in way that would render its effect worthless or nullity).

3. Release of Guaranty

DiPrima also assigns that the district court erred in failing to find that a later guaranty executed by Dunn released DiPrima of any liability under his guaranty. We note that this subsequent guaranty is not in the record before us. As a result, we cannot know the terms of such guaranty.

[17,18] Generally, the fact that a creditor may take additional security to insure payment of a principal obligation does not release or discharge the guarantor. 38 Am. Jur. 2d *Guaranty* § 87 (1999); 38A C.J.S. *Guaranty* § 95 (1996). When the additional security taken by the creditor is a new guaranty, the prior guaranty is not extinguished by the execution of the subsequent guaranty "unless the subsequent guaranty was executed as a substitute for the earlier one." 38 Am. Jur. 2d, *supra*, § 87 at 948. See, also, 38A C.J.S., *supra*.

We cannot conclude on the evidence presented that the Dunn guaranty was executed as a substitute for DiPrima's guaranty. DiPrima's guaranty does not provide that DiPrima is released or discharged of liability if another guaranty is executed to secure M.B.D. Midwest's rental payments. According to the evidence, the later guaranty was obtained because "DiPrima left the company and someone else took his place." Such evidence is insufficient to support a conclusion that the later guaranty was a substitute for DiPrima's guaranty and that the later guaranty was intended to release DiPrima of his liability under his guaranty. Therefore, we conclude that the district court did not err in concluding that the later guaranty did not release DiPrima of his obligation under his guaranty.

4. Amount of Liability

Finally, DiPrima assigns that the district court erred in finding that he was liable for the payment of 6 months' rent and in failing to fix his liability at $4,056. DiPrima argues that based on the language of the guaranty, he was only guarantying the payment of rent by M.B.D. Midwest for the 6 months following the execution of the guaranty, that the total amount of rent paid in that 6-month period was $4,056, and that therefore, $4,056 was the maximum amount of his liability.

[19] It is axiomatic that the words of a contract must be given their plain and ordinary meaning. *Snowden Farms v. Jones*, 8 Neb. App. 445, 595 N.W.2d 270 (1999). The guaranty provides that DiPrima guarantees the payment of the rent by M.B.D. Midwest and that his "liability shall not exceed an amount equal to the sum of the following six months [sic] total rents." DiPrima's above interpretation of the guaranty is strained at

best. The plain and ordinary meaning of the above language limits DiPrima's liability to the amount of the 6 months' rent due following any default by M.B.D. Midwest. Therefore, we conclude that the district court properly found DiPrima liable for 6 months' rent.

V. CONCLUSION

In conclusion, the guaranty executed by DiPrima was ambiguous as a matter of law. Therefore, the district court did not err in admitting parol evidence to determine the intention of the parties. The district court was not clearly wrong in finding that it was the intent of the parties that the guaranty was a personal guaranty of DiPrima rather than a guaranty of the corporation. The district court also did not err in concluding that the later guaranty did not release DiPrima of liability under his guaranty. We further conclude that DiPrima's liability under the guaranty was not limited to $4,056. For these reasons, we affirm.

AFFIRMED.

IN RE INTEREST OF TANISHA P. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. BETTY T., APPELLEE.

611 N.W.2d 418

Filed June 6, 2000. No. A-99-959.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Appeal and Error.** It is well established in Nebraska jurisprudence that Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1998) provide the exclusive means of review for juvenile court dispositional orders within the ambit of the expedited appeal process defined within those statutes.
4. ___: ___. To determine if a matter falls within the expedited juvenile panel process, a two-part analysis applies. First, the contested dispositional order must implement a

different plan for the juvenile from the plan proposed by the Department of Health and Human Services. Second, the appealing party must have a belief that the court-ordered plan is not in the best interests of the juvenile.

5. **Juvenile Courts: Final Orders: Appeal and Error.** An order changing the placement of a juvenile who has been adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) affects a substantial right of the State and is a final and appealable order.
6. ___: ___: ___. Dispositional orders in juvenile proceedings are final and appealable orders.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Joe Stecher, Dodge County Attorney, and Eric S. Miller for appellant.

Timothy M. Schulz, guardian ad litem for Tanisha P.

Bradley D. Holtorf, guardian ad litem for Timothy M. & Travis M.

IRWIN, Chief Judge, and MOORE, Judge.

MOORE, Judge.

The State appeals from the decision of the Dodge County Court, sitting as a juvenile court, approving the return of a minor child, Tanisha P., to the home of her grandmother and legal guardian, Betty T. The court had previously adjudicated Tanisha and her brothers, Timothy M. and Travis M., to be within the court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) based on, inter alia, the boys' admission to sexual abuse of Tanisha. For the reasons recited below, we affirm the decision of the juvenile court.

BACKGROUND

On September 11, 1998, the State filed a petition in the juvenile court in which it was alleged that Tanisha, born April 3, 1988; Timothy, born December 26, 1985; and Travis, born December 18, 1984, were juveniles as defined in § 43-247(3)(a). As summarized, the petition alleged that Tanisha had disclosed to a doctor that Timothy and Travis had been having sexual contact with her and that when Betty was informed about Tanisha's disclosure, Betty accused Tanisha of lying. The petition further

alleged that the boys admitted to having and attempting sexual intercourse with Tanisha. The petition stated that Tanisha had been placed in protective custody. Following a hearing on September 23, 1998, the court ordered that Tanisha would remain committed and placed with the Department of Health and Human Services (DHHS), with visitation according to a plan outlined by DHHS. The boys remained in Betty's home.

Following a hearing on February 24, 1999, all three juveniles were adjudicated under § 43-247(3)(a). In its order filed March 26, the court found that the evidence showed that Tanisha had been sexually abused. However, the court noted that the boys had withdrawn their previous admissions to abusing Tanisha and that Betty believed Tanisha had been sexually abused by someone other than the boys or Betty's boyfriend. The court found that reasonable efforts had been made to prevent Tanisha's placement outside of Betty's home, that it would be contrary to Tanisha's welfare to be in Betty's home, and that reasonable efforts were being made to make it possible for Tanisha to have a stable home. The court ordered that DHHS would submit a "Case Plan and Court Report" (case plan) to the court, that temporary custody of the juveniles would remain with DHHS, and that DHHS should give the court 7 days' notice of any change in placement.

On May 19, 1999, a hearing was held, after which the court reiterated much of its earlier orders but, in addition, adopted DHHS' case plan. The court continued Tanisha's placement in a foster home and the boys' placement with Betty. Pursuant to the case plan, the court ordered that all three juveniles receive all necessary mental, physical, and health care services, and that Betty remain involved in all such services as recommended by the involved professionals.

DHHS wrote a letter to the court on August 5, 1999, in which the progress made by the juveniles and Betty was summarized. The letter stated that Tanisha's therapist, Gloria Gehrt, reported that Tanisha had made "a lot of progress" in her therapy; that there had been sessions between Tanisha and Betty and that Betty now recognizes Tanisha's needs; that Betty had a "safety plan" in place that would provide protection for Tanisha at all times; and that Gehrt recommended that Tanisha be returned to

Betty's home before school started. The letter also stated that the boys had addressed issues of sexual abuse in therapy, inappropriate boundaries between them and Tanisha, and the rules to be in place when Tanisha returned to Betty's home. The boys' therapist, Gene Welch, also recommended that Tanisha be returned to the home before the start of school. Both therapists, along with Betty and the three juveniles, participated in two therapeutic family sessions during which Tanisha appeared excited about seeing her brothers again and at the prospect of returning to the home.

In DHHS' letter, DHHS explained its plans to implement semisupervised visits between Tanisha and her brothers and Betty. In addition, Betty's safety plan was described, including her constant supervision of Tanisha and the rules against Tanisha and the boys being in each others' rooms or in the basement together. DHHS recommended that Tanisha be placed with Betty.

The State filed an "Objection to Change in Placement" on August 11, 1999. The objection stated that the change in placement was against Tanisha's best interests. The record indicates that Tanisha was returned to Betty's home on August 12, at a time when the boys were vacationing with their biological father. Apparently, Tanisha was returned to the home before DHHS received notification of the objection to the placement and the related hearing scheduled for the following week. It also appears that Tanisha has since remained in the home.

At the August 18, 1999, hearing, evidence was presented from licensed clinical social workers and a psychologist. Mary Goodwin, a protection and safety worker with DHHS, testified that she had been the family's caseworker since June. Goodwin testified that she had met with Gehrt, Welch, and the family, at which time a plan was developed to return Tanisha to the home. Goodwin stated it was felt that Tanisha's return was appropriate, because Tanisha had made progress in her therapy, the boys had addressed issues that led to an assessment that Tanisha would be safe in the home, and Betty had developed rules for her home for Tanisha's safety. Goodwin acknowledged that the issue of the boys' sexual abuse of Tanisha was not addressed during the family therapeutic sessions and that

the boys had not apologized to Tanisha because they continued to maintain that they did nothing inappropriate. Although Goodwin conceded that the juvenile court had previously found that the boys did something inappropriate, she believed that Tanisha could safely be returned to Betty's home in reliance on Betty's constant supervision of the children. Goodwin noted that a family support worker would visit the home twice weekly. Goodwin voiced confidence in Betty's ability to protect Tanisha, because it was Betty who took the initiative in obtaining therapy for the juveniles when she noticed sexual acting out among them and because Betty had since fully cooperated with DHHS.

Also in evidence was an August 9, 1999, letter from Gehrt to Goodwin. In it, Gehrt stated that Tanisha had made "good progress" in therapy and had some supervised contact with her brothers. Gehrt stated that Betty had apologized to Tanisha for not believing her story. Gehrt found that Betty was very motivated to do what was necessary to have Tanisha return home. Gehrt recommended that Tanisha be allowed to return home and that all family members continue in counseling.

Welch, a clinical social worker, testified that he had worked with the boys regarding boundary issues, sexuality, and appropriate and inappropriate touching. Welch confirmed that neither boy would now admit to inappropriate contact with Tanisha. Welch testified that he did not believe that the boys had sexual contact with Tanisha, at least not to the point of sexual intercourse. Welch noted that Travis is mentally retarded and that Timothy is of slightly below average intelligence. Welch did not believe that either boy was capable of being deceitful. Welch believed that both boys had been frightened into making their earlier admissions to police.

Welch denied that accused sexual perpetrators must first admit to their acts before they could be successfully treated. He further testified that there was no risk in Tanisha's return to the home even without those issues being addressed.

Dr. Terry Davis, a psychiatrist, testified that he had extensive experience in evaluating sexual offenders, including adolescents. Davis looked at the police reports in this case, as well as

statements from the boys and written evaluations made of the boys. However, Davis did not personally evaluate the boys.

Davis testified generally that in the treatment of an accused sexual perpetrator, it is best if that person acknowledges the existence of a problem. Davis questioned how Welch could treat the boys if Welch does not believe that any offenses occurred and the boys refuse to acknowledge a problem.

The juvenile court found that family members had each gone through extensive treatment and training to address issues such as respect and boundaries and appropriate sexuality. The court noted that the caseworker, the guardian ad litem, and Betty's attorney all believe it is safe for Tanisha to return home. The court accepted the recommendation of DHHS that Tanisha return to the home and ordered that a carefully detailed safety plan be crafted to ensure the safety of the juveniles, that there be ongoing therapy and treatment, and that the necessary resources be provided to Betty to ensure the safety of the juveniles. The court further ordered that the safety plan ensure very close monitoring and that the professionals providing services shall provide all necessary resources for the juveniles while recognizing that all three juveniles have been abused and sexualized and require a high level of supervision.

The county attorney has appealed from the juvenile court's order.

ASSIGNMENT OF ERROR

The county attorney asserts that the juvenile court erred in placing Tanisha back into Betty's home, when the evidence presented at the dispositional hearing held on August 18, 1999, showed that reasonable efforts had not been made to ensure Tanisha's safe return.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

ANALYSIS

Jurisdiction.

[2] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999).

In Tanisha's brief prepared by her guardian ad litem, Tanisha directs us to Neb. Rev. Stat. § 43-285(3) (Reissue 1998), which governs appeals from a change in the placement of a juvenile from what the court originally considered to be a suitable family home or institution to some other custodial situation. Section 43-285(3) states, in part, that "[t]he department or any other party may request a review of the change in placement by a juvenile review panel in the manner set out in section 43-287.04." Tanisha argues that the appeal is untimely because the county attorney failed to first request review by the juvenile review panel. We disagree.

[3,4] Although the language of § 43-285(3) appears to authorize an expedited review in any case, its reach is limited by the requirements set forth in Neb. Rev. Stat. §§ 43-287.01 and 43-287.03 (Reissue 1998). *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). It is well established in Nebraska jurisprudence that Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1998) provide the exclusive means of review for juvenile court dispositional orders within the ambit of the expedited appeal process defined within those statutes. *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998). To determine if a matter falls within the expedited juvenile panel process, a two-part analysis applies. First, the contested dispositional order must implement a different plan for the juvenile from the plan proposed by DHHS. Second, the appealing party must have a belief that the court-ordered plan is not in the best interests of the juvenile. *Id.* In the present case, the court's order changing Tanisha's placement did not differ from the plan proposed by DHHS. Thus, a review by the juvenile review panel was not available to DHHS or the parties.

[5] It is also argued that the court's order is not a final, appealable order as to the State because no substantial right of

the State has been affected. We are directed to *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998), in which the Nebraska Supreme Court held that an order denying continued detention of a juvenile prior to adjudication did not affect a substantial right of the State and was therefore not an appealable order. The situation in the present case, however, differs substantially from that in *In re Interest of Anthony G.*, because the preadjudication status of the juvenile in *In re Interest of Anthony G.* resulted in a finding that the State's parens patriae interest did not encompass custody of a juvenile.

In contrast, Tanisha has already been adjudicated as a juvenile as defined in § 43-247(3)(a). The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). The order in the present case, entered subsequent to Tanisha's adjudication and her placement in State-sponsored foster care, affected an existing right of the State.

[6] The present appeal by the county attorney was timely filed from a dispositional order of the juvenile court changing Tanisha's placement from foster care to Betty's home. Dispositional orders in juvenile proceedings are final and appealable orders. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Thus, we conclude that we have jurisdiction to hear this appeal.

Change in Placement.

The county attorney's argument that the juvenile court erred in returning Tanisha to Betty's home can be fairly summarized as follows: (1) The juvenile court had determined that sexual contact had occurred between Tanisha and her brothers; (2) following that determination, the boys' treatment consisted of therapy with Welch, despite Welch's stated belief that the abuse did not occur; (3) no effective treatment of the boys can have taken place when Welch and the boys all deny the abuse; and (4) Tanisha is therefore being sent back into the same home with her abusers even though nothing has been done to resolve the underlying issues that precipitated the court's involvement with this family.

In Tanisha's brief, Tanisha argues that except for Davis, who never met with the family, the witnesses at the hearing were unanimous in their belief that with Betty's vigilance, together with the ongoing therapy and monitoring by DHHS, Tanisha could safely return home and that her return to the home was in her best interests.

After reviewing the record in this case, we are persuaded that the juvenile court did not err in allowing Tanisha to return home. It was Betty who initiated contact with therapists upon observing inappropriate behavior among the juveniles. The therapists and DHHS have consistently been in agreement that Betty has been cooperative with them and has made every effort to ensure Tanisha's safe return to her home. Betty has worked with DHHS to institute a safety plan whereby Tanisha will never be left unsupervised with her brothers. In addition, a caseworker will be visiting the family twice weekly.

We are further persuaded by the unanimity in the opinions of all those who have worked closely with this family. All are in agreement that Tanisha should be returned to Betty's home. The lone dissenting voice at the hearing was that of a psychiatrist who had never met with or examined any of the family members. Based on our de novo review, we cannot say that the juvenile court erred in returning Tanisha to Betty's home.

CONCLUSION

The juvenile court's order returning Tanisha to Betty's home was a final, appealable order. The court did not err in making that order. Accordingly, the juvenile court's order is affirmed.

AFFIRMED.

SIEVERS, Judge, participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. KESS, APPELLANT.

613 N.W.2d 20

Filed June 13, 2000. Nos. A-99-1064, A-99-1065.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
3. **Legislature: Statutes: Intent: Appeal and Error.** Absent evidence of legislative intent to modify existing statutes or ordinances, an appellate court ordinarily does not assume the existence of such intent.
4. **Legislature: Statutes: Presumptions: Appeal and Error.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the appellate courts construing and applying it.
5. **Legislature: Statutes: Intent: Appeal and Error.** It is not for an appellate court to judicially infer legislative amendatory intent where none is manifest in the legislative history.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Paul E. Cooney for appellant.

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

SIEVERS, INBODY, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Richard L. Kess appeals from two separate orders of the Lancaster County District Court, finding Kess guilty of second-offense driving under the influence (DUI) and fourth-offense DUI. For the reasons set forth below, we affirm.

BACKGROUND

The instant case arises out of Kess' fourth and fifth DUI offenses. The State originally charged Kess with fourth-offense

DUI, a Class IV felony, arising out of an incident on May 16, 1998. The State charged Kess with fourth-offense DUI a second time, arising out of a subsequent incident on September 14, 1998. Pursuant to a plea agreement, the State amended Kess' September 14 fourth-offense DUI charge to second-offense DUI, a Class W misdemeanor. The State agreed not to file any additional charges in either matter and to remain silent at sentencing. In exchange, on May 17, 1999, Kess entered no contest pleas to both charges. The State gave a factual basis for each charge, which will not be repeated here, and the court accepted Kess' pleas. On July 20, the court sentenced Kess to serve "not less than 20 months nor more than 5 years" in prison for fourth-offense DUI and "not less than 90 days nor more than 90 days" in prison and a $500 fine for second-offense DUI. The court ordered that Kess was to serve his sentences consecutively. Kess separately appealed his sentences, which have been consolidated on appeal.

ASSIGNMENTS OF ERROR

Kess argues that the district court erred in (1) imposing excessive sentences upon him for both second- and fourth-offense DUI and (2) sentencing him to not less than 90 days' nor more than 90 days' imprisonment for second-offense DUI.

ANALYSIS

Excessive Sentences.

Kess argues that the sentences that the district court imposed for both his DUI convictions were excessive. The court sentenced Kess to serve not less than 20 months nor more than 5 years in prison for fourth-offense DUI, a Class IV felony. Under Neb. Rev. Stat. § 28-105 (Supp. 1997), a Class IV felony is punishable by a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both, with a minimum sentence of 6 months' imprisonment. The district court sentenced Kess to serve not less than 90 days nor more than 90 days in prison for second-offense DUI, a Class W misdemeanor, and ordered Kess to pay a $500 fine. Under Neb. Rev. Stat. § 28-106 (Cum. Supp. 1998), a Class W misdemeanor, second offense, is punishable by a maximum of 90 days' imprisonment and a $500 fine and a mandatory minimum of 30 days' imprisonment and a $500 fine.

The presentence investigation shows that Kess has a lengthy criminal record, including convictions for disturbing the peace, trespassing, carrying a concealed weapon, possession of marijuana, possession of drug paraphernalia, resisting arrest, and theft.

[1,2] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *Id.*

Clearly, given Kess' record and the fact that Kess' sentences were within the statutory limits, neither of Kess' sentences are excessive. We conclude that the district court did not abuse its discretion in sentencing Kess within the statutory limits.

Definite Term of Imprisonment.

Kess argues that the district court erred in sentencing him to not less than 90 days' nor more than 90 days' imprisonment for second-offense DUI. Kess bases his argument on Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1998), which states in relevant part:

> (1) Except when a term of life is required by law, in imposing an indeterminate sentence upon an offender the court shall:
>
> . . . .
>
> (B) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.

Specifically, Kess argues that because the sentence imposed in the second-offense DUI effectively constitutes a definite term of imprisonment of 90 days, his minimum sentence should be 30, not 90, days' imprisonment, changing his sentence to not less than 30 days' nor more than 90 days' imprisonment. As noted above, the minimum term of imprisonment for a Class W misdemeanor is 30 days.

Initially, we note that Kess' sentence for second-offense DUI was an indeterminate sentence and not a determinate sentence

for the purposes of § 29-2204. In *State v. Urbano*, 256 Neb. 194, 199, 589 N.W.2d 144, 150 (1999), the court sentenced Urbano to "'not less than 5 years nor more than 5 years.'" The Nebraska Supreme Court agreed with Urbano's assertion that in "expressly articulating a minimum and maximum term of imprisonment, the trial court sentenced him to an indeterminate sentence." *Id.* at 213, 589 N.W.2d at 157-58.

Therefore, after concluding that Kess' sentence for a Class W misdemeanor was indeterminate, we must determine whether the trial court's imposition of this sentence was appropriate under § 29-2204. This court addressed the question of whether a trial court can impose an indeterminate sentence for a misdemeanor in *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998). In *State v. Alford*, Alford pled no contest to two counts of misdemeanor sexual assault and guilty to one count of misdemeanor assault and was sentenced to concurrent sentences of 3 to 8 months in the county jail. Alford appealed, arguing in part that the district court was without authority to sentence him to indeterminate sentences in county jail. The State argued that § 29-2204 (Reissue 1995) expressly authorized Alford's sentences. Section 29-2204 (Reissue 1995) provides in pertinent part:

> (1) Except when a term of life is required by law, in imposing an indeterminate sentence upon an offender the court shall:
>
> (a) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum.

In *State v. Alford*, we held that even though § 29-2204 (Reissue 1995) contains no express prohibition against sentencing a misdemeanant to an indeterminate sentence in county jail, Nebraska generally affords different treatment to inmates confined in city and county facilities from that afforded to those confined to state facilities under the Department of Correctional Services. We concluded that because of this disparate treatment, § 29-2204 (Reissue 1995) does not authorize the imposition of an indeterminate sentence to a facility outside the jurisdiction of

the Department of Correctional Services. Therefore, we implicitly held that § 29-2204 (Reissue 1995) authorizes the imposition of an indeterminate sentence for a misdemeanor if the court sentenced the defendant within the jurisdiction of the Department of Correctional Services.

In the instant case, in regard to Kess' second-offense DUI, the court sentenced Kess "to an institution under the jurisdiction of the Nebraska Department of Correctional Services, for a period of not less than 90 days nor more than 90 days," in addition to ordering Kess to pay the costs of prosecution and a fine of $500. Therefore, the district court imposed an indeterminate sentence on Kess for a Class W misdemeanor and sentenced Kess to serve his time under the jurisdiction of the Department of Correctional Services. We conclude that the indeterminate sentence imposed on Kess by the district court for a Class W misdemeanor was proper under *State v. Alford* and the current version of § 29-2204 (Cum. Supp. 1998).

The current version of § 29-2204 regarding indeterminate sentences states in part:

> (1) Except when a term of life is required by law, in imposing an indeterminate sentence upon an offender the court shall:
>
> (a)(i) Until July 1, 1998, fix the minimum and maximum limits of the sentence to be served within the limits provided by law, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum; and
>
> (ii) Beginning July 1, 1998:
>
> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall 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[.]

