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REPORTS OF CASES

DECIDED BETWEEN

MARCH 26, 2002 and JUNE 23, 2003

IN THE

# Nebraska Court of Appeals

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VOLUME XI

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PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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

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

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No. A-00-841: **Tyler v. Lefler**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-00-967: **Rydberg v. I.H.S., Inc**. Remanded for further proceedings. Hannon, Inbody, and Carlson, Judges.

No. A-00-1002: **Elbe v. Amman Sand & Gravel**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-00-1079: **State v. Holder**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-00-1100: **Volk v. Volk**. Affirmed as modified in part, and in part remanded with directions. Hannon, Inbody, and Carlson, Judges.

No. A-00-1109: **Sgambellone v. Dobrovolny**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-00-1110: **Olson v. Olson**. Affirmed as modified. Hannon, Sievers, and Moore, Judges.

No. A-00-1121: **Reeder v. State**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-00-1257: **Parola v. Creighton University**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-00-1277: **Rose v. State of Nebraska Dept. of Banking and Fin**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-00-1286: **Engdahl v. Luddwick**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-00-1315: **McBride v. Nebraska Dept. of Corr. Servs**. Reversed and remanded with directions. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-022: **In re Interest of Justin H. et al**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-041: **Classen v. Hawkins**. Reversed and remanded for a new trial. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-042: **Pohlman v. Wright**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-01-065: **Dowhower v. Dowhower**. Affirmed as modified. Irwin, Chief Judge, and Hannon and Inbody, Judges.

No. A-01-072: **Hartman v. Hartman**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-095: **Classe v. Windsor Group**. Reversed and vacated. Sievers, Carlson, and Moore, Judges.

No. A-01-098: **In re Estate of Furst**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-113: **Vincent v. Vigneri**. Affirmed in part, and in part reversed and remanded with directions. Carlson, Sievers, and Moore, Judges.

No. A-01-120: **Credit Bureau of Hastings v. Cole**. Reversed and remanded with directions. Sievers, Carlson, and Moore, Judges.

No. A-01-121: **In re Estate of Gzehoviak**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-142: **State v. Smith**. Affirmed in part, and in part modified. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-148: **State v. Bolden**. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-157: **Firestone v. Firestone**. Reversed and remanded with directions. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-177: **Kelle v. Kelle**. Appeal dismissed. Irwin, Chief Judge, and Inbody and Carlson, Judges.

No. A-01-192: **Bean v. Lawler**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-237: **State v. En Maati**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-01-252: **Fritz v. Menard Cashway Lumber**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-01-276: **Combs v. Combs**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-322: **State ex rel. Zaleski v. Leech**. Affirmed. Inbody, Hannon, and Carlson, Judges.

No. A-01-332: **W.F.M., Inc. v. Cherry Cty**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-337: **State v. Taubenheim**. Reversed and remanded with directions. Moore, Hannon, and Sievers, Judges.

No. A-01-377: **Pisha v. Neth**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-01-391: **Turner v. Neth**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-420: **Cutler v. Headley**. Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-01-497: **State v. Maciejeski**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-01-523: **Crowe v. Deerfield Enters**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-528: **Krupa v. Krupa**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-529: **Spiehs v. Spiehs**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-542: **Reid v. Reid**. Affirmed as modified. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-543: **Haussermann v. Haussermann**. Affirmed as modified. Hannon, Sievers, and Moore, Judges.

No. A-01-570: **Tyler v. Sanchez**. Affirmed in part, and in part reversed and remanded with directions. Moore, Hannon, and Sievers, Judges.

No. A-01-581: **Matula v. Neth**. Reversed. Sievers, Inbody, and Carlson, Judges.

No. A-01-585: **State v. Felix**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-01-632: **Barnhart v. Barnhart**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Sievers, and Moore, Judges.

No. A-01-650: **Tyrrell v. Tyrrell**. Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-01-676: **Carlson v. Skradski**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-01-693: **Crouse v. Crouse**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-712: **Grosshans v. Grosshans**. Affirmed in part as modified, and in part reversed and remanded with direction. Hannon, Inbody, and Moore, Judges.

No. A-01-740: **Washington Cty. Bd. of Equal. v. Lazure**. Reversed and remanded with directions. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-750: **State v. Centeno**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-01-757: **In re Interest of Wade D.** Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-782: **Brazda v. Brazda**. Affirmed as modified. Sievers, Inbody, and Carlson, Judges.

No. A-01-803: **State v. Caldwell**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-807: **Brozek v. Herd**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-852: **State v. Kinzle**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-859: **State v. Robinson**. Reversed and remanded with directions. Irwin, Chief Judge, and Hannon and Inbody, Judges.

No. A-01-868: **Rowland v. Rowland**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-01-877: **Jouvenat v. Zegers**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-883: **In re Estate of Pick**. Reversed and remanded with directions. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-889: **State v. Ball**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-900: **State v. Robles**. Affirmed. Carlson, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-907: **Wilson v. Wilson**. Affirmed as modified. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-916: **Reeves v. Reeves**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-01-922: **State v. Matson**. Affirmed in part, and in part reversed and remanded with direction to dismiss. Carlson, Sievers, and Moore, Judges.

No. A-01-963: **In re Interest of Freedom G.** Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-01-986: **Meyer v. Meyer**. Affirmed. Sievers, Inbody, and Moore, Judges.