[3-5] As set out above, beginning July 1, 1998, § 29-2204(1)(a)(ii)(A) states that in imposing an indeterminate sentence, the court shall "[f]ix the minimum and maximum limits of the sentence to be served within the limits provided by law for *any class of felony other than a Class IV felony*." (Emphasis supplied.) This is in contrast to the law set out in § 29-2204(1)(a)(i), which states that until July 1, 1998, the court shall "fix the minimum and maximum limits of the sentence to be served within the limits provided by law," without any specific mention of felonies or misdemeanors. Yet, the 1998 amendment to § 29-2204 did not appear to change the previous law that an indeterminate sentence may be imposed for a misdemeanor if a court sentences an offender to serve time under the jurisdiction of the Department of Correctional Services. Section 29-2204(1)(a)(ii)(A) does not state that an indeterminate sentence may no longer be imposed for a misdemeanor. Absent evidence of legislative intent to modify existing statutes or ordinances, an appellate court ordinarily does not assume the existence of such intent. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the appellate courts construing and applying it. *Id.* The legislative history surrounding the 1998 amendment to § 29-2204 does not contain any evidence of the Legislature's intent to modify preexisting law in regard to indeterminate sentencing and misdemeanors. The Nebraska Supreme Court has stated that it is not for an appellate court to judicially infer legislative amendatory intent where none is manifest in the legislative history. See *State v. Urbano, supra.* We therefore conclude that the 1998 amendment to § 29-2204 is limited to felonies as set forth above and that the courts continue to have the authority to impose an indeterminate sentence for a misdemeanor as long as the offender is required to serve his or her time under the jurisdiction of the Department of Correctional Services.

CONCLUSION

Therefore, the district court did not err in sentencing Kess to serve not less than 20 months nor more than 5 years in prison for fourth-offense DUI and in sentencing Kess to not less than 90 days nor more than 90 days in prison and a $500 fine for second-offense DUI, these sentences to be served consecutively.

AFFIRMED.

THOMAS LAKES OWNERS ASSOCIATION, APPELLANT AND CROSS-APPELLEE, V. MARY ANN GETCHELL RILEY ET AL., APPELLEES AND CROSS-APPELLANTS.

612 N.W.2d 529

Filed June 20, 2000. Nos. A-99-401 through A-99-411, A-99-413 through A-99-415.

1. **Judgments: Appeal and Error.** A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
2. **Courts: Appeal and Error.** When a district court as an appellate court reviews a judgment in a bench trial of a law action in a county court, it does not reweigh evidence, but considers the judgment in the light most favorable to the successful party, who is entitled to every reasonable inference deducible from the evidence. The appellate court views the county court judgment in the same way if there is a further appeal.
3. ___: ___. When a district court reverses a county court's judgment and enters findings, a higher appellate court still reviews the county court's judgment for errors appearing on the record.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the court views the evidence in the light most favorable to the party against whom the summary judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
6. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
7. ___. Collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.
8. ___. Offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely switching adversaries.

9. ___. The criteria common to both offensive and defensive use of collateral estoppel is that the party against whom estoppel is asserted has litigated and lost in an earlier action.
10. ___. The only requirement, as to the status of parties regarding collateral estoppel, is that the party against whom the rule is applied was a party or in privity with a party to the prior action.
11. **Due Process: Collateral Estoppel.** 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 in privity with a party to the prior litigation.
12. **Collateral Estoppel: Parties: Words and Phrases.** Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. 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.
13. **Collateral Estoppel: Parties.** The mere fact that litigants in different cases are interested in 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.
14. **Usury: Contracts: Interest.** A usurious contract is not void, but, rather, recovery is limited to the amount of principal without interest, less interest paid.
15. **Usury: Proof: Interest.** Where the defense of usury is established, the plaintiff is not entitled to interest on the judgment awarded.

Appeal from the District Court for Saunders County, ALAN G. GLESS, Judge, on appeal thereto from the County Court for Saunders County, MARY C. GILBRIDE, Judge. Judgment of District Court affirmed as modified.

Loren L. Lindahl and Becky J.W. Dias, of Edstrom, Bromm, Lindahl, Sohl & Skokan, for appellant.

Jeanelle R. Robson and Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This appeal arises from a series of collection actions brought in Saunders County Court. The Thomas Lakes Owners Association (Association) sued the owners (Owners) of various cabins and lots at the Thomas Lakes subdivision for unpaid assessments for dredging the lake and road repairs after a flood, and in some cases, unpaid annual maintenance assessments and

dues. The Association also sought prejudgment interest and attorney fees.

The Owners, who are all Association members, answered and counterclaimed, alleging (1) that the Association's bylaws had not been validly adopted, (2) that the Association's right to make assessments was limited by easements granted to the Owners by the Association's predecessors in title and by their course of dealing, and (3) that the interest charged was in violation of the usury statutes. The county court found that the Owners were collaterally estopped from litigating the adoption of the bylaws; that the Association was entitled, as a matter of law, to recover the assessments as per the formula found in the bylaws; and that the Association was entitled to recover prejudgment interest. The Owners appealed to the district court for Saunders County which reversed, and remanded for further proceedings after finding that the county court's ruling on collateral estoppel was in error.

BACKGROUND

The Thomas Lakes subdivision, located in Saunders County, comprises approximately 125 lots, some owned by individuals and some leased by cabin owners. The subdivision includes lakes, roads, and other "common areas" accessible to lot owners and tenants. These common areas were owned by the late Melvin Thomas (Thomas), who retained approximately 75 lots for rent to third parties, selling the balance to various purchasers. Thomas and the lessees of a particular lot entered into lease agreements, which stated that the lessee would abide by the rules, regulations, and bylaws of the Thomas Lakes Association, a predecessor of the Association.

Thomas offered to sell lots to the various cabin owners in 1981, and he filed restrictive covenants against the lots at Thomas Lakes subdivision on February 8, 1982, prior to sale. The restrictive covenants, among other things, required each lot owner to become a member of the Thomas Lakes Cabin Owners Association (cabin owners association), another predecessor of the Association, and gave the cabin owners association authority to assess lot and cabin owners for their respective shares for street and common area maintenance and similar services. The

covenants provided for the cabin owners association to promulgate other consistent rules and regulations.

Ownership interest in the common areas at the Thomas Lakes subdivision arose through easements granted in 1983, 1984, and 1985 by Thomas, directly to the individual owner in some cases (Owned Lots Easements), and in others to the current owner's predecessor in title (Farmers Bank Easement). The obligation to maintain the road and lake area described in the easements was assumed by the cabin owners association. The easements also stated that the nature and extent of any repairs or replacements of the road and lake rested in the sole discretion of the cabin owners association. The Farmers Bank Easement contains an allocation formula for assessments relating to natural disasters such as floods. Paragraph 5 of the Owned Lots Easements discusses maintenance fees, but contains no specific requirement that the grantee pay special assessments such as the road repair and dredging assessments. All easements require the payment of an annual maintenance fee to the cabin owners association.

Up until 1995, neither the cabin owners association nor the Thomas Lakes Association had governing bylaws. The cabin owners association was an unincorporated association of lot owners created by the terms of the restrictive covenants. The Thomas Lakes Association was an association of tenants created in the lot lease agreements. Following a trial in 1993 in the district court for Saunders County (Thomas case), the court enjoined the cabin owners association from a number of things, including assessing tenants and homeowners and performing any acts related to the Thomas Lakes subdivision. The district court retained jurisdiction to implement bylaws for the Thomas Lakes Association, which were enacted on May 13, 1995, by the present unincorporated Association. The district court terminated its jurisdiction on November 16, 1995. The bylaws, created under the district court's supervision, contain an allocation formula for assessments relating to natural disasters different from that found in the Farmers Bank Easement.

In the present case, the Association filed a motion to strike the Owners' counterclaim on the basis of collateral estoppel or issue preclusion, alleging that the counterclaim was barred by a ruling in a 1996 Saunders County Court case brought by Edward

Haffke, a tenant at Thomas Lakes subdivision, who raised the issue of the bylaws' validity (Haffke case). The 1996 county court determined that the Association's bylaws were valid.

In the present case, the county court ruled on the Association's motion to strike at a hearing on October 21, 1997, holding that issue preclusion could be used to prevent the Owners from relitigating the bylaws' validity. The county court based this ruling on its finding in the Haffke case that the bylaws were validly adopted. In its journal entry dated December 9, 1997, the county court treated the motion to strike as a motion for summary judgment, holding that the Owners were collaterally estopped from raising the validity of the bylaws' adoption in the current cases. The Association filed several more collection cases following this order, which were consolidated for trial.

Subsequently, the Association and the Owners both filed motions for partial summary judgment on the issue of whether the Association's right to make assessments for road repairs and dredging was limited by the easements granted to the Owners by the Association's predecessors in title. On August 17, 1998, the county court sustained the Association's motion and denied the Owner's motion for partial summary judgment, concluding that the assessment provisions contained in the bylaws superseded the easement provisions and governed the assessments at issue. Trial was held before the county court on August 17. At trial, the county court stated that its previous decision on collateral estoppel was applicable to all of the consolidated cases. The county court found in favor of the Association in its order of September 8, ruling that the assessments should be calculated according to the bylaws formula, rather than by the Association's prior course of dealing. The court reasoned that the bylaws were in effect on the date of the flood which precipitated the assessments, so the assessment formula in the bylaws should control. The county court also awarded prejudgment interest to the Association without specifying a date or specific interest rate in the ruling.

From these rulings, the Owners appealed to the Saunders County District Court. The district court reversed the county court's ruling on the collateral estoppel issue, finding that the validity of the bylaws could be relitigated. In its journal entry of

March 22, 1999, the district court reversed, and remanded for further proceedings. From the district court's decision, the Association appeals on the collateral estoppel issue. The Owners have filed a cross-appeal on the issues of whether the bylaws, the easements, or the Association's course of dealing control the assessment amount and whether prejudgment interest was properly awarded.

ASSIGNMENTS OF ERROR

The Association asserts that the district court erred in reversing the county court's ruling on the applicability of issue preclusion as a means to prevent the Owners from litigating the validity of the Association's governing bylaws.

In the Owners' cross-appeal, they assert that the county court erred in (1) granting the Association's motion for partial summary judgment, finding that the bylaws, not the easements, governed the Owners' obligation to pay for improvements; (2) failing to hold that the Association's course of dealing established that the Owners were only responsible for one-half of the costs of road repair and the dredging assessments; and (3) awarding prejudgment interest to the Association.

STANDARD OF REVIEW

Neb. Rev. Stat. § 25-2733(1) (Reissue 1995), regarding appellate review by the district court, provides in pertinent part that "the district court shall review the case for error appearing on the record made in the county court. The district court shall render a judgment which may affirm, affirm but modify, or reverse the judgment or final order of the county court." The district court may enter judgment in accordance with its "findings." § 25-2733(1).

[1,2] A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous. *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). When a district court as an appellate court reviews a judgment in a bench trial of a law action in a county court, it does not reweigh evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the success-

ful party, who is entitled to every reasonable inference deducible from the evidence. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). See, also, *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). The appellate court views the county court judgment in the same way if there is a further appeal. See *Dammann v. Litty, supra*. However, on questions of law, an appellate court is obligated to reach an independent determination from that of the lower court. *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999).

[3] When a district court reverses a county court's judgment and enters findings, a higher appellate court still reviews the county court's judgment for errors appearing on the record. See, *Nelson-Holst v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992) (Supreme Court could not find error by county court and thus district court's judgment in each case, which had reversed county court, was reversed by Supreme Court, with result that county court's judgment was reinstated); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989) (same).

[4] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998).

[5] In an appellate review of a summary judgment, the court views the evidence in the light most favorable to the party against whom the summary judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

DISCUSSION

Issue Preclusion.

The Association seeks to use collateral estoppel or issue preclusion to bar the Owners from relitigating the validity of the Association's bylaws. These bylaws were created pursuant to court order and supervision in the Thomas case. Subsequently, in the Haffke case, Haffke sued the Association for the return of his assessment payment, alleging that the bylaws were not validly adopted. The county court determined that the Association's bylaws were valid. In the present case, the Owners

challenged the validity of the bylaws in their counterclaim and argue that their assessments should be calculated by the more favorable formula found in the easements or by the parties' prior course of dealing.

[6] There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Stewart v. Hechtman*, 254 Neb. 992, 581 N.W.2d 416 (1998); *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997); *Torrison v. Overman, supra*; *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995). The third element of collateral estoppel, the identity of parties or privity, is the focus of our analysis.

The Association claims that it is using issue preclusion defensively to shield itself from having to litigate the bylaws, enacted under a court's supervision and found to be valid by another court, on a case-by-case basis. The Association relies on language from *JED Constr. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981), for its assertion that identity of parties or privity is not required in this case.

In *JED Constr. Co., Inc.*, the court quoted an Iowa case, stating, " 'Identity of parties is not necessary to give validity to a claim of issue preclusion. A stranger to a primary suit can assert the theory of issue preclusion as a defense in a subsequent suit provided other elements of the theory of issue preclusion coincide.' " 208 Neb. at 612, 305 N.W.2d at 3 (quoting *Schneberger v. United States Fidelity & Guar. Co.*, 213 N.W.2d 913 (Iowa 1973)). The Association argues that since it is in the position of a defendant to the Owners' counterclaim, using collateral estoppel in this instance promotes judicial economy and shields it from the possibility of having to relitigate the bylaws in 122 separate cases, which is the approximate number of lots in the Thomas Lakes subdivision.

In asserting that identity of parties is not necessary, the Association takes the above language from *JED Constr. Co., Inc.* out of context. The court in *JED Constr. Co., Inc.* also

stated, "'Collateral estoppel may be applied if . . . the party *against whom the rule is to be applied* was a party or in privity with a party to the prior action. . . .'" (Emphasis supplied.) 208 Neb. at 611, 305 N.W.2d at 3 (quoting *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979)). By stating that identity of parties is not necessary, the court in *JED Constr. Co., Inc.* merely illustrates that although the party to be bound by issue preclusion must have been a party or in privity with a party to the previous suit, the one asserting issue preclusion need not have been a party to the first suit.

[7,8] As to the Association's argument that it is using issue preclusion defensively in a manner that promotes judicial economy, the U.S. Supreme Court has noted: "Collateral estoppel . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). The Supreme Court also stated in *Parklane Hosiery Co.* that "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'" 439 U.S. at 329. Perhaps most revealing for the present case are the Court's following definitions of the offensive and defensive use of collateral estoppel:

> The . . . case involved defensive use of collateral estoppel—a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. The present case, by contrast, involves offensive use of collateral estoppel—a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff. *In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action.*

(Emphasis supplied.) *Id.*

[9] The Association's case does not fit a defensive use of collateral estoppel. Although the Association is in the position of having to defend against the Owners' counterclaim, the Owners

are not parties who have litigated and lost in an earlier action. Regardless of whether the Association is using collateral estoppel in an offensive or defensive manner, the Association's argument that identity of parties is not necessary in the present case ignores the criteria common to both offensive and defensive use, namely that the party against whom estoppel is asserted has litigated and lost in an earlier action.

[10] This principle is in accordance with Nebraska law which indicates, "As to the status of the parties regarding collateral estoppel, the only requirement is that 'the party against whom the rule is applied was a party or in privity with a party to the prior action.' " *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 903, 567 N.W.2d 178, 181 (1997) (quoting *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994)).

[11] Due process requires that the rule of collateral estoppel operates only against persons who have had their day in court either as a party to a prior suit or in privity with a party to the prior litigation. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). The Owners were not parties in the Haffke case, and Haffke is not a party to these proceedings. Unless there is a showing of privity between Haffke and any of the Owners, the doctrine of collateral estoppel is not applicable.

[12,13] Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. *Gottsch v. Bank of Stapleton, supra.* 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. *Id.* For the purpose of issue preclusion, the mere fact that litigants in different cases are interested in 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.*

We find no showing of privity between Haffke and the Owners. There is no evidence that he was a predecessor in title to, related to, or a representative of any of the Owners. Haffke had an opportunity to litigate the adoption of the Association's bylaws and lost his case. Clearly, Haffke, or anyone claiming through him, such as a grantee, is barred from relitigating this

issue. However, the Owners in the present case have not yet had that opportunity. Although the Owners are interested in the same question as Haffke (namely, were the Association's bylaws validly adopted?), this alone cannot serve as a basis for privity between the Owners and Haffke. The Owners are not in privity with Haffke and should not be denied their "day in court."

Accordingly, we hold that the district court was correct in finding that collateral estoppel did not apply in this case to prevent the Owners from relitigating the validity of the Association's bylaws. We affirm the district court's decision to reverse the county court's ruling and remand for further proceedings.

Method for Calculating Assessments.

In the district court's judgment on appeal, it did not address the Owners' first two assignments of error in their cross-appeal, namely the county court's rulings with respect to the use of the assessment formulas found in the easements and from the parties' course of dealing. The district court stated:

> Because I agree with appellants, and because the validity of appellee's by-laws forms an essential predicate to all of the county court's later decisions from which these appeals lie, I now vacate the county court's judgments in all of these cases and reverse and remand for further proceedings in county court.

Because all of the county court's subsequent orders were affected by its initial decision that collateral estoppel precluded litigating the validity of the bylaws, we agree that the matter should be remanded for further proceedings to determine the appropriate method for calculating the assessments.

Prejudgment Interest.

In the county court's order of September 8, 1998, it awarded prejudgment interest at a rate and from a date not specified in the judgment, merely stating that prejudgment interest was to run "from date of demand until paid, as specified in the bylaws." The Association's bylaws specify:

> Dues, charges, or special assessments shall become delinquent if not paid within thirty (30) days after the date of their assessment and constitute, until paid, a continuing

> charge against such lot or cabin owner. Delinquent dues shall accrue at one and one-half percent (1.5%) late charge per thirty (30) days as such dues, charges, or assessments remain unpaid.

The Owners contend that the interest rate provided for in the Association bylaws is a usurious rate and that the county court accordingly erred in awarding prejudgment interest. While the district court did not address the issue of prejudgment interest in its judgment on appeal, we will address the usury argument, as it is a legal issue. To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999).

At trial, the Association admitted to charging 1.5 percent per month, a rate equaling 18 percent per year, on the uncollected assessment amounts. Neb. Rev. Stat. § 45-101.03(1) (Reissue 1998) provides: "Except as provided in section 45-101.04, any rate of interest which may be agreed upon, not exceeding sixteen percent per annum on the unpaid principal balance, shall be valid[.]" The penalty for charging a higher interest rate is loss of the interest. Neb. Rev. Stat. § 45-105 (Reissue 1998) provides in part:

> If a greater rate of interest than is allowed in section 45-101.03 shall be contracted for or received or reserved, the contract shall not on that account be void, but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall recover only the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid.

[14] In response to the foregoing, the Association refers us to Neb. Rev. Stat. § 45-104 (Reissue 1998), which provides in part that "[u]nless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum." The Association argues in its brief that "if that portion of the bylaws is void as to the interest rate, then no agreement exists, and the court falls back to a twelve percent rate of interest by default." Brief for appellant on cross-appeal at 5. A usurious contract is not void, however, but,

rather, recovery is limited to the amount of principal without interest, less interest paid. *Baker v. A. C. Nelson Co.*, 185 Neb. 128, 174 N.W.2d 197 (1970).

[15] We find that the evidence presented at trial shows, as a matter of law, that the bylaws provided for usurious interest. Accordingly, § 45-105 is the controlling provision. In *Central Constr. Co. v. Blanchard*, 180 Neb. 62, 141 N.W.2d 416 (1966), the court states that where the defense of usury is established, the plaintiff is not entitled to interest on the judgment awarded. The court goes on to state that § 45-105 is a special statute governing usurious contracts, taking precedence over the general statute providing for interest on judgments in cases where usury is established.

In the event that the court on remand finds that the bylaws were validly adopted and control the determination of the assessments due, the Association should only recover the principal, without interest, and the Owners should recover costs, pursuant to § 45-105. We do not intend by this ruling to express any opinion regarding the bylaws' validity.

CONCLUSION

We affirm the district court's ruling reversing the summary judgment on the collateral estoppel issue and remanding the matter to the county court for trial on the validity of the bylaws and the proper method of calculating the assessments. We modify the district court's order to find as a matter of law that the interest provision in the bylaws, if found to be validly adopted, is usurious.

AFFIRMED AS MODIFIED.

GERALD R. KIRWAN, JR., AND LEONA KIRWAN, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. CHICAGO TITLE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

612 N.W.2d 515

Filed June 20, 2000. No. A-99-498.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Foreign Judgments: Jurisdiction: States.** A judgment of a state court which had jurisdiction is to be given full faith and credit.
3. **Constitutional Law: Foreign Judgments: States.** The U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state.
4. **Contracts: Parties: States.** The rights and duties of contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. The relevant principles a court should consider are the place of the contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicile or residence of the parties.
5. **Jurisdiction.** Procedural matters are dictated by the law of the forum.
6. **Summary Judgment: Jurisdiction: Appeal and Error.** The standard of review to apply in a trial court's summary judgment and whether a party is entitled to summary judgment is a matter of procedure controlled by the law of the forum.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Affirmed in part, and in part reversed and remanded.

David A. Domina and Nora M. Kane, of Domina Law, P.C., for appellants.

Richard J. Butler and Derrick J. Hahn, of Butler, Galter & O'Brien Law Firm, for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Gerald R. Kirwan, Jr., and Leona Kirwan (the Kirwans) brought this action against their title insurer, Chicago Title Insurance Company (Chicago Title), to recover attorney fees they incurred in successfully defending a suit involving the insured property, which is in South Dakota. Each party moved for summary judgment. The Holt County District Court granted

Chicago Title's motion for summary judgment, finding that the Kirwans learned of the adverse claim to their property after the title insurance commitment was issued but before the policy was issued and that because the Kirwans did not disclose the claim to Chicago Title as required, coverage was precluded.

BACKGROUND

This case arises from a suit filed in South Dakota in which David Vanderwerf (David) and his parents, Harry and Betty Vanderwerf, asserted an adverse claim against a South Dakota ranch which the Kirwans had purchased.

South Dakota Litigation.

In March 1991, Robert and Eva Matthews (the Matthewses) conveyed property to the Kirwan Ranch, a South Dakota partnership, and David as tenants in common, for the purchase price of $192,000. The general partners of the Kirwan Ranch were James T. Kirwan (James); his spouse, Shirley; and their sons James P. Kirwan and William P. Kirwan. The partners and David executed a mortgage to the Matthewses for $123,000. In addition, Harry, Betty, and David provided a total of $83,300. Harry and Betty requested that only David's name appear on the deed. David was obligated to pay his share of the mortgage to the Matthewses.

From 1993 to 1995, the partners experienced financial difficulties. In an attempt to alleviate this situation, James asked an attorney to prepare a quitclaim deed from David to the partners. On September 6, 1995, William, on behalf of the partners, asked David to execute the quitclaim deed. David was told that the deed was not going to be recorded, but would be used as security for a loan from a Yankton bank. (It was later learned that the Yankton bank had made no such request.) David was told that when the partners received the loan money, they would buy out David's interest in the land. David immediately signed the quitclaim deed, and without his knowledge, it was recorded that same day, on September 6, 1995.

The partners, without David's knowledge, entered into a contract to sell the property to the Kirwans (Gerald Kirwan is James' first cousin). The contract was executed, and the deed

was signed on December 12, 1995. The Kirwans' mortgage was ultimately through First Trust National Association (First Trust). Chicago Title issued a title commitment to the Kirwans, which became effective on April 1, 1996. A title insurance policy from Chicago Title, which became effective on May 16, 1996, was ultimately issued to the Kirwans. The deed to the Kirwans for the property was recorded on April 15, 1996. The Kirwans did not have any notice of the arrangement between David and the partners when the Kirwans entered into the agreement. David learned of the contract to sell the property to the Kirwans about 2 months after he signed the quitclaim deed.

On April 5, 1996, the Vanderwerfs' lawyer wrote a letter to Gerald Kirwan, stating David's claims to the property. It arrived on April 7 or 8, 1996, 1 week after closing and 4 months after the contract was recorded. In the letter, a lawsuit was threatened to enforce the Vanderwerfs' rights in the property. This was the first notice the Kirwans had of the Vanderwerfs' claim.

On May 16, 1996, the Vanderwerfs brought suit against the partners, the Kirwans, and First Trust, to set aside the transfer and void claims to the property by the Kirwans and First Trust. That lawsuit ultimately went to the South Dakota Supreme Court, which found that the Kirwans were bona fide purchasers for value without notice and that First Trust was a mortgagee in good faith and for value, thereby rejecting the Vanderwerfs' claims. See *Vanderwerf v. Kirwan*, 1998 S.D. 119, 586 N.W.2d 858 (1998).

Present Litigation Involving Chicago Title.

When suit was filed by the Vanderwerfs, the Kirwans immediately contacted Chicago Title for defense of the claim. Chicago Title began representing the Kirwans as well as their lender, First Trust, as a policy beneficiary. However, Chicago Title later withdrew its defense of the Kirwans. The Kirwans then hired their own legal counsel and successfully defended the Vanderwerfs' suit, including the appeal.

Chicago Title's position is that it had no duty to defend because the Kirwans learned of the adverse claim after the commitment was issued and before the policy was issued, but the Kirwans failed to inform Chicago Title of the claim, which

results in preclusion of coverage for the Vanderwerf litigation. The Kirwans' attorney received the title commitment issued by Chicago Title on or about April 15, 1996. The title commitment had an effective date of April 1, 1996, and it included "Conditions and Stipulations" as follows:

> If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment . . . and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge.

The Kirwans' title insurance policy from Chicago Title, which became effective on May 16, 1996, contains the following provision in the "Exclusions from Coverage" section:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . . .
>
> (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy[.]

The South Dakota Supreme Court's opinion stated that the Kirwans learned of the Vanderwerfs' claim on April 7 or 8, 1996, while the Kirwans' belief was that only after closing on April 9, 1996, did they learn of the Vanderwerfs' claim. Nonetheless, the Kirwans admit that neither they nor their attorney disclosed the Vanderwerfs' title claim to Chicago Title between April 9, 1996, and when the suit was filed 40 days later. Chicago Title learned of the claim on or about June 21, 1996, when the Kirwans' attorney forwarded a copy of the

Vanderwerfs' lawsuit to an agent of Chicago Title to tender defense of the action. As earlier stated, Chicago Title defended for a time, but withdrew, and the Kirwans completed the defense on their own—the basis for the recovery sought herein.

The Kirwans filed suit in the Holt County District Court against Chicago Title to recover their defense costs. Each side filed motions for summary judgment. The district court granted Chicago Title's motion for summary judgment and denied the Kirwans' motion. The district court found that the Kirwans did not have to reimburse Chicago Title for its expenses associated with defending the Kirwans' lender, First Trust. The court also awarded Chicago Title $3,664.38 for legal fees spent to defend the Kirwans before withdrawing its defense of the suit.

The Kirwans appeal the district court's entry of summary judgment in favor of Chicago Title, and Chicago Title cross-appeals the denial of an award for attorney fees it incurred in defending First Trust.

ASSIGNMENTS OF ERROR

The Kirwans assert, restated, that the district court erred in granting summary judgment in favor of Chicago Title and denying the Kirwans' motion for partial summary judgment. Chicago Title cross-appeals, asserting that the district court erred in failing to award Chicago Title attorney fees incurred in the defense of First Trust in the Vanderwerf litigation.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999). In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Knudsen v. Mutual of Omaha Ins. Co., supra.*

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 all 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 further proceedings as it deems just. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

[1] The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Shivvers v. American Family Ins. Co., supra*; *American Family Ins. Group v. Hemenway, supra*; *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997).

ANALYSIS

Full Faith and Credit to South Dakota Decision.

[2,3] The decision of the South Dakota Supreme Court in *Vanderwerf v. Kirwan*, 1998 S.D. 119, 586 N.W.2d 858 (1998), is entitled to full faith and credit because a judgment of a state court which had jurisdiction is to be given full faith and credit. See *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988) (sister state's judgment has same validity and effect in this state as in state rendered). The U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state. *Walksalong v. Mackey*, 250 Neb. 202, 549 N.W.2d 384 (1996). South Dakota's jurisdiction in the action brought by the Vanderwerfs has not been challenged, nor do the parties here dispute that the factual issues in the South Dakota case were determined by appropriate legal procedure.

Choice of Law.

The Kirwans assert that because the land in question was in South Dakota, the policy was issued in South Dakota, and the Vanderwerfs' lawsuit was filed and tried in South Dakota, the

insurance policy is governed by and construed according to South Dakota law.

[4] The rights and duties of contracting parties are governed by the law of the state with the most significant relationship to the transaction and the parties. *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994) (adopting approach set forth in Restatement (Second) of Conflict of Laws § 188 (1971) in dealing with conflict of laws in contract actions to determine which law to apply). "The relevant principles a court should consider are the place of the contracting, the place of any negotiations which occurred, the place of performance, the location of the subject matter, and the domicil[e] or residence of the parties." 245 Neb. at 556-67, 514 N.W.2d at 331. These principles in *Powell* are from the Restatement (Second), *supra*, § 188.

Applying these principles to the present case, we readily conclude that South Dakota is the state with the most significant relationship to the transaction and the parties. The parties did not make a choice of law in either the title commitment or the policy (although the arbitration clause in the title insurance policy mandates that the law of the situs of the land applies to arbitration). The contracts for the land sale and the title insurance were made in South Dakota. The record shows that both the title commitment and title insurance policy were issued by Chicago Title's agent, Gregory County Abstract Company of Burke, South Dakota.

[5,6] On the other hand, Nebraska has little to do with the title insurance contract, except that the Kirwans are residents of Nebraska and that Chicago Title delivered the title insurance policy to the Kirwans in Holt County, Nebraska. We find that these minor connections to Nebraska do not outweigh the substantial connections to South Dakota. Therefore, we apply South Dakota law to the construction of the title commitment and title insurance policy concerning the rights and obligations of the Kirwans and Chicago Title. However, since procedural matters are dictated by the law of the forum, Nebraska law still governs all other aspects of this case. See *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996) (although substantive rights of parties to action are governed by state where cause of action arose,

procedural matters are dictated by law of forum). See, also, *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993). The standard of review to apply in a trial court's summary judgment and whether a party is entitled to summary judgment is a matter of procedure controlled by the law of the forum. See *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996).

The issues presented in this case surround the alleged conflict between the title commitment and title insurance policy and the exclusions contained therein regarding notice of adverse claims affecting the insureds' right to attorney fees. This precise issue has not been addressed by South Dakota, but we look to the general insurance and contract law of that state in rendering our decision in order to determine what the South Dakota Supreme Court would do if faced with this issue. We now turn to the merits.

Granting Chicago Title's Motion for Summary Judgment.

The trial court based its decision in favor of Chicago Title on its finding that the Kirwans learned of the adverse claims after the title commitment was issued, but did not notify Chicago Title before the policy was issued, which resulted in an exclusion from coverage of the Vanderwerfs' claim.

A policy of insurance is contractual in nature. See *State, Div. of Ins. v. Norwest Corp.*, 1998 S.D. 61, 581 N.W.2d 158 (1998). Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999); *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999). See *Fort Pierre v. United Fire and Cas. Co.*, 463 N.W.2d 845 (S.D. 1990). An insurer's duties to its insured are defined and governed by the terms of the insurance policy. *Farm Bureau Ins. Co. v. Witte, supra*; *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993). 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. See *Kimball Investment Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289 (2000).

Furthermore, there is a presumption that the parties to a contract know and understand its contents and that the contract embodies and expresses the true intention of the parties. *Farmland Ins. Companies v. Heitmann*, 498 N.W.2d 620 (S.D. 1993) (Henderson, J., dissenting), citing *Ryken v. Blumer*, 307 N.W.2d 865 (S.D. 1981).

Interpretation and construction principles are to be controlled by the same rules applicable to contracts generally. *Dairyland Ins. Co. v. Wyant*, 474 N.W.2d 514 (S.D. 1991). " 'As a matter of law insurance contracts should be construed like any other contract, giving effect to the expressed intentions of the parties so far as that intention is legal.' " *Id.* at 518. The test for governing interpretation and construction of a contract is to determine what a reasonable person in the position of the insured would have understood the words to mean. *Id.*

The South Dakota Supreme Court has stated that " '[a]n insurance contract's language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties.' " *Stene v. State Farm Mut. Auto. Ins. Co.*, 1998 S.D. 95, ¶ 14, 583 N.W.2d 399, 402 (1998), quoting *St. Paul Fire & Marine Ins. v. Schilling*, 520 N.W.2d 884 (S.D. 1994).

The scope of coverage of an insurance policy is determined from the contractual intent and the objectives of the parties as expressed in the contract. *St. Paul Fire & Marine Ins. v. Schilling, supra.* Therefore, the nature of the insurer's duty to defend is defined by the insurance policy as a contract. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., supra.* Although an insurer is obligated to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. See, *Tri-State Co. of Minnesota v. Bollinger*, 476 N.W.2d 697 (S.D. 1991); *Hawkeye-Security Ins. Co. v. Clifford*, 366 N.W.2d 489 (S.D. 1985). The insurer bears the burden of showing that it has no duty to defend its insured, by showing that the claim clearly falls outside of the policy coverage. *State Farm Mut. Auto. Ins. Co. v. Wertz*, 540 N.W.2d 636 (S.D. 1995); *North Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908 (S.D. 1992).

Chicago Title asserts that because the Kirwans did not disclose the adverse claims, as required by the title insurance commitment and the title insurance policy, the Vanderwerfs' litigation was outside the policy, and as a result, there was no duty to defend the Kirwans. Where an insurance policy is unambiguous, its terms are to be construed according to their plain and ordinary meaning. *Pete Lien & Sons v. First American Title*, 478 N.W.2d 824 (S.D. 1991).

The "Conditions and Stipulations" section of the title commitment provides:

> If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment . . . and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge.

In addition, the Kirwans' title insurance policy provides:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . . .
>
> (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy[.]

The language of the title commitment is clearly intended to force the insureds to tell Chicago Title what they know or come to know about the property and its title, which is not of record, so that the risk which Chicago Title assumes in the policy can be assessed and guarded against. The quoted provision of the policy clearly excludes from coverage those claims which the

insureds had knowledge about, but failed to disclose in writing to the insurer. Such limitation on liability is consistent with *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). All parties agree that the Kirwans learned of the adverse claim after the commitment was issued, but never informed Chicago Title about the claim before the policy was issued and, in fact, waited until litigation about the claim had begun.

The Kirwans argue that the district court's decision is erroneous because it

> leaves a *bona fide* purchaser who relies on a title commitment at risk, and without coverage, for the interval between a commitment and the policy date. . . . [I]f the insured learns of a claim within this interval, the insurer has no duty to defend. . . . It creates a "catch" for innocent insureds who learn of an adverse claim after closing while awaiting their policy, and leaves them uninsured though their premium is paid.

(Emphasis in original.) Brief for appellants at 12.

Additionally, the Kirwans ask us to conclude that the effect of the above-quoted language of the commitment and the policy, when taken together, is an illegal "bait and switch" and as such is an unfair trade practice in violation of Neb. Rev. Stat. § 44-1525(1) (Supp. 1999) and "*SDCL* Ch. 58-33." Brief for appellants at 15. The cited Nebraska statute prohibits a number of things, e.g., "[m]aking, issuing, circulating . . . any estimate, illustration, circular, statement . . . which . . . [m]isrepresents the benefits, advantages, conditions, or terms of any policy." § 44-1525(1). If we understand the Kirwans' argument, it is that the commitment was less restrictive than the policy and that when the policy arrived, it excluded something that had not been previously excluded from coverage. Of course, we cannot ignore that what is excluded is an adverse claim of which the insured was aware but had not informed Chicago Title. The Kirwans argue that the coverage had "switched" from the commitment (which excluded a claim only if Chicago Title was prejudiced by nondisclosure) to the policy (which excluded a known but undisclosed adverse claim) regardless of whether Chicago Title was prejudiced. While this is true, this argument ignores the fact that the commitment provides that "all liability and obligations here-

under shall cease . . . when the policy . . . committed for shall issue." In short, the terms of the commitment provide that it ceases to exist once the policy issues because the commitment is only an agreement to issue a policy. Therefore, the obligations of the commitment are replaced by those of the policy. There is no showing in this record that the terms and conditions of the policy were not known to the Kirwans, or knowable by them had they asked Chicago Title. Without such evidence, there plainly is no misrepresentation.

The fact is that the policy commitment is written to force the insured to disclose known potential adverse claims not of record so that Chicago Title can amend Schedule B (the matters not insured against) to include an adverse claim which arises after the commitment is issued, but before the policy is issued. The ability to amend the schedule is expressly provided for in paragraph 2 of the conditions and stipulations of the commitment, and thus there was no representation that late-disclosed adverse claims could not be excluded by the policy issued after the commitment. The Kirwans' position that Chicago Title cannot exclude coverage for the Vanderwerf litigation, given that it was not of record or disclosed, is tantamount to a driver buying automobile insurance on Monday and complaining because the insurance company will not cover the accident occurring 2 days before on Saturday. The clear language of the commitment allows Chicago Title to exclude or limit coverage on Schedule B when the policy is issued for an adverse claim which comes to light after the commitment but before the policy is issued. However, nondisclosure results in a new and undisclosed adverse claim being excluded from coverage. By the time the Kirwans disclosed the Vanderwerfs' claim, the commitment had "evaporated" by its express terms and the policy controlled, meaning that Chicago Title did not need to show that it had suffered prejudice from the nondisclosure.

The district court, in its well-reasoned order, said regarding prepolicy issuance acquisition of knowledge of adverse claims by the proposed insureds:

> The rationale of title insurance is a coverage of risks ascertainable to both parties from the public records and not otherwise ascertainable by the proposed insured and the

> insurer. Permitting an insured to obtain coverage for something he or she knew about, but which was unknown and unknowable to the insurer, upsets the actuarial basis and justification for title insurance. Common sense supports the application of an exclusion to such situations[.]

Underlying the resolution of this issue is the fact that a title commitment, which might also be called a binder, is not the same as a title insurance policy. Black's Law Dictionary 266 (7th ed. 1999) defines commitment as "[a]n agreement to do something in the future" and defines a binder as "[a]n insurer's memorandum giving the insured temporary coverage while the application for an insurance policy is being processed or while the formal policy is being prepared," *id.* at 161. Thus, a commitment or binder is a temporary contract of insurance. See *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

In *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 511, 557 N.W.2d 696, 703 (1997), the court stated:

> The title insurance commitment, oftentimes referred to as a binder, is not a title policy. . . . [I]t is often in the form of a preliminary report on the status of the title. As such, it is issued at the end of the title search process undertaken by the insurer. D. Barlow Burke, Jr., Law of Title Insurance § 15.2 (2d ed. 1993). In contrast, title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. See *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984).

The Kirwans argue that "[n]either South Dakota nor Nebraska law permits a title insurer to vary terms between a title commitment and a subsequent policy," brief for appellants at 17, but no supporting authority is advanced—perhaps because the argument must ignore the distinction between the commitment or binder and the policy. In our view, the title commitment was a separate agreement which had a different purpose than the actual title insurance policy. The commitment in effect "guaranteed" the issuance of a certain type of title insurance, subject to the conditions and stipulations in the commitment, but to be

covered, adverse claims had to be disclosed to Chicago Title if knowledge thereof was acquired by the insured between binder and policy.

The Kirwans further assert as part of their argument against the exclusion of coverage for the Vanderwerfs' claim that they believed the claim was not serious. In the Kirwans' brief, they state that they

> and their attorney received a vague, threatening letter from a South Dakota lawyer claiming his client had an interest in the land. The letter ambiguously claimed either a right to sale proceeds for the land, or an interest in title. Neither the buyers nor their attorney took the threat seriously; in any event, the transaction had already closed.

Brief for appellants at 16.

The letter to the Kirwans was from an attorney and clearly asserted that the Vanderwerfs had either a right to the sale proceeds or an interest in title to the land. That is all the Kirwans needed to know in order to alert Chicago Title to this "adverse claim." Whether they believed it to be meritorious and serious is completely beside the point. Once the Kirwans got notice, they were dutybound to give notice to Chicago Title, and since they failed to do so, the policy, which was issued and superseded the binder, excluded the Vanderwerfs' claim from coverage.

Lack of Prejudice Because Kirwans Win Lawsuit.

The Kirwans argue that because they were successful in defending the South Dakota case filed by the Vanderwerfs, Chicago Title was not prejudiced by the delay in notification of the adverse claim and cannot exclude the claim from coverage. This argument at the outset ignores the difference between the commitment and the policy. Nonetheless, their argument is that as long as the purpose of the notification clause was fulfilled, then the insurer should not be relieved from its obligations to defend under the policy. The purpose of most notification clauses in insurance policies is to put the insurer on notice of a potential claim and to afford the insurer an opportunity to promptly investigate the merits of the claim. However, a notification requirement in a binder is different because it is, in effect, an underwriting device which forces disclosure of adverse

claims not of record which present a potential risk to the title. The disclosure enables the insurer to assess the risk, describe it as it wants in Schedule B "Exceptions from Coverage," and charge a premium which is reflective of the risk being carried. The insured can then determine whether the coverage set forth in the policy, with exceptions, is worth the proposed premium. The fact that the adverse claim later proves nonmeritorious does not dispense with the insurer's understandable desire to know what the insured knows and which is not of record. In this way, the insurer can assess the risk posed by the adverse claim uncovered after the commitment, but before the policy is issued. We have little doubt that if this was a health care policy with exclusions for known preexisting conditions, a claim that a known but undisclosed condition such as leukemia should be covered because its treatment later proved successful, would likely not succeed in the patient's suit for the cost of treatment. The Kirwans' argument is similarly unpersuasive. The Kirwans' argument suffers from a failure to appreciate Chicago Title's contractual ability to rewrite the "Exceptions from Coverage" during the pendency of the commitment, as well as a failure to recognize that paying to defend a claim of which it was uninformed is inherently prejudicial to Chicago Title.

The exclusions we are dealing with in the commitment and policy concern adverse claims which the insured became aware of *before* the effective date of the policy. The cases which have found that the insurer must have been prejudiced by the delay in notice concern claims made after the insurance policy has become effective. See, e.g., *Weir v. City Title Ins. Co.*, 125 N.J. Super. 23, 308 A.2d 357 (1973). In the *Weir* case, the court stated that it was well settled that where an application for insurance has been submitted to an insurer, but before a policy is issued, and a change of condition material to the risk occurs, the insured has an affirmative obligation to inform the insurer of the change. The *Weir* court found that the title insurance company was relieved of its obligations under its contract, where the insured was aware within 2 days after filing the application for title insurance that there was a defect in his title, and neither he nor his attorney informed the insurance company of that fact before the policy was issued. While we conclude that paying to

defend an undisclosed claim would be prejudicial to Chicago Title, a showing of prejudice was unnecessary.

Chicago Title's Cross-Appeal.

Chicago Title asserts that the district court erred in denying its counterclaim. Chicago Title counterclaimed against the Kirwans for $10,795.43 in attorney fees that Chicago Title paid First Trust for fees First Trust incurred in the defense of the Vanderwerfs' suit in South Dakota. Chicago Title asserts that it is entitled to recoup this expense from the Kirwans under the provisions of the Kirwans' mortgage agreement with First Trust in which the Kirwans warranted good and marketable title to First Trust and agreed to defend the title at the Kirwans' expense.

There are two relevant provisions in the mortgage between the Kirwans and First Trust which relate to Chicago Title's claim for reimbursement. First, the provision under the heading "Expenditures by Lender" provides in part:

> [I]f any action or proceeding is commenced that would materially affect Lender's interests in the Property, Lender on Grantor's behalf may, but shall not be required to, take any action that Lender deems appropriate. Any amount that Lender expends in so doing will bear interest . . . . All such expenses, at Lender's option, will (a) be payable on demand, (b) be added to the balance of the Note . . . or (c) be treated as a balloon payment[.]

The second relevant provision, under the heading "Defense of Title," provides in pertinent part:

> Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice[.]

The South Dakota Supreme Court enforces and gives effect to the unambiguous language and terms of the contract. See *Cotton*

v. Manning, 1999 S.D. 128, 600 N.W.2d 585 (1999). These contractual provisions allow the lender to be represented by its own counsel. We find that these provisions in the mortgage are not ambiguous, and we therefore apply their clear meaning.

Under the contractual language of the mortgage, the Kirwans must defend an action against their title at their cost. First Trust can participate with counsel of their choice, and the cost can be added to the Kirwans' note, be due on demand, or treated as a balloon payment. The option among the three choices is First Trust's. However, here the claim for such fees is being made by Chicago Title because it made payment for First Trust's attorney fees, despite its position that the Vanderwerfs' claim was outside the policy. Thus, Chicago Title was a volunteer in paying First Trust's attorney fees, a position somewhat at odds with its refusal to pay fees for the Kirwans. But, in any event, it now wants its money back on the basis of subrogation. The district court rejected the subrogation claim and found that the mortgage only obligated the Kirwans to pay the fees that First Trust incurred. However, this decision ignores the "Expenditures of the Lender" provision we have quoted above wherein the fees of First Trust can be recouped from the Grantor (the Kirwans). Given that Chicago Title voluntarily paid the fees for First Trust, we now turn to its claim that it is entitled to collect such fees from the Kirwans via subrogation.

" '[S]ubrogation is an equitable doctrine and depends upon a just resolution of a dispute under a particular set of facts.' " *Julson v. Federated Mut. Ins. Co.*, 1997 S.D. 43, ¶ 8, 562 N.W.2d 117, 120 (1997), quoting *Vogt v. Schroeder*, 129 Wis. 2d 3, 383 N.W.2d 876 (1986). Thus, if the lender could recoup attorney fees it expended from the Kirwans, Chicago Title should be able to collect the fees it paid for the lender, since it was the entity that incurred the actual expense. In short, Chicago Title "steps into the shoes" of First Trust in terms of the right to recover the defense costs from the Kirwans. Subrogation is an equitable remedy that provides for an adjustment between the parties to secure the ultimate discharge of a debt by a person who, in equity or good conscience, ought to pay for it. *St. Paul Fire & Marine v. Amerada Hess Corp.*, 275 N.W.2d 304 (N.D. 1979), citing *National Garment Co. v. New York C. & St. L. R.*

Co., 173 F.2d 32 (8th Cir. 1949). And if the Kirwans are contractually obligated to pay the fees of First Trust, the subrogation claim takes on added strength.

Since we have found that the Vanderwerf litigation was not covered by the title insurance in this case, it is inequitable that Chicago Title bear the cost of the Kirwans' attorney fees for the defense of the Vanderwerfs' claim when the Kirwans are contractually obligated to do so. Equitable and contractual subrogation allow Chicago Title to recover such fees and costs. Contractual subrogation occurs where one having no interest or any relation to the matter pays the debt of another, and by express or implied agreement is entitled to the rights and securities of the creditor so paid. See 73 Am. Jur. 2d *Subrogation* § 9 (1974). It is not necessary that there be a contract concerning such costs between Chicago Title and the Kirwans, as equity supplies the doctrine of subrogation as a matter of doing justice rather than a matter of exacting performance of a contract. See *id.*

We find that the mortgage allows First Trust to require reimbursement from the Kirwans for attorney fees it expended in the Vanderwerf litigation. Since Chicago Title paid First Trust's attorney fees, we find that Chicago Title can stand in the place of First Trust and require the Kirwans to reimburse it for those fees it paid to First Trust in connection with the Vanderwerf litigation. We therefore reverse the decision of the district court on this issue.

In the Kirwans' answer to Chicago Title's counterclaim, they assert that they could not admit or deny Chicago Title's claim as to the amount of attorney fees because the Kirwans were without knowledge concerning that matter. Although the Kirwans asserted in their answer that if such costs were incurred, that the costs were unreasonable and unnecessary, they did not argue this point in their brief on the cross-appeal.

In the record before us, there are two affidavits which support the amount of attorney fees paid by Chicago Title to First Trust. Jerry L. Wattier is an attorney from the law firm which defended First Trust in the Vanderwerf litigation. His affidavit contains the firm's billing records for the work it did on the Vanderwerf case for First Trust. The total amount stated was $10,795.43. Wattier

also stated in his affidavit that these fees have been paid by Chicago Title to the firm. In addition, the affidavit of Steven J. Tierney, an associate vice president and an attorney for Chicago Title, states that Chicago Title "has or will pay legal fees and expenses totaling $10,795.43 to Mr. Wattier's law firm." Both affiants stated that the amount of the fee was reasonable and was necessary in order to defend the interests of First Trust. The burden shifted to the Kirwans to put evidence before the court to dispute the reasonableness or necessity of the fees. See *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998) (holding that if movant for summary judgment submits affidavit as to material fact and that fact is not contradicted by adverse party's evidence, court will determine that there is no issue as to that fact). Having failed to do this, there is no genuine issue of material fact for trial on the fees, and we find in Chicago Title's favor on the counterclaim in the amount of $10,795.43 and direct the district court to enter judgment accordingly.

CONCLUSION

Finding no merit to the Kirwans' arguments, we affirm the grant of summary judgment to Chicago Title. We reverse the grant of summary judgment to the Kirwans on Chicago Title's counterclaim and remand it for entry of judgment in Chicago Title's favor in the amount of $10,795.43.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION AND KABREDLO'S, INC., DOING BUSINESS AS KABREDLO'S, APPELLEES.

612 N.W.2d 252

Filed June 20, 2000. No. A-99-574.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by an appellate court de novo on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

3. **Administrative Law: Liquor Licenses: Appeal and Error.** A district court may not disturb a decision of the Nebraska Liquor Control Commission unless the decision was arbitrary and unreasonable.
4. **Appeal and Error.** Errors assigned but not argued will not be addressed.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Administrative Law: Liquor Licenses.** Neb. Rev. Stat. § 53-132 (Reissue 1984) does not state that all factors listed in subsection (3) must be met prior to issuance of a license or that the criteria in subsection (3) control a Nebraska Liquor Control Commission decision, but must simply be considered by the commission.
7. **Statutes: Administrative Law: Liquor Licenses: Final Orders: Notice: Appeal and Error.** Neb. Rev. Stat. § 53-1,116 (Reissue 1984) does not set forth a specific procedure for the issuance of a liquor license, but, rather, it concerns the requirement that the final order of the Nebraska Liquor Control Commission be mailed to the parties prior to the filing of a motion for rehearing or a notice of appeal.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellant.

Jennifer S. Liliedahl, of Bowman & Krieger, for appellees.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This is an appeal by the City of Lincoln, Nebraska (City), from an order of the district court for Lancaster County affirming a decision of the Nebraska Liquor Control Commission (Commission) to grant Kabredlo's, Inc., doing business as Kabredlo's, a retail class B liquor license in the City. The district court held that the Commission had properly considered the relevant criteria of Neb. Rev. Stat. § 53-132(3) (Reissue 1984) and that the Commission's decision was not arbitrary and unreasonable.

BACKGROUND

Kabredlo's convenience store located in the B-3 zoning district at 338 North 27th Street in Lincoln, Nebraska, applied to the City for a special use permit "under section 27 of the

Lincoln Municipal Code" to sell beer at that location for off-premises consumption. Lincoln Mun. Code § 27.63.685 (1994) provides that a special use permit is required in order for businesses located in B-3 zoning districts and various other zoning districts to sell alcoholic beverages for off-premises consumption. Subsection (c) requires a 100-foot separation from residential districts or uses when a business is seeking the special use permit. The section does, however, allow for mitigation of the 100-foot requirement through fences or landscaping, for example, or waiver by the Lincoln City Council. Kabredlo's is surrounded on three sides by residential uses or zoning, and its location does not allow for the required 100-foot buffer between the store and those residential uses.

Kabredlo's special use permit application was first reviewed by the Lincoln/Lancaster County Planning Commission. The planning commission staff prepared a report on various aspects of Kabredlo's 27th Street store site. The report indicated that the main access to Kabredlo's is from 27th Street through an east-west alley. The report suggested that customers living to the east or south would most likely use the alley system for access, as P and Q Streets (both east-west streets) are closed off at 27th Street, forcing traffic to use O or R Street.

On September 11, 1996, in accordance with the recommendation of the planning commission's staff, the planning commission voted to recommend denial of the special use permit. The record before the planning commission included testimony from three individuals in opposition, three opposing letters, and a petition in opposition with more than 30 signatures. The planning commission's findings stated:

> A. The proposal does not conform to the requirements of subsection "c" of Section 27.63.685 [of the Lincoln Municipal Code], which requires a 100 foot separation from residential districts or uses. This is the first Liquor Special Permit application we have had that is sided by residential uses or districts on three sides, and the first that cannot fence or otherwise mitigate the boundary with those uses or districts.

The planning commission's findings also indicated a concern with traffic impacts brought about by P and Q Streets, which are

closed off at 27th Street; heavy use of residential alleys to access the site; upkeep of the dirt alley; and the fact that the site was identified as a high crime location by the police, who did not support adding alcohol sales to the site.

Kabredlo's testified at the planning commission that there would be no floor displays with liquor and just "two doors of liquor" for variety and for the convenience of its customers, many of whom were pedestrians. The store hours at that time were 8 a.m. to 10 p.m. Kabredlo's proposed adding rock to the alley to help with traffic concerns. Formerly, there had been a smaller store at the address, which was demolished. A new, larger store had been built prior to the hearing before the planning commission. Kabredlo's indicated that it would be easier to control shoplifting in the new facility, lessening the need for Kabredlo's to call the police. Kabredlo's argued that the employee parking lot in back of the building could act as somewhat of a buffer between the store and residential uses and pointed out that there were bushes and trees on the other "residential" sides.

Kabredlo's special use permit application was reviewed by the city council during a public hearing on September 30, 1996. At this hearing, Kabredlo's again indicated that the store would put down gravel in the alley and that it was willing to work with the City's public works department on any suggested improvements for keeping the alley passable. Kabredlo's did not feel that adding liquor sales would increase traffic, as most of its customers were pedestrians. It asked the city council to waive the 100-foot buffer requirement as allowed under the city code. Finally, as to crime, Kabredlo's indicated that it had an education program for employees on alcohol sales and that it was active in reporting shoplifting and other concerns, both inside and outside of the store, to the police. The city council had the planning commission fact sheet available for review. At the close of the hearing, the city council voted to deny Kabredlo's special use permit application.

Although Kabredlo's lacked the required special use permit, Kabredlo's applied to the Commission for a retail class B liquor license on July 31, 1997. The city council held a public hearing to determine whether it would support the liquor license appli-

cation. Following the public hearing on August 25, 1997, the City recommended to the Commission that Kabredlo's liquor license application be denied. The City, in resolution No. A-78313, listed the following reasons for its recommendation of denial: (1) The existing population and the projected population growth of the city and within the area to be served were inadequate to support the proposed license; (2) existing licenses were adequately serving the area; (3) issuance of the license would not be compatible with the nature of the neighborhood; (4) the applicant had not demonstrated the propriety of issuing the license; (5) the license would not be required by the present or future public convenience and necessity; and (6) the special permit under § 27.63.685 for the location was denied, and, therefore, the approval of the application would violate the zoning restriction of the City.

The City's recommendation for denial triggered the requirement in Neb. Rev. Stat. § 53-133 (Reissue 1984) for a hearing before the Commission. The hearing before the Commission was held on November 6, 1997, and testimony was presented by Kabredlo's and the City, addressing the main points from the city council resolution of August 25. The records from the prior hearings on Kabredlo's application for a special use permit and the city council hearing on Kabredlo's liquor license application were all admitted as exhibits before the Commission.

In discussing the 100-foot buffer, Kabredlo's pointed out that the store faces onto 27th Street, rather than into any of the residences. Also, the house to the north is not always occupied, and since the time of the special use permit denial, a fence has been erected along this boundary. Kabredlo's again pointed out that to the east is an alley and the employee parking lot, occasionally used by customers. None of the residences in this direction face the store. Kabredlo's argued that these properties were also lined with bushes and trees, creating somewhat of a barrier. Finally, to the southeast is the alley, again buffered by trees and bushes, with no direct entrance to a house from that direction. The City argued that landscaping would not be effective mitigation in this situation; that the fence was not effective because the house to the north was an elevated, two-story house; and that it was not possible to fence the store off from the alley.

Kabredlo's presented a petition to the Commission with 253 signatures in support of having alcohol sold at the 27th Street location. Kabredlo's argued that the petition with 33 opposing signatures presented to the planning commission was solicited by the owner of the insurance company to the south of Kabredlo's store and represented signatures from employees of that business and other individuals not living in the neighborhood.

The Commission's order granting the liquor license to Kabredlo's was dated November 26, 1997, and reads in relevant part:

> THE COMMISSION FINDS:
>
> 1. That the applicant is fit, willing and able to provide the proposed services.
>
> 2. That the applicant can conform to all provisions, requirements, rules and regulations found in the Nebraska Liquor Control Act and the Rules of the Nebraska Liquor Control Commission.
>
> 3. That the applicant has demonstrated that the type of management and control exercised over the proposed licensed premises would be sufficient to ensure that the proposed licensed business would conform to all provisions, requirements, rules and regulations, found in the Nebraska Liquor Control Act.
>
> 4. That all of the factors set forth in 53-132(3) have been considered and the issuance of this license is required by the present or future public convenience and necessity.
>
> 5. That the application should be granted with the stipulation to stop liquor sales at 10:00 p.m.
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the application of Kabredlo's . . . for a Retail Class B Liquor License . . . should be . . . approved, and that a license should be duly issued according to law.

The City filed a motion for rehearing with the Commission on November 21, 1997, which was overruled on December 3. Subsequently, the City appealed to the district court for Lancaster County. The City's contention before the district court was that the Commission did not consider zoning restrictions in

its decision to grant the liquor license, making the Commission's decision arbitrary and unreasonable. The City also attached a copy of the actual liquor license to its petition, showing the license period to be from November 13, 1997, to April 30, 1998. The City argued that the Commission illegally caused the license to be issued prior to its final order of November 26, 1997.

The district court analyzed the restriction in the Lincoln Municipal Code, finding that the zoning ordinance allowed stores like Kabredlo's to operate in the B-3 zoning district, that the availability of a special use permit indicated that selling alcohol was not entirely prohibited in those zoning districts, and that the zoning ordinance allowed for mitigation of the 100-foot requirement or waiver by the city council. The district court cited numerous places in the record of the hearing before the Commission where zoning and related issues were discussed. The district court stated that the criteria in § 53-132(3) were not necessarily controlling on the Commission's decision, but simply to be considered by the Commission. The district court found that the Commission did indeed consider these criteria and that the record supported the Commission's finding that the requirements of § 53-132(2) had been met. For these reasons, the district court held that the Commission's decision was not arbitrary or unreasonable. This appeal follows.

ASSIGNMENTS OF ERROR

The City asserts that the Commission erred in determining to grant the license without properly considering the factors required under § 53-132. The City also asserts that the district court erred in (1) determining that the Commission can consider local zoning restrictions by merely discussing them and voting to grant the license without making any findings related to the City's zoning restrictions and (2) failing to find that the Commission illegally issued the liquor license to Kabredlo's, effective November 13, 1997, prior to the Commission's final order dated November 26, 1997.

STANDARD OF REVIEW

[1] On appeal, decisions of the Commission are reviewed by an appellate court de novo on the record. *Grand Island Latin*

Club v. Nebraska Liq. Cont. Comm., 251 Neb. 61, 554 N.W.2d 778 (1996); *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 548 N.W.2d 326 (1996); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *No Frills Supermarket, supra.*

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999); *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[3] A district court may not disturb a decision of the Commission unless the decision was arbitrary and unreasonable. *Marting, supra.*

DISCUSSION

Factors Required Under § 53-132.

The criteria to be considered by the Commission when determining whether to grant a class B retail liquor license are found in § 53-132, which provides:

> (2) A retail license or bottle club license shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city, village, or county where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the

> Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.
>
> (3) In making its determination pursuant to subsection (2) of this section the commission shall consider:
>
> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest . . . ;
>
> (c) The existing population of the city, village, or county . . . and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses or bottle club licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises;
>
> (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;
>
> (g) The adequacy of existing law enforcement;
>
> (h) Zoning restrictions;
>
> (i) The sanitation or sanitary conditions on or about the proposed licensed premises; and
>
> (j) Whether the type of business or activity proposed . . . is and will be consistent with the public interest.

[4] Although the City assigns as error that the Commission did not adequately consider the factors under § 53-132, it does not argue that Kabredlo's failed to meet the conditions set out in § 53-132(2)(a) through (d). Further, with regard to § 53-132(3), the City does not argue that Kabredlo's failed to satisfy any of the factors listed in subsections (a) through (j) with the exception of (h), the zoning restrictions factor. Errors assigned but not argued will not be addressed. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Our de novo review of the record shows sufficient evidence to support the Commission's findings that Kabredlo's has met the conditions in § 53-132(2) and the criteria of 53-132(3), with the exception of § 53-132(3)(h), which will be discussed below. We find that the City's first assignment of error is without merit as it relates to the criteria under § 53-132(2) and (3)(a) through (g), (i), and (j).

Zoning Restrictions Under § 53-132(3)(h).

The City's second assignment of error is that the district court erred in determining that the Commission can consider local zoning restrictions by merely discussing them and voting to grant the license without making any findings related to the City's zoning restrictions. In its brief, however, the City essentially argues that the zoning restriction should be a controlling criteria on the Commission, necessitating a denial of the liquor license, unless there is a specific finding that the zoning restriction was arbitrary or unreasonable.

Kabredlo's is in violation of the City's zoning requirements in that it does not have the required special use permit. The City argues that Kabredlo's did not appeal either the city council's decision to deny the special use permit or the city council's decision not to waive the requirements of the Lincoln Municipal Code as allowed under Neb. Rev. Stat. § 15-1201 (Reissue 1997). In addressing the zoning issue, the district court stated that the criteria in § 53-132(3) were not necessarily controlling on the Commission's decision, but were to be considered. The district court also pointed out that the zoning ordinance does not entirely prohibit the sale of alcohol in the zoning districts covered by the special use permit and that the 100-foot requirement is not absolute, as the possibility for mitigation and waiver do exist.

We can find no case law in Nebraska specifically addressing a situation where an applicant for a liquor license has previously been denied a zoning permit similar to the special use permit lacking in this case. In a number of cases, zoning was presented in a different context, such as city ordinances requiring an off-sale alcohol beverage retailer to sell alcoholic beverages only from premises which are separate and distinct from the sale of other products. The Nebraska Supreme Court has either disapproved of, or found unconstitutional, separate and distinct premises requirements in the context of liquor licensing laws in a number of cases. See, *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995); *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993); *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992); *Gas 'N Shop v. Nebraska*

Liquor Control Comm., 241 Neb. 898, 492 N.W.2d 7 (1992); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988).

For our analysis, it is useful to examine some of the cases that analyze the factors of § 53-132(3). In *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993), and *Whitehead Oil Co. v. City of Lincoln*, 243 Neb. 312, 498 N.W.2d 793 (1993), the court analyzed the evidence relating to each of the factors under § 53-132(3), as well as evidence relating to each separate finding by the city council, finding no evidence that weighed against the applicants. The court's conclusion in both cases was that the record did not indicate a legitimate reason for denying the requested licenses. The court in *B & R Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 763, 497 N.W.2d 654 (1993), found that a lawful justification for refusing to grant a liquor license must exist; purely arbitrary treatment or classification cannot be sustained. In *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992), the court indicated that the record documented no zoning restrictions which would preclude the issuance of the license in question. While this conclusion suggests that a violation of an applicable zoning restriction could present a legitimate reason to preclude issuing a liquor license, the case does not directly stand for that proposition. None of the foregoing cases suggest that failure to satisfy one or more of the factors under § 53-132(3) automatically requires denial of the license.

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999); *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). Section 53-132 directs that a license *shall be issued* to the applicant if the criteria of (a) through (d) of subsection (2) are met. Additionally, it states that the Commission *shall consider* the factors laid out in

subsection (3) in determining if the elements of subsection (2) have been met. The statute does not state that all factors listed in subsection (3) must be met prior to issuance of a license, as suggested by the City. The Commission's final order stated that it found that all the conditions of § 53-132(a) through (d) had been met and that it had considered the criteria set forth in subsection (3). We find that the district court's ruling that the criteria in subsection (3) of 53-132 do not control the Commission's decision, but must simply be considered by the Commission, is correct.

The City spends considerable time arguing in its brief that in order for the Commission to disregard zoning, the Commission must make a specific finding in a final order that denying the liquor license application because of the lack of the special use permit would be arbitrary and unreasonable. The lack of the special use permit is not determinative. Under § 53-132(3)(h), the Commission must only "consider" zoning restrictions. Thus, we do not review the denial of the special use permit in this appeal. The record as a whole shows that considerable evidence was submitted to the Commission regarding the zoning ordinance and that the Commission considered the zoning restriction factor. But, in the final analysis, the record did not indicate a legitimate reason for denying the license. See, *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993); *Whitehead Oil Co. v. City of Lincoln*, 243 Neb. 312, 498 N.W.2d 793 (1993).

Issuance of Liquor License Prior to Final Order.

Finally, the City alleges that the Commission illegally issued the liquor license before the final order and before the City's motion for rehearing was decided by the Commission. The hearing before the Commission was on November 6, 1997, and the Commission's order granting the license was dated November 26, 1997. The copy of the liquor license attached to the City's petition to the district court shows a license period of November 13, 1997, to April 30, 1998. The City filed its motion for rehearing on November 19, 1997, which the Commission denied on December 3.

The City raised this issue in its motion for rehearing, citing Neb. Rev. Stat. § 53-1,116 (Reissue 1984), which requires "[a]

copy of the rule, regulation, order, or decision of the commission, in any proceeding before it [to be] served upon each party of record to the proceeding before the commission." In addition to service on the parties, this section allows any party to apply for a rehearing within 20 days after the service of any order, decision, et cetera. The section also provides that decisions of the Commission may be appealed by filing notice of intent to appeal with the Commission within 20 days from when the Commission mailed the final decision to each party and by filing a petition with the district court within 30 days from when the Commission mailed the final decision to the parties.

In the City's petition to the district court, the City alleges that "the Executive Director of the Commission caused, directed, or otherwise allowed the liquor license to administratively issue to the City Clerk of the City of Lincoln, Nebraska, on or about November 15, 1997." In Kabredlo's answer, it admitted that the copy of the liquor license attached to the City's petition, showing the license period of November 13, 1997, to April 30, 1998, was granted to Kabredlo's by the Commission's order of November 26, 1997. However, Kabredlo's denied the paragraphs relating to the allegation that the Commission allowed the license to administratively issue on or about November 15, prior to the date of the final order. There is no evidence on the record before the district court about the actual issuance of the license, and the district court did not rule on this issue.

[7] The City misconstrues the purpose of § 53-1,116. Contrary to the City's argument that this section does not allow a liquor license to be issued without a final order of the Commission, this statutory provision does not set forth a specific procedure for the issuance of a liquor license. Rather, it concerns the requirement for the final order to be mailed to the parties prior to the filing of a motion for rehearing or a notice of appeal. This same argument was addressed in *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 548 N.W.2d 326 (1996), where the appellant alleged that the liquor license was issued before the entry of the Commission's written order. The license in that case was not contained in the record. The appellant's petition to the district court alleged that the license was issued on a particular date, and the Commission admitted

that allegation in its answer. The record did not, however, contain evidence of either an admission or denial of this fact by the license applicant. The court held that the record in that case did not sustain the assignment of error.

In the present case, although the license is part of the record and shows a license period starting prior to the date when the Commission's final order was issued, there is nothing on the record to sustain the allegation that the license actually was issued prior to the final order. Kabredlo's answer does not admit to this allegation, and there was no evidence presented on this issue. As evidenced by the Commission's minutes from November 5 and 6, 1997, the license was issued to Kabredlo's by the Commission after a unanimous vote by the Commission granting the license. The City filed its motion for rehearing based on the November 6 decision of the Commission to grant the license, because the City knew the decision to grant the license was made on that date. The fact that the order was signed on a later date has no bearing on the present case. Accordingly, as in *Marting, supra*, the record fails to sustain this assignment of error. We find that the retail class B liquor license granted to Kabredlo's pursuant to the Commission's decision of November 6 was properly granted and legally issued.

CONCLUSION

The Commission adequately considered all factors under § 53-132, including zoning restrictions under subsection (3)(h). The district court's decision that the criteria in subsection (3) of § 53-132 do not control the Commission's decision, but simply must be considered by the Commission, is correct. Finally, the Commission legally issued the class B retail liquor license to Kabredlo's. We affirm the decision of the district court affirming the Commission's decision to grant the liquor license.

AFFIRMED.

DUKHAN MUMIN, APPELLEE, V.
JAMES C. HART, JR., APPELLANT.
612 N.W.2d 261

Filed June 20, 2000. No. A-00-234.

1. **Judgments: Records.** Under Neb. Rev. Stat. § 25-1301 (Supp. 1999), judgment is not entered until the clerk of the court places a file stamp and date upon the judgment, and of course, there is no judgment until the judge renders a judgment by signing a written notation of the relief granted or denied.
2. ___: ___. A judge does not render the judgment until he or she signs a written notation of the relief granted or denied, and the clerk of the court cannot enter a judgment until the judge renders one.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Appeal dismissed.

Dukhan Mumin, pro se.

James C. Hart, Jr., pro se.

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

James C. Hart, Jr., has appealed from an alleged order dated January 27, 2000, overruling his motion to vacate a default judgment. A supplemental transcript contains what appears to be a trial docket note entitled "District Court Journal," containing an order sustaining Dukhan Mumin's motion for default judgment against Hart for the reason that Hart did not comply with a previous order of the court. This opinion does not consider the validity of that order in any respect, except on the point specifically discussed in this opinion.

In this opinion, we are interested only in the finality of the orders allegedly appealed from in view of Neb. Rev. Stat. § 25-1301(3) (Supp. 1999). This section provides in part:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
>
> (3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and

> date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

This statute was effective on August 28, 1999. Neb. Rev. Stat. § 25-1912 (Supp. 1999) was effective at the same time, and it provides for an appeal within 30 days "after the entry of such judgment."

These statutes have substantially modified the steps that trial courts must use to render and to enter an effective judgment decree or final order. Since these statutes became effective, this court has spent considerable time with attempted appeals which were ineffective because some trial judges or some clerks of the court have not followed the current version of § 25-1301. In short, the former methods of judges rendering judgments, decrees, and final orders by some entry in trial dockets, judge's minutes, computers, or other previous procedures are ineffective unless they contain a written notation of the relief granted or denied and the judge signs that notation. The judgment, decree, or final order is not entered until the clerk places a file stamp on it. Unless the transcript shows that both steps have been followed, this court does not acquire jurisdiction.

[1] Under § 25-1301, judgment is not entered until the clerk of the court places a file stamp and date upon the judgment, and of course, there is no judgment until the judge renders a judgment by signing a written notation of the relief granted or denied. There being no final order to appeal from, this court must dismiss this appeal for lack of jurisdiction.

This is a case of first impression under the new version of § 25-1301. However, the posture of this case is analogous to the posture of an attempt to appeal from the overruling of a motion for new trial in the case of *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999). In that case, under § 25-1301 (Reissue 1995), there was a notation in the judge's minutes overruling a motion for a new trial, but the judge had not made an oral pronouncement. The court said:

> The only notations regarding the trial court's decision on Dvorak's motion for new trial are the judge's minutes for March 3 and June 26, 1997, indicating that the motion

> was overruled. . . . Because there has been no rendition of judgment regarding Dvorak's motion for new trial, we are without jurisdiction to address Dvorak's cross-appeal, and it is dismissed as premature.

Id. at 348, 590 N.W.2d at 687.

[2] Under § 25-1301 (Supp. 1999), a judge does not render the judgment until he or she signs a written notation of the relief granted or denied, and the clerk of the court cannot enter a judgment until the judge renders one. Because this statute was not followed, this appeal must be dismissed.

APPEAL DISMISSED.

FOLGERS ARCHITECTS LIMITED, ASSIGNEE OF FOLGERS ARCHITECTS & FACILITY DESIGN, INC., A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT, V. RICHARD A. KERNS ET AL., APPELLANTS AND CROSS-APPELLEES.

612 N.W.2d 539

Filed June 27, 2000. Nos. A-98-1326, A-98-1327, A-98-1328.

1. **Actions: Breach of Contract: Damages.** A suit brought to recover damages for breach of contract is an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Judgments: Appeal and Error.** When reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Records: Pleadings: Appeal and Error.** Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment.
6. **Judgments: Pleadings: Presumptions: Evidence: Appeal and Error.** If the pleadings are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.
7. **Contracts: Intent: Breach of Contract: Damages.** A contractual provision prohibiting assignment of rights under a contract, unless a different intention is mani-

fested, does not forbid assignment of a right to money damages for a breach of the contract.

8. **Corporations: Debtors and Creditors: Liability.** A corporation is viewed as a complete and separate legal entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation.
9. ___: ___: ___. A corporation's directors or officers are not ordinarily liable to the corporation's creditors or third persons for corporate acts or debts simply by reason of an official relation with the corporation.
10. **Corporations: Contracts: Agents: Liability.** A corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract.
11. ___: ___: ___: ___. Where a person acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf, in the absence of fraud, create no individual or personal liability against him.
12. **Breach of Contract: Pleadings: Proof: Damages.** In order to recover on an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty.
13. **Judgments: Appeal and Error.** An appellate court accords the district court's finding of fact the same status as a jury verdict and affirms unless the finding is clearly wrong, and the appellate court views the evidence in the light most favorable to the successful party.
14. **Contracts: Quantum Meruit.** The theory of quantum meruit is premised on the existence of a contract implied by law; however, the law only implies a contract and allows a recovery under the theory of quantum meruit when the parties have not entered into an express agreement.
15. **Breach of Contract: Forbearance: Estoppel.** The doctrine of promissory estoppel is based on the proposition that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
16. **Estoppel.** Promissory estoppel requires that reliance be reasonable and foreseeable.
17. **Claims: Words and Phrases.** A claim is unliquidated if a reasonable controversy exists concerning the claimant's right to recover or the amount of such a recovery.
18. ___: ___. A claim is liquidated when no reasonable controversy exists as to the plaintiff's right to recover and it is possible to compute with exactness the amount owed.
19. **Claims: Prejudgment Interest.** In order for a plaintiff to be eligible to receive prejudgment interest on the balance for unliquidated claims, accruing after January 1, 1987, a litigant must comply with the requirements of Neb. Rev. Stat § 45-103.02 (Reissue 1998).

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, affirmed in part as modified, reversed and dismissed in part, and in part vacated and set aside.

P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellants.

Gregory C. Scaglione, of Koley, Jessen, Daubman & Rupiper, P.C., for appellee.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

INBODY, Judge.

I. INTRODUCTION

Folgers Architects Limited (FAL), assignee of Folgers Architects & Facility Design, Inc. (FAFD), a Delaware corporation, brought an action against the defendants to collect unpaid architectural fees, reimbursable expenses, and termination fees relating to several apartment construction projects. FAL asserted causes of action under theories of breach of oral and written contracts, promissory estoppel, and quantum meruit. The district court for Douglas County entered judgment in favor of FAL against the defendants. This timely appeal followed.

II. STATEMENT OF FACTS

1. FACTUAL BACKGROUND

Sometime in late 1992 or early 1993, Jeffrey Anderzhon, an architect with Anderzhon Architects, Inc. (AAI), first met with Richard A. Kerns, to discuss the possibility of AAI's providing architectural services for the development of several apartment complexes. Weekly meetings were held to discuss the development of the apartment complexes and were attended by Anderzhon; Kerns; Gene Wilczewski, a developer; and Larry Hagewood, an engineer.

During the meetings, Kerns and Anderzhon came to a verbal agreement that Anderzhon would provide architectural services for apartment construction projects being developed. The apartment projects were known as Thornberry, Burwick, Walton Heath, Ashberry, Sussex Place, Greely, Wingpoint, Devonshire, Reno, and Kennamare. It was agreed that the design of the apartment projects would be based on two other apartment projects that Anderzhon had designed and that the fees for the architectural services would be on a per unit basis. It was further agreed that Anderzhon would be paid a $5,000 initial startup fee for each project and that Anderzhon would issue invoices for his services as the architectural services progressed.

Anderzhon and Kerns further agreed that as each apartment project progressed, a written form contract prepared by the American Institute of Architects, known in the industry as a B181 contract, would be executed in compliance with requirements of Housing and Urban Development (HUD). HUD required that a B181 contract be executed for all projects that sought HUD coinsurance for the private financing of multiple-unit dwellings.

In March 1993, Anderzhon began the architectural services for the apartment projects. On February 1, 1994, Anderzhon and Kerns executed a B181 contract for the Burwick project. The contract was entered into by Burwick Apartments, Ltd., as the owner and AAI as the architect. The contract outlined among other things the architect's services and responsibilities, the administration of the contract, the owner's responsibilities, the construction cost, payments to the architect, ownership and use of documents, termination of the agreement, and the basis of compensation.

In July 1994, AAI merged its operation with FAFD. However, Anderzhon kept the accounts receivable for the work AAI had performed on these projects prior to July 1994. All services provided by Anderzhon and FAFD after July 1994 were billed by FAFD. The evidence further shows that Anderzhon informed Kerns that his practice had merged with FAFD and that all future work relating to the apartment projects would be performed and billed by FAFD. FAFD, along with Anderzhon, continued to provide architectural services for the apartment projects. The evidence shows that Kerns made no objection to FAFD performing the architectural design work or billing for the services provided and reimbursable expenses incurred.

On November 1, 1994, Anderzhon and Kerns executed a B181 contract for the Walton Heath project. The contract was executed by Walton Heath Apartments, Ltd., as the owner and FAFD as the architect.

As each project began, Anderzhon would set up a billing system for the project. As architectural services were provided on a particular project, invoices were issued to Kerns. The invoices reflected the percentage of the work that had been completed on the project, the amount due, and the amount of the reimbursable

expenses due. Kerns then issued checks for the payment of the invoices from checking accounts that were set up for each project.

Apparently, Kerns felt that the apartment projects were over budget, and he was having difficulty raising enough capital to cover all of the apartment construction projects. So, Kerns notified Anderzhon and FAFD that none of the apartment projects would be completed and that no additional architectural fees or reimbursable expenses associated with the apartment projects would be paid. Anderzhon and FAFD made several demands to Kerns for payment of the architectural fees due, and Kerns responded that he was "tapped out."

On May 5, 1995, Anderzhon sent Kerns a letter of termination, notifying Kerns that FAFD was terminating its services on the apartment projects because of Kerns' failure to proceed with the projects. On May 17, FAFD's legal counsel also sent Kerns a demand letter for the payment of the outstanding accounts receivable owed on the projects. No further payments were made on the projects.

In late 1995, 1996, and 1997, FAFD filed lawsuits against Kerns; Burwick Apartments, Ltd.; Thornberry Apartments, Inc.; Sussex Place Apartments, Inc.; Ashberry Apartments, Inc.; and Walton Heath Apartments, Inc., for breach of oral and written contracts relating to the nonpayment of the accounts receivable relating to the architectural work performed on the apartment projects. These suits were later consolidated for trial.

On or about May 1, 1997, Anderzhon resigned his position with FAFD. At the time Anderzhon resigned, he assigned to FAFD the accounts receivable of AAI for architectural services provided on the apartment projects prior to July 1994.

In August 1997, FAFD discontinued its operations because of financial difficulties. At this time, FAFD assigned its accounts receivable to JLK, "an assignment entity." These receivables included the receivables related to the apartment projects at issue.

Subsequently, Ken Folgers, the former president of FAFD, formed FAL, an Illinois corporation. FAL then repurchased the accounts receivable previously assigned by FAFD to JLK. The receivables repurchased by FAL included the receivables at issue in this case.

The record reflects that the trial court allowed FAFD to amend the petitions to identify FAL as the assignee of FAFD and also granted the defendants leave to further plead or stand on their prior answers.

Trial on this matter was held before the Douglas County District Court without a jury on August 13, 14, and 27, 1998. Although several witnesses testified, for purposes of our review, we need only summarize the testimony of Anderzhon and Kerns below.

2. Testimony of Anderzhon

Anderzhon testified that in late 1992 or early 1993, he and Kerns entered into a verbal agreement that Anderzhon would provide architectural services in connection with the construction of several apartment complexes being developed by Kerns.

Anderzhon described the type and the amount of work that he performed on each apartment project. The work performed on the apartment projects was broken down into several phases, and each phase was assigned a percentage of completion: the design phase, the construction document phase, the bid and negotiation phase, and the construction phase. When work was completed in one phase, Anderzhon would issue invoices to Kerns for the amount due on the projects. Anderzhon also offered into evidence the invoices that he had issued to Kerns on the projects. The invoices reflected the amounts due on the project, the expenses incurred by Anderzhon's performing the work, and the amounts Kerns had paid.

Anderzhon testified Kerns had verbally agreed to pay for the architectural services performed on the apartment projects and assured Anderzhon that Kerns was putting together other investors and that he would see that the outstanding invoices for the architectural services were paid.

3. Testimony of Kerns

Kerns testified that in 1993 and 1994, he met with Anderzhon to discuss the prospect of Anderzhon's providing architectural services for several apartment projects. Kerns claimed that he was not in charge of the apartment projects, that he was not responsible for making decisions on the projects, that he had

minimal contact with Anderzhon, that he never personally directed Anderzhon to do anything with respect to the apartment construction projects, and that he was only responsible for arranging investors and providing the "seed money" needed to get the apartment projects started. Kerns contended that Wilczewski was actually in charge of putting together the projects and the team who worked on the projects.

Kerns further testified that Anderzhon was to provide architectural services on the apartment projects, but that Anderzhon was only entitled to be paid the $5,000 retainer and the reimbursable expenses he incurred. Kerns further claimed that Anderzhon was not entitled to be paid anything beyond the retainer and reimbursable expenses unless the apartment projects received final approval from HUD and the projects proceeded to closing. However, Kerns admitted on cross-examination that Anderzhon had been paid for a portion of the architectural services he performed and that Anderzhon had been paid more than the amount due for the retainer and reimbursable expenses on some of the projects.

Kerns testified that he never told Anderzhon that he would be personally responsible and that he never signed a personal guarantee for the payment of Anderzhon's architectural fees. However, Kerns admitted on cross-examination that the B181 contracts provided that if the projects were terminated prior to final approval from HUD, the architectural fees accrued up to the point of termination would be due.

Kerns further admitted on cross-examination that he had used the architectural plans prepared by Anderzhon as his own personal property, that he had displayed the architectural plans at a Christmas party he held for potential investors, and that he listed the architectural plans as a contribution of personal property in exchange for an interest in the limited partnerships.

4. Procedural Background

At the conclusion of FAL's case and prior to resting, FAL sought leave to file a consolidated petition to conform the pleadings with the evidence presented. The trial court granted FAL's request. In addition, the defendants requested and the court granted their request that they be allowed to reserve any objec-

tions they might have to the consolidated petition until after the petition was filed.

On August 27, 1998, FAL filed a consolidated petition, naming the following additional defendants: Burwick Apartments, Inc.; Thornberry Apartments, Ltd.; Sussex Place Apartments, Ltd.; Ashberry Apartments, Ltd.; and Walton Heath Apartments, Ltd. Hereinafter, these are referred to as the "newly added defendants."

On September 8, 1998, the original defendants filed an answer to the consolidated petition. On the same day, the newly added defendants filed a special appearance objecting to the jurisdiction of the court over them for the reasons that no sufficient and proper service of summons had been served upon them. Following a hearing, on September 16, the trial court overruled the special appearances.

On November 12, 1998, the trial court entered judgment in favor of FAL in varying amounts for all of the apartment projects with the exception of the Devonshire and Kennamare projects. In its order, the court determined (1) that FAL had satisfied its burden of proving enforceable written contracts between Anderzhon and Kerns; Burwick Apartments, Inc.; Burwick Apartments, Ltd.; Walton Heath Apartments, Inc.; and Walton Heath Apartments, Ltd., and that FAL was entitled to recover damages on its causes of action for breach of the written contracts, promissory estoppel, and quantum meruit; (2) that FAL established that there were enforceable oral contracts between Anderzhon and Thornberry Apartments, Inc.; Thornberry Apartments, Ltd.; Ashberry Apartments, Inc.; Ashberry Apartments, Ltd.; Sussex Place Apartments, Inc.; and Sussex Place Apartments, Ltd., and that FAL was entitled to recover damages on its causes of action for breach of the oral contracts, promissory estoppel, and quantum meruit; (3) that FAL satisfied its burden of proving that Kerns breached his verbal promise to pay the $5,000 architect fee for the Greely, Wingpoint, and either Ashberry or Kennamare projects and that FAL was entitled to recover the $5,000 for these three projects; and (4) that FAL was entitled to prejudgment interest at the rate of 12 percent on all of the projects except for the Burwick and Walton Heath projects. With regard to the credibility of the witnesses,

the court stated that the testimony of "Anderzhon was credible and his recollection was reliable." However, the court found the recall of Kerns, Wilczewski, and Hagewood "was not reliable."

On November 30, 1998, the original defendants filed a motion for a new trial, which was overruled by the trial court on December 10. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, the defendants contend, summarized and restated, that the district court erred in (1) overruling the special appearance of the newly added defendants; (2) allowing FAL, an assignee, to pursue its claim for damages relating to the B181 contracts when the contracts contained an anti-assignment provision; (3) finding that FAL was entitled to recover on the B181 contracts even though the Burwick and Walton Heath projects did not receive final approval from HUD; (4) finding Kerns liable for the judgments entered against Burwick and Walton Heath on the B181 contracts; (5) finding that the parties had an oral contract for the Ashberry, Sussex Place, Kennamare, Devonshire, Reno, and Greely projects; (6) finding that FAL was entitled to recover on the basis of promissory estoppel; (7) finding that FAL was also entitled to recover on the theory of quantum merit; and (8) awarding FAL prejudgment interest.

On cross-appeal, FAL alleges that the district court erred (1) in failing to find Kerns jointly and severally liable for judgment awarded for the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects; (2) in failing to award prejudgment interest at the rate of 18 percent on the Burwick and Walton Heath projects rather than the 12 percent actually awarded; and (3) failing to award postjudgment interest in the amount of 18 percent on the remaining projects.

IV. STANDARD OF REVIEW

[1,2] A suit brought to recover damages for breach of contract is an action at law. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. See *Buckingham, supra.*

[3,4] In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996). When reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Four R Cattle Co., supra*; *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996); Tracy v. Tracy, 7 Neb. App. 143, 581 N.W.2d 96 (1998).

V. DISCUSSION

1. Special Appearance

[5,6] The newly added defendants contend that the district court erred in overruling their special appearance for the reason that no sufficient and proper service of summons had been served upon them. In the instant case, the evidence in support of this assigned error was not preserved in the bill of exceptions. Absent a complete bill of exceptions, the only issue before the court on appeal is whether the pleadings are sufficient to support the judgment. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994). If the pleadings are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. See, *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979); *Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N.W. 599 (1933); *Gaines v. Warrick*, 113 Neb. 235, 202 N.W. 866 (1925).

From our review of the pleadings, it is apparent that no service of a summons was made upon the newly added defendants as required by Neb. Rev. Stat. § 25-503.01 (Reissue 1995). In addition, FAL admitted during oral argument before this court that no summons was issued and served upon the newly added defendants. Thus, the pleadings are insufficient to support the judgment of the district court with respect to the newly added defendants, and we find that the district court erred in overrul-

ing the newly added defendants' special appearance and entering judgment against them. Accordingly, we vacate the order of judgment entered against Burwick Apartments, Inc.; Thornberry Apartments, Ltd.; Sussex Place Apartments, Ltd.; Ashberry Apartments, Ltd.; and Walton Heath Apartments, Ltd.

2. WRITTEN CONTRACTS

Because several of the errors assigned in this appeal relate to the Burwick and Walton Heath B181 contracts, we will address these errors in this section.

(a) Anti-Assignment Provision

First, the defendants contend that the district court erred in allowing FAL, an assignee, to recover on the Burwick and Walton Heath B181 contracts because the contracts, by their terms, were not assignable. Specifically, the defendants contend that both contracts contained anti-assignment provisions which prohibited assignment without the written consent of the other party and that no consent was given by the defendants.

The Burwick and Walton Heath contracts provide in article 8.3:

> The Owner and the Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such party with respect to all covenants of this Agreement. *Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.*

(Emphasis supplied.)

[7] We have not been cited to, nor has our independent research uncovered, any Nebraska cases dealing with the specific issue raised here; however, there are numerous cases from other jurisdictions which hold that a contractual provision prohibiting assignment of rights under a contract, unless a different intention is manifested, does not forbid assignment of a right to money damages for a breach of the contract. *Ford v. Robertson*, 739 S.W.2d 3 (Tenn. App. 1987); *Cordis Corp. v. Sonics International*, 427 So. 2d 782 (Fla. App. 1983); *Grady v. Commers Interiors, Inc.*, 268 N.W.2d 823 (S.D. 1978); *Fuller v. Favorite Theaters Co. of Salt Lake*, 119 Utah 570, 230 P.2d 335

(1951); *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 182 P.2d 182 (1947); Restatement (Second) of Contracts § 322 (1981). We now hold that a contractual provision prohibiting assignment of rights under a contract, unless a different intention is manifested, does not forbid assignment of a right to money damages for a breach of the contract.

In the instant case, the anti-assignment provision at issue does not manifest a different intention. Further, the evidence reflects that the Burwick and Walton Heath B181 contracts were breached on or about May 12, 1995. The assignments which the defendants complain of occurred in May and August 1997, after the contracts at issue were breached. Because the assignments took place after the Burwick and Walton Heath contracts had been breached and after a right to money damages for the breach had accrued, we find that the anti-assignment provisions in the Burwick and Walton Heath contracts did not prevent the assignments from AAI to FAFD and from FAFD to JLK. Consequently, we find that the assignment provision at issue did not prevent FAL, the assignee, from pursuing its claim, and this assigned error is without merit.

(b) Final Approval

Next, the defendants contend that the district court erred in allowing FAL to recover on the Burwick and Walton Heath B181 contracts because neither project received final approval from HUD and therefore the defendants were not responsible for any payments other than the retainer fee and reimbursable expenses which had already been paid.

In its order, the district court determined that the defendants' refusal or failure to proceed to closing on the Burwick and Walton Heath projects triggered article 7 of the B181 contracts and that pursuant to this article, Anderzhon was entitled to be compensated for his services.

Article 7 provides in pertinent part:

> **7.1** This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.
>
> . . . .

> **7.3** *In the event of termination not the fault of the Architect, the Architect shall be compensated for all services performed to termination date, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 7.4.*
>
> **7.4** Termination Expenses include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount computed as a percentage of the total compensation earned to the time of termination, as follows:
>
> **.1** 20 percent if termination occurs during the Design Phase, or
>
> **.2** 10 percent if termination occurs during the Construction Documents Phase, or
>
> **.3** 5 percent if termination occurs during any subsequent phase.

The evidence in the record supports the district court's finding that the defendants failed to proceed with the Burwick and Walton Heath projects, that the defendants informed Anderzhon that they did not intend to proceed with these projects, and that through no fault of Anderzhon, the projects were terminated. Accordingly, we cannot say that the district court was clearly wrong in finding that pursuant to article 7, the defendants were responsible for the payment of the architectural services, the reimbursable expenses, and the termination expenses, despite the fact that neither project received HUD approval.

(c) Individual Liability of Kerns for Walton Heath and Burwick Obligations

Next, Kerns contends that the district court erred in finding him personally liable for judgments entered relating to the Burwick and Walton Heath B181 contracts. Kerns contends that when he executed the Burwick and Walton Heath contracts, he did so as an officer of Walton Heath Apartments, Inc., and as a limited partner of Burwick Apartments, Ltd., and that therefore, he should not have been held personally liable under the contracts. The district court determined that when Kerns executed the contracts, he bound himself personally as a partner and as a legal representative of the owner of the projects. First, we will

address whether the court erred in finding Kerns individually liable for corporate obligations.

(i) Individual Liability for Corporate Obligations

Kerns contends that he should not be individually liable for the obligations of Walton Heath Apartments, Inc., because he executed the B181 contracts in his capacity as president of Walton Heath Apartments, Inc.

[8,9] Generally, a corporation is viewed as a complete and separate legal entity from its shareholders and officers, who are not, as a rule, liable for the debts and obligations of the corporation. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). Further, a corporation's directors or officers are not ordinarily liable to the corporation's creditors or third persons for corporate acts or debts simply by reason of an official relation with the corporation. *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991).

[10,11] As a general rule, concerning liability on a corporate contract, a corporation's directors or officers are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate directors or officers purport to bind themselves, or have otherwise bound themselves, to performance of the contract. *Id.* Where a person acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf, in the absence of fraud, create no individual or personal liability against him. *Savorelli v. Stone*, 168 Neb. 419, 96 N.W.2d 222 (1959).

In the instant case, Kerns executed and signed the Walton Heath B181 contract in his official capacity as president of the corporation. Further, the contract reflects that it was entered into on behalf of the Walton Heath corporation as the owner. There is no evidence to support a finding that Kerns bound himself individually. In fact, the evidence shows that Kerns never signed any guaranties to bind him personally and that Anderzhon admitted that Kerns never told him that he would be personally responsible for the corporation's obligations. Further, there is no evidence to support a finding that Kerns committed fraud by his actions as a corporate president. Accordingly, we find that this is not an appropriate case to disregard the corporate fiction and

hold Kerns liable in his individual capacity for corporate obligations. Therefore, we find that the trial court erred in finding Kerns liable in his official capacity as the president of Walton Heath Apartments, Inc.

(ii) Individual Liability for Limited Partnership Obligations

Kerns further contends that he should not be personally liable for the obligations of the limited partnership because he executed the Burwick and Walton Heath contracts in his capacity as a limited partner of Burwick Apartments, Ltd.

Neb. Rev. Stat. § 67-251 (Reissue 1996) outlines when a limited partner is liable for the obligations of the limited partnership. Section 67-251 provides in pertinent part:

> (a) . . . [A] limited partner is not liable for the obligations of a limited partnership unless he or she is also a general partner or, in addition to the exercise of his or her rights and powers as a limited partner, he or she participates in the control of the business. *However, if the limited partner participates in the control of the business, he or she is liable only to persons who transact business with the limited partnership with actual knowledge of his or her participation in control reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.*

(Emphasis supplied.)

In the instant case, the evidence clearly shows that Kerns extensively participated in the control of the business despite his status as a limited partner. However, for a limited partner to be held liable for the obligations of a limited partnership, those persons who transact business with the limited partnership must reasonably believe that the limited partner is a general partner.

The evidence further reflects that Anderzhon knew Kerns had set up corporate and partnership entities for the apartment projects. The Burwick contract clearly reflects that Kerns signed the contract in his capacity as a limited partner of Burwick Apartments, Ltd. Further, Anderzhon admitted during his testimony that the contracts were entered between Anderzhon and the limited partnership, not Kerns; that Anderzhon was aware that Kerns signed the contract in his capacity as a limited part-

ner of Burwick Apartments, Ltd.; that Kerns never personally signed the contract; and that Kerns did not sign, nor did Anderzhon request Kerns to sign, a personal guarantee for the contract.

Based on the evidence in the record, we cannot say that Anderzhon reasonably believed that based on Kern's conduct that Kerns was a general partner of Burwick Apartments, Ltd. Therefore, we find that the district court was clearly wrong in finding Kerns individually liable for the limited partnership obligations with regard to the Burwick Apartments, Ltd., contract.

3. Oral Contracts

Next, the defendants contend that the district court erred in finding that the parties had entered into enforceable oral contracts relating to the Thornberry, Ashberry, Sussex Place, Kennamare, Devonshire, Wingpoint, and Greely projects.

[12] In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty. *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984).

[13] As stated above, our review of this bench trial is limited. We accord the district court's finding of fact the same status as a jury verdict and affirm unless the finding is clearly wrong, and we view the evidence in the light most favorable to the successful party. See *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992). We find that there was ample evidence for the trier of fact to conclude that the parties entered into an oral agreement for architectural services, that Anderzhon and FAFD provided the architectural services, and that the defendants did not pay for those services as agreed. Accordingly, we cannot say that the district court was clearly wrong in finding the parties had an oral contract for the Thornberry, Ashberry, Sussex Place, Kennamare, Devonshire, Wingpoint, and Greely projects. Therefore, this assigned error is without merit.

4. Quantum Meruit

[14] Next, the defendants contend that the district court erred in finding that FAL was also entitled to recover on the theory of

quantum meruit. The theory of quantum meruit is premised on the existence of a contract implied by law. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985); *Tracy v. Tracy*, 7 Neb. App. 143, 581 N.W.2d 96 (1998). However, the law only implies a contract and allows a recovery under the theory of quantum meruit when the parties have not entered into an express agreement. See *Associated Wrecking v. Wiekhorst Bros.*, 228 Neb. 764, 424 N.W.2d 343 (1988).

Having previously determined in this opinion that the parties in the instant case entered into express agreements, we find that the district court was clearly wrong in finding that FAL was entitled to recover under the theory of quantum meruit.

5. Promissory Estoppel

Next, Kerns contends that the district court erred in finding that FAL was entitled to recover on the basis of promissory estoppel.

Having previously determined in this opinion that Kerns is personally liable to FAL for breaching the oral contracts with regard to the judgments relating to the Thornberry, Ashberry, Sussex Place, Kennamare, Devonshire, Wingpoint, and Greely projects, we now consider whether Kerns is also personally liable for the judgments relating to the Burwick and Walton Heath projects under the theory of promissory estoppel.

[15,16] The doctrine of promissory estoppel is based on the proposition that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994); *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992); *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). Promissory estoppel requires that reliance be reasonable and foreseeable. *Whorley, supra*; *Rosnick, supra*.

Kerns contends that there is no evidence that he made any promises which Anderzhon could have reasonably relied upon. From our review of the record, it is clear that the trial court determined that Anderzhon's testimony was credible and that his

recollection was reliable; conversely, the court found Kern's testimony was not credible and his recollection unreliable. 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); *Tracy v. Tracy, supra.*

Because the evidence in the record supports the district court's finding that Anderzhon performed architectural services in reliance on Kern's statements and that Anderzhon's reliance on Kern's representations was reasonable and foreseeable, and because it is not our province to reweigh the evidence, we cannot say the district court was clearly wrong in finding that Kerns was liable on the basis of promissory estoppel for the judgments relating to the Burwick and Walton Heath projects.

6. Prejudgment Interest

Finally, the defendants contend that the district court erred in awarding prejudgment interest because a reasonable controversy existed as to FAL's right of recovery and as to the amount of the recovery FAL would be entitled.

[17,18] To determine whether a litigant is entitled to prejudgment interest, we must first determine whether the claim is liquidated or unliquidated. A claim is unliquidated if a reasonable controversy exists concerning the claimant's right to recover or the amount of such a recovery. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). Conversely, a claim is liquidated when no reasonable controversy exists as to the plaintiff's right to recover and it is possible to compute with exactness the amount owed. *Kaus v. Bideaux*, 709 F.2d 1221 (8th Cir. 1983).

Here, the evidence shows that the amount FAL claimed it was entitled to recover with respect to the Burwick project prior to trial was substantially different from the amount sought by FAL in the consolidated petition filed during the trial. In addition, the amounts claimed in FAL's original petition filed with regard to the Walton Heath project varies from the amount claimed by FAL in its consolidated petition filed during the trial and awarded by the district court. Finally, the amounts FAL claimed it was entitled to recover on the remaining projects also varies from the amount the district court awarded in its order of judgment.

We find that FAL was unable to compute with exactness the amount owed and that a reasonable controversy existed as to the amount FAL was entitled to recover. Accordingly, the claims of FAL were unliquidated.

[19] In order for a plaintiff to be eligible to receive prejudgment interest on the balance for unliquidated claims, accruing after January 1, 1987, a litigant must comply with the requirements of Neb. Rev. Stat § 45-103.02 (Reissue 1998). *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). Section 45-103.02 provides in relevant part:

> [Prejudgment] interest . . . shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (b) The offer is made not less than ten days prior to the commencement of the trial;
>
> (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

In the instant case, FAL's cause of action clearly accrued after January 1, 1987. As a result, § 45-103.02 applies, and FAL was required to comply with its terms. The record before this court contains no evidence that FAL complied with § 45-103.02. Consequently, it was error for the district court to award prejudgment interest when FAL did not comply with the requirements of § 45-103.02, and we reverse that portion of the district court's order awarding FAL prejudgment interest.

7. Cross-Appeal

Finally, we address the remaining errors assigned by FAL on cross-appeal which have not previously been addressed in this opinion.

(a) Kerns Individually Liable

First, FAL contends that the trial court erred in failing to find Kerns individually liable for the judgments awarded with respect to the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects.

Having reviewed the trial court's order, we find that the trial court did find Kerns individually liable for the judgments awarded with respect to these projects under the theory of breach of oral contract. Therefore, we reiterate for the sake of clarity that Kerns is individually liable for the judgments awarded with respect to the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects under the theory of breach of oral contract.

(b) Postjudgment Interest

Next, FAL alleges that the district court erred in failing to award postjudgment interest at the rate of 18 percent on the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects, when it did so on the judgments relating to the Burwick and Walton Heath projects.

It is apparent from the district court's order that the court awarded postjudgment interest on the Burwick and Walton Heath judgments at the rate of 18 percent because the B181 contracts specifically provided the rate of interest on payments due Anderzhon and unpaid. However, it is equally apparent that the district court did not award postjudgment interest at the rate of 18 percent on the remaining projects because the court determined that the parties had not orally agreed to a rate of interest for the payments due Anderzhon and unpaid if any.

Neb. Rev. Stat. § 45-103 (Reissue 1998) provides the rate at which postjudgment interest shall accrue on judgments. Section 45-103 provides in pertinent part:

> Interest on decrees and judgments for the payment of money shall be fixed at a rate equal to one percentage point above the bond equivalent yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills in effect on the date of judgment. The State Court Administrator shall distribute

> notice of such rate and any changes to it to all Nebraska judges to be in effect two weeks after the date the auction price is published by the Secretary of the Treasury of the United States.

Accordingly, we cannot say the district court erred in failing to award postjudgment interest at the rate of 18 percent rather than the rate provided in § 45-103 for the judgments awarded on the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects.

VI. CONCLUSION

The district court erred in overruling the special appearance of Burwick Apartments, Inc.; Thornberry Apartments, Ltd.; Sussex Place Apartments, Ltd.; Ashberry Apartments, Ltd.; and Walton Heath Apartments, Ltd. Therefore, the judgment entered against these defendants is vacated.

The district court further erred in finding Kerns individually liable for the obligations of Burwick Apartments, Ltd., and Walton Heath Apartments, Inc., because Kerns executed the contracts in his capacity as a limited partner of Burwick Apartments, Ltd., and as an officer of Walton Heath Apartments, Inc.

However, the district court did not err in finding that Anderzhon and Kerns had an enforceable oral contract for architectural services and that FAL was entitled to damages for breach of the oral contract; however, having determined that Anderzhon and Kerns entered enforceable oral contracts, we find that the district court erred in finding that FAL was also entitled to recover on the theory of quantum merit. Further, the district court did not err in finding Kerns liable to FAL for the judgments rendered with regard to the Burwick and Walton Heath projects under the theory of promissory estoppel, and that part of the judgment is so modified.

Finally, the portion of the district court's order awarding prejudgment interest is reversed for the reason that FAL failed to comply with § 45-103.02. We further find that the district court did not err in failing to award postjudgment interest at the rate of 18 percent rather than at the rate provided in § 45-103 on the

Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, REVERSED AND DISMISSED IN PART, AND IN PART VACATED AND SET ASIDE.

JANNA L. MINNIG, APPELLANT, V. SCOTT E. NELSON, APPELLEE.
613 N.W.2d 24

Filed June 27, 2000. No. A-99-796.

1. **Minors: Names.** The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child.
2. **Minors: Names: Proof.** The proponent of the change in surname has the burden to prove that the change in surname is in the child's best interests.
3. **Minors: Names.** Whether a change in a minor's surname is in the best interests of the child may depend on several factors, such as (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed.

Jennifer S. Liliedahl, of Bowman & Krieger, for appellant.

Terrance A. Poppe and Kelly N. Understock, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Janna L. Minnig appeals from a district court order granting Scott E. Nelson's request to have the surname of the parties'

minor child changed from "Minnig" to "Nelson." On appeal, Minnig asserts that Nelson failed to meet his burden of proof to demonstrate that such a name change would be in the child's best interests. Because we conclude that Nelson failed to adduce sufficient evidence to demonstrate the name change would be in the child's best interests, we find the district court abused its discretion in granting the name change, and we reverse the court's judgment in this regard.

II. BACKGROUND

Paxton Rae Minnig was born on November 29, 1998. Minnig is Paxton's mother, and Nelson is Paxton's father. Since birth, Paxton's last name has been "Minnig." On January 22, 1999, Minnig filed a petition for the establishment of paternity, support, and custody. At trial, the parties entered into a stipulation concerning all issues except Paxton's last name.

At trial, both parties testified that they wanted Paxton to have their respective last name, and both testified as to their reasons. The record indicates that a temporary order was entered on February 17, 1999, giving temporary custody and child support to Minnig and granting Nelson visitation. The evidence at trial indicated that Nelson had paid support and had exercised visitation since the time of the temporary order. On May 7, the district court filed an order approving the parties' stipulation. The stipulation addressed all the salient issues except Paxton's last name. The court held that Paxton's last name should be changed from Minnig to Nelson. Minnig has filed this timely appeal.

III. ASSIGNMENT OF ERROR

On appeal, Minnig has assigned three errors, which we consolidate for discussion to one. Minnig asserts that the district court abused its discretion in granting Nelson's request to change Paxton's last name from Minnig to Nelson.

IV. ANALYSIS

[1,2] The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990). In a filiation proceeding, a court, in deciding whether a child's surname should be changed

from the mother's surname to the father's surname, must consider the best interests of the child regarding a change of name. *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988). The proponent of the change in surname has the burden to prove that the change in surname is in the child's best interests. *Id.*

[3] The Nebraska Supreme Court has noted that whether a change in a minor's surname is in the best interests of the child may depend on several factors, such as (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit. *In re Change of Name of Andrews, supra.* See, also, *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982). These factors are substantially similar to the factors considered by other courts in the context of requests for name change in paternity proceedings. See *Jarrells v. Epperson*, 115 Ohio App. 3d 69, 684 N.E.2d 718 (1996); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996). Other important factors include the motivation of the parties, the effect a failure to change the name will have on furthering the estrangement of the child from a parent exhibiting a desire to preserve a parental relationship, the possibility that a different surname may cause insecurity or a lack of identity, and the use of a particular surname for a substantial length of time without objection. See *Hazel v. Wells, supra.*

In light of the foregoing factors, we conclude that Nelson failed to meet his burden of proof. See *Lancaster v. Brenneis, supra.* There was no evidence whatsoever to suggest that either party is guilty of any misconduct, failure to support Paxton, or failure to maintain contact with him. At the time of the hearing,

Paxton was less than 5 months old and, accordingly, was not able to express a reasonable preference. There was absolutely no evidence to suggest that leaving the surname as Minnig or changing the surname to Nelson would have any impact whatsoever on the preservation and development of Paxton's relationship with each parent; impose any difficulties, harassment, or embarrassment for him; or impact his identification as part of a family unit. There was no evidence whatsoever concerning community respect associated with Paxton's present or proposed surname.

At trial, Nelson testified that he wanted Paxton to have "Nelson" as his surname because Paxton was Nelson's only child and might be the only child Nelson ever has. Additionally, Nelson indicated that he thought it would be less confusing for Paxton if he had "Nelson" as a last name in the event Minnig someday marries and changes her own last name to that of her eventual husband. On appeal, Nelson argues that he has gone "above and beyond" the support obligation imposed by Nebraska law, brief for appellee at 9, and that changing Paxton's surname to "Nelson" will foster bonding by Paxton with Nelson, as the noncustodial parent. While we applaud Nelson's interest in supporting and caring for his child, and while it is laudable and encouraging to see that Nelson intends to continue in his relationship with Paxton, Nelson's efforts do not demonstrate that Paxton's best interests necessitate a change in his name. The evidence at trial indicates that both parties have supported Paxton and have shown care toward Paxton. As the party seeking the name change, it was Nelson's burden to demonstrate that such a change would be in Paxton's best interests.

Because there was no evidence presented at trial demonstrating that changing Paxton's surname would be in his best interests, we conclude that the district court abused its discretion in ordering the change in his surname. Accordingly, we reverse the court's finding in this regard and order that Paxton's surname be "Minnig." In all other respects, we affirm the court's judgment.

AFFIRMED IN PART, AND IN PART REVERSED.

WILLIAM H. STEWART, JR., APPELLEE, V. JENNIFER L. STEWART, APPELLANT.

613 N.W.2d 486

Filed June 27, 2000. No. A-99-1014.

1. **Modification of Decree: Child Support: Rules of the Supreme Court.** All orders for child support, including modifications, must include a basic income and support calculation worksheet from the Nebraska Child Support Guidelines.
2. **Modification of Decree: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and an appellate court is empowered to enter the order which should have been made as reflected by the record.
3. **Modification of Decree: Child Support: Rules of the Supreme Court.** It is not within the trial court's discretion to forgo completion of the basic income and support calculation worksheet from the Nebraska Child Support Guidelines.
4. **Child Support: Rules of the Supreme Court.** The basic income and support calculation worksheet must be completed in accordance with the Nebraska Child Support Guidelines.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Kevin Ruser, of the University of Nebraska Civil Clinical Law Program, for appellant.

Virginia G. Johnson for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

PER CURIAM.

This case returns to us after a previous appeal which resulted in a remand to the district court. In the first appeal, Jennifer L. Stewart appealed the decision of the Lancaster County District Court which gave her former husband, William H. Stewart, Jr., custody of the parties' two children and ordered Jennifer to pay child support. In *Stewart v. Stewart*, No. A-98-663, 1999 WL 111956 (Neb. App. March 2, 1999) (not designated for permanent publication), we found that the evidence of income was insufficient to calculate child support and remanded for an evidentiary hearing. Upon remand, the district court ordered Jennifer to pay child support in the amount of $313 per month. Jennifer again appeals the district court's order.

BACKGROUND

William and Jennifer were divorced in 1991, and Jennifer was awarded custody of their two minor children. William filed an application to modify custody in November 1997, which resulted in William being awarded custody of the children and Jennifer being ordered to pay child support of $334 per month. As described above, Jennifer appealed, and we remanded for an evidentiary hearing on the issue of child support. See *Stewart v. Stewart, supra.* Therefore, at that evidentiary hearing on May 12, 1999, the parties adduced evidence and submitted proposed basic income and support calculation worksheets from the Nebraska Child Support Guidelines for the district court's consideration. On June 3, 1999, the trial court modified the amount of child support to $313 per month. The record does not contain a worksheet prepared or adopted by the trial court, and counsel agreed at oral argument that there was no such worksheet from the trial court.

William submitted a worksheet showing his total monthly income to be $2,138.56. William testified that this figure was computed by taking his year-to-date earnings from his April 1, 1999, paycheck and dividing by 3 to produce this monthly figure. William's check stubs show that he earns $14.698 per hour. William's worksheet shows Jennifer's income at $1,118. There is no explanation of how this figure was calculated. Based on William's calculations, Jennifer's child support would be $313 per month, the figure ordered by the trial court.

Jennifer submitted two worksheets, which are the same except that one is calculated on a 30-hour workweek for Jennifer and the other is calculated on a 40-hour workweek. Both worksheets calculate Jennifer's income according to her present wage of $6.50 per hour. At oral argument, Jennifer's counsel conceded that a 40-hour workweek should be imputed to her, even though she was working less than 20 hours per week at the time of the evidentiary hearing. Jennifer calculated William's income using his hourly wage of $14.698. Jennifer annualized her income and William's by multiplying their respective hourly wages by 40 hours per week, and then again by 52 weeks. Finally, that figure was divided by 12, producing total monthly income of $1,126.67 for Jennifer and $2,547.65 for William. Jennifer then

calculated her support obligation as $308.55 per month, but reduced that figure to $222.42 in accordance with paragraph R, Basic Subsistence Limitation, of the guidelines.

ASSIGNMENT OF ERROR

Jennifer's sole assignment of error is that the district court ordered her to pay monthly child support that does not comply with the guidelines.

STANDARD OF REVIEW

Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Truman v. Truman*, 256 Neb. 628, 591 N.W.2d 81 (1999); *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

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. *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998); *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

ANALYSIS

Given that the trial court failed to complete and attach a worksheet to the order on William's application to modify decree, we are left to speculate about the trial court's findings on the parties' incomes to determine the child support amount. The requirement that a worksheet be attached to all orders for child support has been noted and emphasized in past appellate court decisions. See, e.g., *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Laubscher v. Laubscher*, 8 Neb. App. 648, 599 N.W.2d 853 (1999); *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998); *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997).

[1] One of the obvious purposes of the worksheet requirement is so that the appellate courts do not have to speculate about the trial court's conclusions. While the record does contain the par-

ties' worksheets, we emphasize that this is not enough to satisfy the requirements of paragraph C of the guidelines, which specifically mandates that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet . . . ." The rules clearly state that it is the order itself which must contain a worksheet. In short, the trial courts must show the appellate courts, and the parties, that they have "done the math." The trial court's worksheet makes that showing.

[2] Jennifer urges us to recalculate the support obligation by completing a worksheet on appeal and then remand with the direction that the trial court attach our worksheet to its order and set child support in accordance with our worksheet. Jennifer reasons that we may properly do so because appeals in domestic relations matters are heard de novo on the record and an appellate court is empowered to enter the order which should have been made as reflected by the record. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993). While acknowledging our power to do this and some measure of efficiency if we were to so proceed, the law requires that the trial court follow the guidelines. This means that a worksheet is prepared by the trial court or that the court expressly adopts one correctly prepared by the parties.

[3] It is not within the trial court's discretion to forgo completion of the worksheet. When the trial court fails to prepare or adopt a worksheet as required, and the parties fail to insist on such, for example, by a motion nunc pro tunc or for a new trial as may be appropriate, before bringing the case to the appellate level, we will remand so that the trial court can complete the worksheet and attach it to the order as required by the guidelines.

[4] Obviously, the worksheet must be completed in accordance with the guidelines. The guidelines require that each party's income be annualized and then divided by 12 to arrive at a monthly income. Deductions are likewise annualized and divided by 12. Therefore, the method used by William in computing the parties' total monthly incomes is not correct. The evidence is undisputed that William earns $14.698 per hour and

that Jennifer earns $6.50 per hour. As such, these hourly wages are to be annualized and then divided by 12 for purposes of computing Jennifer's child support obligation. Therefore, the trial court shall find that William's total monthly income is $2,547.65 and that Jennifer's total monthly income is $1,126.67. These incomes are to be used by the trial court on remand.

Finally, Jennifer argues the trial court erred in failing to comply with paragraph R of the guidelines, which provided at the time of trial:

> A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $687 net monthly [amended March 15, 2000, to $696] for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in paragraph I., above.

We find no authority which allows a trial court to ignore the provisions of paragraph R except as might be appropriate under paragraph C, Rebuttable Presumption, of the guidelines. Therefore, we hold that upon remand, paragraph R shall be applied, unless the court makes the requisite findings under paragraph C.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JOSEPH RUISI, APPELLANT AND CROSS-APPELLEE.

616 N.W.2d 19

Filed July 11, 2000. No. A-99-382.

1. **Constitutional Law: Ordinances: Appeal and Error.** The Court of Appeals may determine the constitutionality of a municipal ordinance.
2. **Ordinances: Animals: Words and Phrases.** Omaha Mun. Code, ch. 6, art. V, § 6-105 (1996), provides that a dangerous dog or other dangerous animal is any dog or other animal which attacks a human being or other domestic animal one or more times without provocation.
3. **Legislature: Intent: Strict Liability.** Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea.

4. **Constitutional Law: Due Process: Ordinances: Strict Liability: Animals: Intent: Proof.** An ordinance against harboring a dangerous dog does not violate the constitutional requirements of due process merely because it is a strict liability crime. Proof of prior knowledge that the dog had dangerous propensities is not required, nor is proof of any criminal intent required.
5. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, and if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction, the appellate court will affirm.
6. **Sentences: Appeal and Error.** So long as a trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that the trial court has abused its discretion, because such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result.
7. ___: ___. An appellate court, including a district court reviewing a county court sentence, has an extremely limited review of sentences, and sentences within statutory limits are uniformly and routinely affirmed despite the appellate court's opinion of the sentence.
8. **Ordinances: Evidence: Records: Appeal and Error.** An appellate court will consider ordinances if offered as evidence at trial level or if included in the appellate court's transcript.
9. **Ordinances: Records: Presumptions: Appeal and Error.** In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court.
10. **Criminal Law: Statutes: Due Process: Notice.** Where a penal statute supplies adequate and fair notice of the conduct prohibited and also supplies an explicit definition of the proscribed conduct, due process is satisfied.
11. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process present a question of law.
12. **Constitutional Law: Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.

Appeal from the District Court for Douglas County, J. MICHAEL COFFEY, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed in part, and in part reversed.

James C. Vitek and Joseph C. Vitek for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired.

SIEVERS, Judge.

One of Joseph Ruisi's three dogs attacked and severely injured Paula Cork, a visitor in Ruisi's home. Ruisi was convicted in Douglas County Court on one count of harboring a dangerous and ferocious dog and on three counts of no proof of vaccination. On appeal to the district court for Douglas County, his convictions were affirmed, but his sentences were reduced. Ruisi's dog, which had been impounded since the attack, was ordered destroyed. Ruisi appeals his convictions, his sentences, the impoundment of his dog, and the destruction order. The State cross-appeals, arguing that the district court should not have reduced Ruisi's sentences.

FACTUAL BACKGROUND

Ruisi met Cork at an Omaha bar on the night of May 14, 1998. The two talked, and during their conversation, he indicated to her that he had three dogs. His dogs include a male "Polish Ovchar," named Boksi, a female Hungarian Kuvasz, and a female Great Pyrenees. Cork told Ruisi that she was afraid of dogs. Ruisi invited Cork to his house, and they drove there together in his car. After they entered the house, Cork saw the three dogs and told Ruisi that she was afraid of them. He told her to "[s]tick by me and you'll be okay." Ruisi testified that he told her that the dogs were guard dogs and to "please leave them alone." The dogs sniffed them, but did not snap or growl. After a short while, the dogs left them alone. Although Ruisi had a basement in which he could put the dogs, and had done so before, he left them out this night.

Ruisi showed Cork around his house, and they ended up talking in a spare bedroom. Ruisi left the room to get coffee, while Cork stayed behind, sitting near the edge of the bed. One of Ruisi's dogs, Boksi, was at the foot of the bed. Cork testified that she was "just sitting there" and did not startle the dog or do anything to provoke it, but did start to reach her hand out to pet it. At that point, the dog attacked Cork. It went after her forearm first, pulled her to the floor, then bit her face and the back of her neck.

Ruisi heard Cork's screams and returned to the room. He got the dog out of the room and put him in the garage. He also got Cork something to try to stop the bleeding, then called the 911 emergency dispatch service. An emergency squad arrived shortly thereafter and took Cork to the hospital. Cork's injuries included scratches, a sinus injury, lacerations to her face and neck, and a broken nose. These injuries required over 200 stitches. Cork testified that she will have to undergo 5 years of reconstructive surgery. Cork also received mental health therapy for posttraumatic stress disorder. Since the attack, she has had nightmares and an extreme fear of dogs.

At trial, Ernest Stary, an animal control officer, testified that he arrived at Ruisi's home at approximately 2:30 a.m. on May 15, 1998. Stary stated that there were three dogs at the Ruisi residence. Ruisi told him that Boksi had bitten Cork that night. Stary asked Ruisi to provide him with proof of vaccination for the three dogs, which Ruisi did not do. Ruisi told Stary that he believed the dogs might have been vaccinated, but could not show proof of it. At trial, Ruisi admitted that Boksi was not current for his rabies vaccination on the night of May 14. He stated that he did not have the other two dogs' proof of vaccinations that night because he was staying in a temporary residence and did not have all of his paperwork at that residence. Ruisi did not produce copies of the proof of vaccinations at trial. Stary took Boksi to the humane society on May 15, where he has been impounded since.

Ruisi was cited for three counts of no proof of vaccination pursuant to Omaha Mun. Code, ch. 6, art. V, § 6-201 (1996). Ruisi was also cited for harboring a dangerous and ferocious dog, pursuant to Omaha Mun. Code, ch. 6, art. III, § 6-105 (1996), because his dog Boksi had attacked and bitten Cork.

Ruisi testified that he did not have any knowledge that any of his dogs had ever bitten or tried to bite anyone and had never attacked another animal, and that he had no reason to think that any of them would attack Cork. Ruisi does not dispute that Boksi attacked Cork and agrees that the dog inflicted the wounds that she described.

The county court found Ruisi guilty on all charges and sentenced him to 6 months in jail on the harboring a dangerous ani-

mal charge and 5 months in jail on each of the three charges for no proof of vaccination; the latter sentences were ordered to run concurrent to each other, but consecutive with the harboring sentence. The court also ordered the destruction of Boksi. Ruisi appealed the convictions, sentences, and destruction order to the district court, which affirmed the convictions and findings of the county court, but the district court reduced Ruisi's sentences to 6 months of probation followed by 180 days in jail, unless waived by the court, for the harboring charge and each of the three counts of no proof of vaccination, all to run concurrent with each other. Ruisi timely appealed.

ASSIGNMENTS OF ERROR

Ruisi assigns six errors: The district court erred in (1) determining that it was not a violation of due process for the Omaha city ordinance to impose strict liability by eliminating a mens rea requirement that a dog owner know that a dog is a dangerous dog as defined in the ordinance; (2) determining that the evidence was sufficient for the county court to convict Ruisi of the offenses of harboring a dangerous dog and no proof of vaccination; (3) sentencing Ruisi to 6 months of probation followed by 6 months of imprisonment, because this exceeds the statutory limits for a violation of a misdemeanor offense; (4) failing to find that the county court order of impoundment was in violation of his due process rights under the 14th Amendment; and (5) determining that his dog should be destroyed and that he pay the expenses necessitated by the impoundment and destruction of the dog. Ruisi also asserts that his sentences are excessive.

The State has cross-appealed, asserting that the district court erred in modifying the sentences imposed by the county court.

ANALYSIS

Harboring Dangerous Animal as Strict Liability Crime.

Ruisi first asserts that the strict liability nature of the harboring a dangerous dog ordinance is a violation of due process, because there is no requirement that a dog owner know that a dog is a dangerous dog as defined in the ordinance.

[1] We first address whether we have jurisdiction over Ruisi's claims that the ordinance in question is unconstitutional. Neb. Rev. Stat. § 24-1106 (Reissue 1995) provides that an appeal shall be taken to "the Court of Appeals except in capital cases, cases in which life imprisonment has been imposed, and cases involving the constitutionality of a statute." Section 24-1106 does not except from the jurisdiction of this court consideration of the constitutionality of an ordinance. See, also, Neb. Ct. R. of Prac. 9E (rev. 1996). This court may determine the constitutionality of a municipal ordinance. See *State v. Champoux*, 5 Neb. App. 68, 555 N.W.2d 69 (1996).

[2] Section 6-105 of the Omaha Municipal Code provides:

> No person shall own, keep or harbor, or allow to be in or upon any premises occupied by him, or under his charge or control, any dangerous dog or other dangerous animal without said dog or other animal being confined so as to protect the public from injury.
>
> A dangerous dog or other dangerous animal is defined as one who meets one or more of the following conditions:
>
> (a) Any dog or other animal which attacks a human being or other domestic animal one or more times, without provocation;
>
> (b) Any dog or other animal with a history, tendency or disposition to attack, to cause injury or to otherwise endanger the safety of human beings or other domestic animals;
>
> (c) Any dog or other animal that snaps, bites or manifests a disposition to snap or bite.
>
> If upon the conviction of an offense under this section it shall appear to the court that said dog or other animal is still living, the court may, in addition to any other fine or judgment, order the poundmaster to forthwith put the dog or other animal to death by removing the same to the animal shelter for such purpose. Any person found guilty of violating this section shall pay all expenses, including shelter, food, veterinary expenses for identification or certification of the dog or other animal, boarding and veterinary expenses necessitated by the seizure of any dog or other animal for the protection of the public and such other

> expenses as may be required for the destruction of any such dog or other animal.

[3] In *State v. Pettit*, 233 Neb. 436, 447, 445 N.W.2d 890, 897 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), the Nebraska Supreme Court stated: " 'Strict liability offenses are the exception rather than the rule and will only be found where there is a clear legislative intent not to require any degree of mens rea.' " Accord *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). However, the court went on to state that the violation of some criminal statutes may occur without a defendant's criminal intent, if such law

> "omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where the conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause."

Pettit, 233 Neb. at 447, 445 N.W.2d at 898, quoting *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960). Thus, contrary to Ruisi's assertion, there are many laws and ordinances that are "strict liability" in nature. For example, most traffic laws contain no criminal intent element.

The argument being advanced, "I did not know my dog was dangerous because he had never attacked anyone before," is not dissimilar to the argument made in statutory rape cases that "I did not know how young she was." That defense, which is fundamentally a lack of intent argument, like that advanced here, has been uniformly rejected. See *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985) (defense of reasonable mistake in prosecution for sexual assault of child is not constitutionally required).

While there are no cases regarding the specific ordinance at issue, cases regarding Nebraska's civil dog bite statute are instructive. In *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993), the court reiterated that Nebraska's dog bite statute,

Neb. Rev. Stat. § 54-601 (Reissue 1998), is based on strict liability. That statute provides in part that "the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs." The court in *Holden* stated: "Section 54-601 has been applied a number of times by this court and has been found to make an owner strictly liable for injuries inflicted by his dog without any proof that the owner knew of the dog's dangerous propensities." 242 Neb. at 392, 495 N.W.2d at 271. See, also, *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996); *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989); *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979). In *Donner v. Plymate*, 193 Neb. 647, 650, 228 N.W.2d 612, 614 (1975), the court stated: "Dog owners are statutorily liable for any and all damage without proof of scienter or knowledge of dangerous propensities of their dog for biting . . . persons." Referring to this language, the court in *Paulsen*, 202 Neb. at 795, 277 N.W.2d at 235, found: "It is, therefore, beyond question that section 54-601, R. R. S. 1943, creates a cause of action based upon strict liability on the part of a dog owner."

While § 54-601 applies to civil actions and the present case involves a criminal ordinance, the statute and the resulting case law support the notion that the public policy of the State is that dog owners are held to a very high standard in order to protect the public from injury by dogs. The mere fact that a dog has bitten someone who is not a trespasser is enough to impose liability on the dog's owner for the full range of personal injury damages caused by the dog. We find that the same public policy is carried through in Omaha's criminal "harboring" ordinance as there is no express provision for prior knowledge or criminal intent.

To find in the ordinance a mens rea requirement of criminal intent, or even a requirement of negligence on the part of the dog owner, would defeat the ordinance's public policy, which is to protect people from the great harm which can befall a victim of a dog attack. In short, under the Omaha ordinance, no dog (or dog owner) is entitled to "one free bite." We construe the city council's intent and purpose in enacting the ordinance as pro-

tection of the public without any need to show criminal intent. In fact, we believe that in promulgating such ordinance, the city council was attempting to address exactly what occurred in this case. In addition, violation of the ordinance is a misdemeanor, thus limiting the penalty which can be imposed.

[4] We hold that the Omaha ordinance against harboring a dangerous dog does not violate the constitutional requirements of due process merely because it is a "strict liability" crime. Proof of prior knowledge that the dog had dangerous propensities is not required, nor is proof of any criminal intent required.

Sufficiency of Evidence—Harboring Conviction.

[5] Ruisi argues that the evidence was insufficient to support his conviction for harboring a dangerous dog. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, and if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction, the appellate court will affirm. *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998). The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

There is no conflict in the evidence that Ruisi's dog attacked and injured Cork. Ruisi argues that Cork provoked the dog, but reaching one's hand out intending to pet a dog does not constitute "provocation," particularly when we view the evidence most favorably to the State. There is no other evidence that Cork provoked the dog into attacking her. Having found the ordinance constitutional, negating the need that the State prove criminal intent, we find that the evidence is obviously sufficient to sustain Ruisi's conviction for harboring a dangerous dog.

Excessive Sentence on Harboring Conviction.

Ruisi argues that his sentence of 6 months' incarceration on the harboring charge is excessive. On appeal to the district court, that court reduced and modified Ruisi's sentence to 6 months of probation followed by 180 days of imprisonment, unless waived

by the court. The State asserts in its cross-appeal that the district court should not have reduced Ruisi's sentence. See *State v. Turco*, 6 Neb. App. 725, 576 N.W.2d 847 (1998) (cross-appeal by State proper from alleged error by district court in its review of county court conviction and sentence).

[6,7] So long as a trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that the trial court has abused its discretion, because such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). In *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998), we considered the reduction by the district court of a lawful sentence imposed within the statutory limits by a county court. We held that in such instance, the district court acts as an appellate court and has no greater power of sentence review than does an appellate court of a district court's sentences. Thus, as the sentence pronounced by the county court was within statutory limits, which nearly universally means there has been no abuse of discretion, we reversed the district court's reduction of sentence in *Hopkins, supra.* In *Hopkins*, we said that "an appellate court, including a district court reviewing a county court sentence, has an extremely limited review of sentences, and sentences within statutory limits are uniformly and routinely affirmed despite the appellate court's opinion of the sentence." 7 Neb. App. at 901, 587 N.W.2d at 413. It is now quite clear that this is the law of Nebraska.

In the instant case, the district court reasoned that "without evidence of a prior attack or biting incident and no evidence of a history or tendency of the dog to be violent that the sentence imposed upon the Defendant was excessive and constituted an abuse of discretion by the trial court and should be modified." While these could well be important considerations for the sentencing court, precedent dictates they are not meaningful for the reviewing court, which generally looks only at whether the sentence is within statutory limits. See *Harrison, supra.* Although the trial court sentenced Ruisi to the maximum term allowed, the sentence for harboring a dangerous dog charge was still

within the limits prescribed by the ordinance. The trial court's original sentence is also supported by competent evidence, including the severe nature of Cork's injuries and the lack of care exhibited by Ruisi in not putting the dogs in the garage or basement to protect Cork, when he knew she was afraid of the dogs. These are relevant factors to consider. Applying the law from *Hopkins, supra*, and *Harrison, supra*, we hold that the trial court did not abuse its discretion in sentencing Ruisi to 6 months in jail for the harboring charge. We therefore reverse the district court's sentence and reinstate the county court's sentence of 6 months on the harboring charge.

No Proof of Vaccination Conviction.

Ruisi was charged with and convicted of three counts of no proof of vaccination, an ordinance found in § 6-201 of the Omaha Municipal Code. The trial court sentenced him to 5 months in jail on each charge, with the sentences to run concurrent to each other and consecutive to the harboring sentence. On appeal, the district court reduced his sentences to 6 months of probation followed by a term of incarceration of 180 days, unless waived by the court, on each count, to run concurrent to each other and to the reduced harboring sentence. Ruisi asserts that the evidence was not sufficient to sustain his convictions and that his sentences were excessive.

[8,9] At trial, Ruisi failed to offer the ordinance concerning failure to provide proof of vaccination, and it is not in the record before us. See *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998) (holding that appellate court will consider ordinances if offered as evidence at trial level or if included in appellate court's transcript). Usually, when a defendant appeals a conviction and sentence under a municipal ordinance, claiming insufficiency of the evidence and excessiveness of the sentence, an appellate court's consideration of the assignments of error requires examination of the specific ordinance involved. Before *Bush, supra*, the rule was that an appellate court would not take judicial notice of an ordinance not in the record but assumed that a valid ordinance creating the offense charged existed, that the evidence sustained the findings of the trial court, and that the sentence was within the limits set by the ordinance. *State v. Hill*,

254 Neb. 460, 577 N.W.2d 259 (1998); *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992); *State v. King*, 239 Neb. 853, 479 N.W.2d 125 (1992). This is known as the "ordinance rule" and normally disposes of an appeal when the record does not contain the applicable city ordinance. *Bush* clearly teaches that the ordinances and the sufficiency of the evidence to sustain a conviction thereunder can be considered if the ordinance is in our transcript—which the *Bush* court points out is merely a matter of the appellant requesting, via a praecipe, that the county court clerk include the ordinance in the transcript. As explained in *King*, 239 Neb. at 854, 479 N.W.2d at 126, "In the absence from the record of the applicable municipal ordinance, an appellate court *presumes that the evidence sustains the findings of the trial court*." (Emphasis supplied.)

Because the pertinent ordinance is not in the record or in our transcript, we apply the ordinance rule. Therefore, we must assume the evidence is sufficient to sustain Ruisi's convictions and that the sentences imposed by the trial court are within the limits set by the ordinance. Accordingly, Ruisi's assignment of error regarding the sufficiency of the evidence and the excessiveness of his sentences on the charges of no proof of vaccination is without merit.

With regard to the State's cross-appeal regarding the reduction of Ruisi's county court's sentences for these offenses by the district court, we apply the same principles from *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), and *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998), as we did with respect to the district court's reduction of the sentence for harboring a dangerous dog. Under the ordinance rule, we presume that the county court's sentence is within the limits set by the ordinance. Therefore, we reinstate the county court's sentences of 5 months in jail on each of the three counts to run concurrent to each other, but consecutively to the sentence on the harboring conviction.

Impoundment and Destruction of Dog.

With regard to the disposition of the dog, Ruisi raises two arguments. Ruisi first argues that his dog should not have been impounded. The dog was originally impounded on May 15,

1998, for a 10-day observation period pursuant to an ordinance because Ruisi could not show proof of vaccination, and then on May 19, the court ordered the dog held until the proceedings were complete. We do not have the 10-day observation ordinance in the record, and therefore we apply the ordinance rule, which means that we must find that the impoundment was lawful and fully in accord with the ordinance.

[10] Moreover, we find that the action of the court in ordering the impoundment of the dog was in accordance with § 6-106, which specifically provides that the court may order the impoundment of a dangerous dog under § 6-105 during the pendency of enforcement proceedings. Furthermore, we cannot conclude that the impoundment of the dog violated any due process rights of Ruisi since we do not have the ordinance, but under the ordinance rule, we presume its validity—including adequate notice and an opportunity to be heard. See *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990) (where penal statute supplies adequate and fair notice of conduct prohibited and also supplies explicit definition of proscribed conduct, due process is satisfied).

Second, Ruisi argues that the dog should not be destroyed and that he should not be made to pay the expenses necessitated by the impoundment and destruction of the dog. Section 6-105, which we have in the record and which we have previously quoted, clearly provides that the court may order such destruction and that the person convicted of harboring the dangerous animal shall pay the expenses. Because we have affirmed the conviction for harboring a dangerous dog, it naturally follows that we would affirm the destruction of the dog, at Ruisi's cost, as the ordinance provides, unless we were to find merit in Ruisi's due process argument.

Due Process.

The dog was impounded on May 15, 1998, pursuant to § 6-205 of the Omaha Municipal Code for a 10-day rabies observation period. On May 19, 1998, the county court placed a hold on the dog during the pendency of Ruisi's case, pursuant to § 6-106 of the code. On July 6, 1998, Ruisi filed a motion for the release of the dog, which was heard and denied by the court on July 30, 1998.

[11] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process present a question of law. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[12] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999) (Connolly, J., concurring). The protections of procedural due process attach whenever there has been a deprivation of a significant property interest. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997). When examining a claim that one is being deprived of a property interest without due process of law, a three-stage analysis is employed. See *Shearer, supra.* The question at the first stage is whether there is a protected liberty interest at stake. *Id.* If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. *Id.* Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which is due. *Id.*

In *Shearer, supra*, Justice Connolly stated in his concurrence:

> However, "[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in '"extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."'" *United States v. James Daniel Good Real Property*, 510 U.S. at 53, quoting *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). See, also, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (noting that postdeprivation process may be sufficient when state must necessarily act quickly or it is impractical to provide predeprivation process). Whether such an exception applies requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings. *United*

> *States v. James Daniel Good Real Property, supra.* In this regard, we consider (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

256 Neb. at 592-93, 591 N.W.2d at 777-78.

Property Interest.

Ruisi's property interest in the dog, while it exists, is minimal. At the time the dog was taken away, Ruisi lived in a home in Omaha and worked at Peter Kiewit and Sons. The record shows that he apparently has quit that job and is now a sheep farmer. While he contends that he needs the dog to guard his sheep, he owns two other dogs beside the one at issue. Moreover, Ruisi has not even shown that the dog is capable of guarding sheep. Thus, we concede that Ruisi has some property interest in the dog, but we have difficulty on this record in saying that the interest is "substantial."

Risk of Erroneous Deprivation.

There is little risk of erroneously depriving Ruisi of his property interest in the dog because even Ruisi does not dispute that the dog inflicted the injuries on Cork, which obviously were significant. There is no risk here that the dog to be destroyed is "innocent" or is not dangerous.

City's Interest.

The city has a significant interest in removing from circulation a dog that has attacked and seriously injured a person without any provocation. The dog presents a danger to society, and the city has a legitimate interest in protecting the public from the animal.

Balancing.

We cannot say that Ruisi's property interest in the dog outweighs the city's interest in keeping this harmful animal from

the public. The monetary value of the dog is minimal, and even if it has value as a guard dog for Ruisi's sheep, a factual assertion not proved by the record, we cannot say that such assumed value outweighs the need for protection of the public. In addition, a person cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993); *Dawson County Irrigation Co. v. McMullen*, 120 Neb. 245, 231 N.W. 840 (1930). See, also, *Koepp v. Jensen*, 230 Neb. 489, 432 N.W.2d 237 (1988). Ruisi had such recourse through legal means, but has failed to convince the county court, the district court, or this court that the dog was not dangerous and should not be destroyed.

In conclusion, we find no denial of due process in the order for destruction of the dog. As far as the order that Ruisi pay the costs of the dog's impoundment and destruction, the ordinance so provides. Such costs are merely part of the owner's responsibility when keeping a large dog which turns out to be a dangerous animal that must be destroyed. These are costs which society legitimately imposed on Ruisi.

CONCLUSION

We find that the ordinance prohibiting the harboring of a dangerous dog is constitutional and that the evidence was sufficient to support the conviction thereunder. We also find that Ruisi has not shown that the evidence was insufficient on the three convictions for no proof of vaccination. We reverse the district court's reduction of Ruisi's sentences and reinstate the trial court's sentence of 6 months on the harboring a dangerous dog conviction and 5 months in jail on each count of no proof of vaccination to run concurrent to each other, but consecutively with the 6-month sentence on the harboring charge. In addition, there was no violation of Ruisi's due process in the impoundment of the dog or in the order that the dog be destroyed. Pursuant to § 6-105, we find no error in ordering Ruisi to pay the expenses necessitated by the impoundment and destruction of the dog.

AFFIRMED IN PART, AND IN PART REVERSED.

BUCKLEY, District Judge, Retired, dissenting.

I respectfully dissent from that portion of the opinion of the majority that the county court's sentences were not excessive and, therefore, not an abuse of discretion. The district court, in appellate review, said they were excessive. I agree.

An abuse of discretion "takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result." *State v. Philipps*, 242 Neb. 894, 898, 496 N.W.2d 874, 877 (1993).

The majority states that "[s]o long as a trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that the trial court has abused its discretion . . . ." Citing *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). What is meant by "supported by competent evidence" is far from clear. The majority goes on to say that a sentence pronounced within statutory limits nearly universally means that there has been no abuse of discretion and that sentences within statutory limits are " 'uniformly and routinely affirmed despite the appellate court's opinion of the sentence.' " Quoting *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998). The majority then concludes: "It is now quite clear that this is the law of Nebraska."

The above statement is understandable when one considers that in the 8 years of the existence of the Nebraska Court of Appeals, not a single criminal sentence has met the definition of abuse of discretion set forth in *Philipps, supra*.

This may seem to lead the majority to the conclusion that limitations such as "supported by competent evidence" and "nearly universally" are virtually meaningless and that therefore any sentence—without exception—that is within statutory limits is not an abuse of discretion and thus not excessive.

The problem with such a position is threefold. First, it is inconsistent with, and renders empty, the words of Neb. Rev. Stat. § 29-2308 (Reissue 1995), which states in part:

> In all criminal cases that now are or may hereafter be pending in the Court of Appeals or Supreme Court, the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the

> sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.

Second, it defeats the very concept of discretion, because a sentence that exceeds its statutory authority is not an abuse of discretion, but is unlawful, null, and void.

Third, it does not recognize that sentencing courts are human and fallible, and thus can impose imperfect judgments, however intended and well meaning they may be.

I cannot accept the majority's position. The Nebraska Supreme Court has left the door ajar—however slightly. It has not foreclosed any sentence within statutory limits from being excessive, but it strongly suggests it is a rare exception. This case indeed is one of those rare exceptions.

In determining an appropriate sentence, the court must consider in each case the offense and the offender. The majority dismisses the district court's reasons for adjudging the sentences excessive as not meaningful if the sentence is within statutory limits, but then goes on to recognize the severe injury to Cork and the lack of care of Ruisi to protect Cork (notwithstanding there was no evidence that the dog would bite) as relevant factors to consider. I disagree that the district court's reasons were irrelevant.

All four of the offenses are city ordinance misdemeanor violations. No proof of vaccination of a dog is tantamount to no proof of a valid driver's license or failure to carry one's insurance card in one's automobile. Regardless of whether the required proof is furnished by the time of sentence, to send a defendant to jail at all, let alone the maximum, is unheard of. While the dog caused a serious injury to Cork, the fact that there was no evidence that the dog had ever bitten anyone before or had any kind of propensity to bite is more relevant than the result of the bite to the nature of the offense.

Ruisi has no prior criminal record. While harboring a dangerous dog requires no criminal intent or guilty knowledge as elements of the crime, the fact that Ruisi had no such intent and had no knowledge or reason to know that the dog would bite are facts which are significant considerations in the sentence.

Eleven months in jail for four misdemeanors, the maximum allowed by law, none requiring criminal intent, enforced upon a first time offender of any kind are excessive sentences and an abuse of discretion by any definition.

NICOLE L. POOL, APPELLANT, V.
THARNWELL J. POOL, APPELLEE.
613 N.W.2d 819

Filed July 11, 2000. No. A-99-835.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
2. **Modification of Decree: Appeal and Error.** Although in conducting a de novo review of a modification of a dissolution decree an appellate court reaches a conclusion independent of the trial court, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998).
4. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior dissolution decrees or court orders have characterized the arrangement.
5. **Child Custody: Child Support: Proof: Appeal and Error.** Where a party proves that joint physical child custody exists, it is error for a trial court to refuse to apply a joint custody calculation to determine child support.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded with directions.

Jeffrey L. Hansen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

James L. Zimmerman, of Sorensen & Zimmerman, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Nicole L. Pool filed a petition for modification of the parties' divorce decree in order to increase Tharnwell J. Pool's child support obligation for their two children. The district court increased the child support, but based it on a joint physical custody arrangement, which Nicole asserts was error.

BACKGROUND

Nicole and Tharnwell's 6-year marriage was dissolved pursuant to a decree entered on March 8, 1996, by the district court for Scotts Bluff County. The parties had two children during the marriage: Christopher, born April 9, 1991, and Alexander, born May 27, 1993. The original decree ordered that the parties would have joint custody of the children. The court ordered child support to be paid by Tharnwell in the amount of $158.71 per month.

On August 20, 1998, the district court entered an order modifying the parties' original decree. The court found that based upon a material change in circumstances and in the best interests of the children, Nicole was to have the care, custody, and control of the children, thereby ending the joint custody. The court modified Tharnwell's visitation and increased his child support obligation to $215.33 per month. The support obligation of $215.33 was calculated using the joint physical custody worksheet from the Nebraska Child Support Guidelines, on the basis that Nicole would have the children in her custody 66⅔ percent of the time and Tharnwell would have physical custody 33⅓ percent of the time. Tharnwell's visitation consisted of the following: every other weekend, plus an additional weekend day per month; weekday visitation two times a week from 4 to 8 p.m.; alternating holidays; and extended summer visitation continuously from June 1 to July 31 each year. During Tharnwell's summer visitation, Nicole was granted visitation with the children every other Saturday from 8 a.m. to 8 p.m.

On March 16, 1999, Nicole filed a petition for modification due to a decrease in her income and an increase in Tharnwell's income. After a hearing, the district court found that there was a material change in circumstances with regard to the parties' incomes and entered an order on June 29, 1999, which increased

Tharnwell's child support obligation to $396.33 retroactive to April 1, 1999. The court based this calculation on the joint physical custody worksheet provided in the child support guidelines. The court explained from the bench that it did not find a material change in circumstances with regard to the amount of time that each party spent with the children and noted that while the court may have erred in ordering child support based on joint custody at the previous modification, it was not going to revisit that issue, because it was not appealed after the previous order of August 20, 1998, was entered.

Nicole's motion for a new trial was denied, and she has timely appealed.

ASSIGNMENT OF ERROR

Nicole asserts that the district court erred in calculating child support based on joint custody, even though she has sole custody.

STANDARD OF REVIEW

[1,2] An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999); *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997); *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Although in conducting a de novo review of a modification of a dissolution decree an appellate court reaches a conclusion independent of the trial court, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Smith-Helstrom v. Yonker, supra*; *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

ANALYSIS

Nicole argues that the district court erred in calculating child support based on the joint physical custody worksheet. Tharnwell does not cross-appeal the finding of the district court that there has been a material change in circumstances with regard to the parties' incomes so as to justify the modification of

child support. The district court relied on its previous modification order, which calculated child support based on the joint custody worksheet, even though Nicole was granted sole physical custody. That previous order had also restructured Tharnwell's visitation with the children. The joint custody worksheet was used in both instances apparently because the trial court found that the children spent about 61 percent of the time with Nicole and about 39 percent of the time with Tharnwell. Nicole asserts that the court should have used the sole physical custody worksheet and that during the extended summer visitation, Tharnwell's support obligation would be reduced according to the child support guidelines.

[3] In general, child support payments should be set according to the guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). Although the guidelines are not to be applied with blind rigidity, child support shall be established in accordance with the 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. § 42-364.16.

[4,5] If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior dissolution decrees or court orders have characterized the arrangement. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). Where a party proves that joint physical child custody exists, it is error for a trial court to refuse to use a joint custody calculation to determine child support. *Id.* We see the issue here as whether a joint physical custody arrangement exists between Nicole and Tharnwell justifying the trial court's calculation of support using the joint custody worksheet. Tharnwell asserts that we are bound by the trial court's prior determination (from which there was no appeal) that joint custody existed.

In *Elsome v. Elsome, supra*, the trial court modified child support and calculated it based on the sole custody worksheet, but deviated from the child support guidelines in order " 'to accommodate the substantial amounts of time the children spend with [the father].' " *Id.* at 894, 601 N.W.2d at 541. In *Elsome*, the par-

ties had joint legal custody of the children. The children spent 4 days of the week with their mother and the other 3 days with their father. This arrangement resulted in the mother having physical custody of the children 60 to 62 percent of the time, with the father having physical custody 38 to 40 percent of the time. The Supreme Court held that the lower court should have found a joint physical custody arrangement existed, in addition to the joint legal custody provided for in the first decree. Therefore, the trial court should have used the joint physical custody worksheet to calculate child support.

In *Elsome*, the court, drawing on authority from other jurisdictions, which we will not repeat, determined that "joint legal custody" is generally defined as joint authority and responsibility for making major decisions regarding the child's welfare. In contrast, joint physical custody involves joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant time periods. The *Elsome* court concluded that if the trial evidence establishes a joint physical custody arrangement, it should be so construed by the courts, irrespective of how prior court orders or decrees have characterized the arrangement. This latter holding provides at least a partial answer to Tharnwell's argument (with which the trial court agreed), that if Nicole disagreed with the calculation of child support based on a joint physical custody basis, her only remedy was to appeal to this court the August 20, 1998, order which calculated child support based on a joint physical custody basis. But, *Elsome* clearly teaches that child support is to be set on a joint or sole physical custody basis depending on what the trial evidence reveals the arrangement to be—despite what a prior decree or order may have found it to be. Moreover, the doctrine that child support is always subject to modification and is never entirely final has been a part of our jurisprudence for years. See, e.g., *Erickson v. Erickson*, 202 Neb. 345, 275 N.W.2d 287 (1979). And, in modification matters affecting child support, the paramount concern is the best interests of the children. See, e.g., *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). Making proper financial provisions for the support of the children of divorce is in their best interests. Therefore, we conclude that the fact that joint physical custody

was used as a basis for a previous calculation of support is no impediment to a proper calculation in this proceeding.

In the present case, the children spend every other weekend and 1 additional weekend day a month with Tharnwell. In addition, Tharnwell has visitation from 4 to 8 p.m. two nights a week. This visitation arrangement is suspended from June 1 to July 31 each year when the children have their extended summer visitation with Tharnwell. During this time, Nicole has visitation with the children every other Saturday from 8 a.m. until 8 p.m.

We return to *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), in which the trial evidence revealed a true joint physical custody arrangement, because the children lived with their mother 4 days out of the week and lived with their father the remaining 3 days out of the week. In the case at hand, Nicole is the primary caregiver and was in fact granted sole physical custody in the prior modification order. On the other hand, Tharnwell was granted rather "typical" weekend, holiday, and summer visitation rights. This is clearly an arrangement of Nicole having sole physical custody and Tharnwell having visitation. As such, it is clear that child support should be set using the parties' current incomes and the sole custody worksheet. In *Elsome*, the error was in using a sole custody worksheet when the evidence at the modification hearing revealed that the parents were really in a joint physical custody arrangement with respect to their children. Here, the converse is true, but the error must be remedied.

CONCLUSION

We find that the district court abused its discretion in basing the child support calculation on the joint custody worksheet. We reverse the judgment and remand this cause to the district court to recalculate child support, retroactive to April 1, 1999, based on the sole physical custody worksheet found in the Nebraska Child Support Guidelines and enter the appropriate order.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. SAMUEL ENRIQUEZ-BELTRAN, APPELLEE.

616 N.W.2d 14

Filed July 11, 2000. No. A-99-1242.

1. **Double Jeopardy: Criminal Law: Penalties and Forfeitures.** Generally, the Double Jeopardy Clause prevents both property or money forfeiture proceedings and criminal charges against a defendant arising from the same incident.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
4. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. The only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
5. **Double Jeopardy: Criminal Law: Postconviction: Pleas: Waiver: Penalties and Forfeitures.** A defendant waives a double jeopardy claim or defense on direct appeal, as well as when raised in postconviction proceedings, when he or she voluntarily pleads guilty to the criminal charges, even after there has been a forfeiture of money or property arising out of the same incident.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

[1] *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), holds that generally, the Double Jeopardy Clause prevents both property or money forfeiture proceedings and criminal charges against a defendant arising from the same incident. In this appeal, we determine whether *Franco* extends to a case where a forfeiture is followed by a criminal conviction which results from a guilty plea.

BACKGROUND

The conviction and forfeiture action at issue in this case stem from the arrest of Samuel Enriquez-Beltran on drug-related charges. On July 28, 1997, the State of Nebraska filed a "Complaint for Forfeiture of Money" in the district court for Dawson County. It alleged that Enriquez-Beltran was the owner of the $1,497 to be forfeited and that the money was "being used, or was intended to be used, to facilitate a violation of Neb. Rev. Stat. Chpt. 28, Article 4, Drugs and Narcotics (Reissue 1995)." Enriquez-Beltran received service of process regarding the filing of the forfeiture action and, subsequently, received notice of the hearing on the State's motion to forfeit. On September 12, the district court ordered the money forfeited to Dawson County. On that same day, Enriquez-Beltran filed a "Petition for Release of Property Seized." After an evidentiary hearing, the district court found that "the State has proved beyond a reasonable doubt that the monies seized were used in violation of Section 28-416 R.R.S. (1943) et seq." The court ordered the money forfeited in its order filed on October 23.

The information against Enriquez-Beltran, filed on August 25, 1997, alleges two counts of possession with intent to distribute under Neb. Rev. Stat. § 28-416(1) (Reissue 1995). On November 4, Enriquez-Beltran, who was represented by counsel, pled guilty under a plea agreement to one count of possession with intent to distribute. The other count was dismissed as part of the plea agreement. The district court accepted Enriquez-Beltran's guilty plea after informing him of his rights, inquiring about the factual basis for and the voluntariness of his guilty plea, and explaining the binding effects of the plea agreement. The court determined that Enriquez-Beltran's plea was made knowingly, intelligently, and voluntarily and found him guilty on one count of possession with intent to distribute. On February 19, 1998, the court sentenced Enriquez-Beltran to 3 to 6 years' imprisonment.

Enriquez-Beltran subsequently filed a "Petition for a Writ of Habeas Corpus," which alleged that his conviction was obtained in violation of his constitutional right to be free from double jeopardy. Specifically, he asserted that his conviction, following the State's successful forfeiture action, placed him twice in

jeopardy for the same crime. Pursuant to an order dated September 14, 1999, the court denied the writ of habeas corpus on procedural grounds as not being the proper pleading, but found that "in the interest of justice," the writ would be treated as a motion for postconviction relief. After an evidentiary hearing, the trial judge found that the forfeiture action and Enriquez-Beltran's conviction arose out of the same transaction and that jeopardy attached with regard to the forfeiture of funds action. The court held that Enriquez-Beltran was entitled to "an absolute discharge" from his conviction pursuant to *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). The State has timely appealed. Enriquez-Beltran remains imprisoned, and his motion that we release him on bond is also before us.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred in (1) granting postconviction relief where the claim in question could and should have been raised on direct appeal and (2) concluding that the Nebraska Legislature intended proceedings brought pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998) to be criminal in nature, or, in other words, that *State v. Franco, supra*, was wrongly decided.

STANDARD OF REVIEW

[2,3] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Williams, supra*; *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996).

ANALYSIS

We believe that the issues presented by the State's appeal present issues of law upon which we must reach an independent conclusion. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999); *State v. Egger*, 8 Neb. App.

740, 601 N.W.2d 785 (1999). See, also, Neb. Ct. R. of Prac. 9D(1)d (rev. 1996). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Paul, supra*; *State v. Egger, supra.* Plain error applies when an appellate court discovers error on the record. *State v. Egger, supra.* Thus, while the State only argues that Enriquez-Beltran's double jeopardy claim could and should have been raised on direct appeal and that *State v. Franco* is wrong, we think that under the plain error doctrine, we must examine the effect of Enriquez-Beltran's guilty plea. In short, the issue we address is whether the plea is a procedural bar.

[4] The record readily discloses that Enriquez-Beltran voluntarily, intelligently, and knowingly entered a guilty plea to the possession charge after the forfeiture proceedings were resolved against him. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996); *State v. Dreimanis*, 8 Neb. App. 362, 593 N.W.2d 750 (1999). Further, "[t]he only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction." *State v. Start*, 239 Neb. 571, 574, 477 N.W.2d 20, 22-23 (1991). See, also, *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992); *State v. Wiemer*, 3 Neb. App. 821, 533 N.W.2d 122 (1995). The rule and the exceptions thereto are equally applicable to a direct appeal or an appeal from postconviction proceedings. See, e.g., *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998) (appeal from denial of postconviction relief); *State v. Start, supra* (direct appeal).

In *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988), the defendant pled guilty to kidnapping and first degree sexual assault. He was sentenced to 15 to 25 years' imprisonment on each count, the sentences to run consecutively. He appealed, arguing that because the charges arose out of the same transaction, the consecutive sentences subjected him to double jeop-

ardy. The Nebraska Supreme Court held that the defendant waived the double jeopardy argument on appeal by voluntarily pleading guilty to the charges below. The *Maeder* court held: "'"A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional."'" 229 Neb. at 570-71, 428 N.W.2d at 182, quoting *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987).

Likewise, in *State v. Start, supra*, the court followed its decision in *Maeder*. The court in *Start* stated:

> The district court judge carefully explained to Start the consequences of his pleas, including the possibility of consecutive sentences on the two assault charges. Start was represented by counsel at this time. The court found that the pleas were freely and voluntarily made, and Start does not dispute that finding here. Under well-settled rules of this court, Start waived the double jeopardy defense by pleading no contest to the assault charges and is therefore precluded from raising that issue on appeal.

239 Neb. at 575, 477 N.W.2d at 23.

[5] Thus, from this precedent, it is clear that a defendant waives a double jeopardy claim or defense on direct appeal, as well as when raised in postconviction proceedings, when he or she voluntarily pleads guilty to the criminal charges, even after there has been a forfeiture of money or property arising out of the same incident. We see no reason that this rule would not apply in this case where Enriquez-Beltran attempts to raise a double jeopardy claim by a writ of habeas corpus, which was treated as a petition for postconviction relief by the trial court.

In the present case, Enriquez-Beltran was represented by counsel in the forfeiture and possession cases, and he has not complained of ineffective assistance on the part of the attorney with regard to his guilty plea. The court properly informed Enriquez-Beltran of the rights he was giving up by entering a guilty plea. The court also inquired about the factual basis for and the voluntariness of his guilty plea, and explained the binding effects of the plea agreement. Enriquez-Beltran has raised no issues concerning the sufficiency of the information and has not claimed ineffective assistance of counsel or lack of jurisdiction. These are the only matters which are still reviewable after

a guilty plea. Therefore, because Enriquez-Beltran voluntarily pled guilty, we find that he waived any claim that the subsequent criminal prosecution on the possession charge subjected him to double jeopardy. As a result, he is not entitled to postconviction relief, and the district court erred in granting Enriquez-Beltran "an absolute discharge" from his conviction based on double jeopardy. *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), is distinguishable, because there, the defendant moved to stop the criminal prosecution, after the forfeiture proceeding, by raising the issue via a plea in bar. Here, a waiver and a procedural bar occurs because there was a knowing and voluntary guilty plea to the criminal charges after the forfeiture proceedings were completed. See *United States v. Broce*, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989) (holding that entry of valid guilty plea, absent any procedural or constitutional violations, effectively forfeits defendant's right to assert defense of double jeopardy). Moreover, there need not be a conscious waiver with respect to each potential defense relinquished by the guilty plea. *Id.*

Since our decision regarding the effect of Enriquez-Beltran's guilty plea is determinative as to the outcome of this case, we need not address the two errors assigned by the State. See, *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999) (appellate court is not obligated to engage in analysis which is unnecessary to adjudicate case and controversy before it).

CONCLUSION

The decision of the district court is reversed, and Enriquez-Beltran's conviction and sentence are reinstated. We, therefore, also deny his motion that we release him on bond.

REVERSED.