No. A-01-1006: **State v. Shirley**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-1010: **In re Interest of Dallas H.** Affirmed. Carlson, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-1019: **State v. Alsidez**. Affirmed. Sievers, Carlson, and Moore, Judges.

Nos. A-01-1021, A-01-1022: **In re Interest of Michael C. & Charles C.** Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-1029: **Morehead v. Morehead**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-1084: **Johnson v. Luther**. Affirmed as modified. Sievers, Inbody, and Moore, Judges.

No. A-01-1089: **Funkhouser v. Gemco Constr. Co.** Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-1093: **State v. Wilger**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-1098: **Cunningham v. Cunningham**. Affirmed in part, and in part vacated and remanded with directions. Sievers, Carlson, and Moore, Judges.

No. A-01-1107: **State v. Hunt**. Affirmed. Hannon, Inbody, and Carlson, Judges.

No. A-01-1108: **State v. Miller**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-01-1115: **State v. Whelan**. Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-01-1124: **Jones v. IBP, inc.** Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-01-1141: **State v. Hansen**. Affirmed. Carlson, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-01-1153: **State v. Motschenbacher**. Reversed and remanded with directions. Moore, Sievers, and Carlson, Judges.

No. A-01-1159: **Beavers v. Kellogg Co**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-01-1160: **Zeck v. Mumford**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-1161: **Buchheister v. Lang**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-01-1177: **Stevens v. Harvey**. Reversed and remanded with directions. Hannon, Sievers, and Inbody, Judges.

No. A-01-1180: **In re Interest of Zachary H. et al**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-01-1208: **State v. Parks**. Affirmed. Inbody, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-1230: **State v. Janis**. Affirmed. Sievers, Hannon, and Moore, Judges.

Nos. A-01-1240, A-01-1241: **In re Interest of Mason M. & Lewis M**. Affirmed. Sievers, Inbody, and Carlson, Judges.

No. A-01-1245: **McManus v. Alderson**. Affirmed in part, modified in part, and in part reversed. Sievers, Hannon, and Inbody, Judges.

No. A-01-1250: **In re Application of Goodwill Med. Transp. v. R & F Hobbies, Inc**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-01-1267: **Mid-America Fin. Invest. Corp. v. Chesmore**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-01-1268: **State v. Arias**. Affirmed. Sievers, Hannon, and Moore, Judges.

No. A-01-1286: **In re Interest of Joshua N**. Affirmed. Irwin, Chief Judge, and Hannon and Moore, Judges.

No. A-01-1293: **State v. Johnson**. Affirmed as modified. Hannon, Sievers, and Moore, Judges.

No. A-01-1301: **State v. Diaz**. Sentence vacated, and cause remanded with directions. Hannon, Inbody, and Moore, Judges.

No. A-01-1341: **Chavez v. IBP, inc**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-1356: **State v. Ginapp**. Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-01-1359: **Maxwell v. Cantwell**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-01-1380: **In re Interest of Crystal S. et al.** Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-01-1410: **Witmer v. Hemberger**. Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-02-057: **In re Interest of Michael L. et al.** Affirmed. Hannon, Carlson, and Moore, Judges.

No. A-02-081: **In re Interest of Mandi K.** Affirmed. Sievers, Inbody, and Carlson, Judges.

No. A-02-107: **Winters v. Gamel**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-02-128: **Fetterolf v. M & S Grading**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-02-157: **Witmer v. Ashcroft**. Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-02-161: **In re Interest of Tara H.** Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-02-175: **Markmann v. Metropolitan Utilities Dist.** Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

Nos. A-02-178 through A-02-180: **In re Interest of Felicia S. et al.** Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-02-187: **Schmeckpeper v. Christensen**. Affirmed. Hannon, Sievers, and Moore, Judges.

No. A-02-189: **State v. Swimmer**. Affirmed. Inbody, Sievers, and Moore, Judges.

No. A-02-216: **State v. Trammell**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Moore, Judge.

No. A-02-221: **State v. Fuller**. Reversed and remanded with directions. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-222: **Hill v. Hill**. Appeal dismissed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

Nos. A-02-270, A-02-691: **Dunker v. LaBelle**. Judgment in No. A-02-270 affirmed. Appeal in No. A-02-691 dismissed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-289: **State v. George**. Affirmed. Sievers, Inbody, and Moore, Judges.

No. A-02-296: **State v. Bloom**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-309: **Haddadin v. Haddadin**. Affirmed. Hannon, Judge, and Irwin, Chief Judge. Carlson, Judge, participating on briefs.

No. A-02-332: **State v. Fazel**. Affirmed. Inbody, Sievers, and Moore, Judges.

No. A-02-339: **In re Interest of Resah L.** Reversed and remanded with directions. Hannon, Inbody, and Moore, Judges.

No. A-02-349: **In re Conservatorship of Tyler**. Orders vacated, and cause remanded with directions. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-352: **State v. Haase**. Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-02-358: **State v. Pfeifer**. Affirmed. Hannon, Judge.

No. A-02-376: **State v. Williams**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-02-388: **In re Interest of John M.** Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-392: **State v. Hunt**. Affirmed as modified. Hannon, Sievers, and Moore, Judges.

No. A-02-406: **In re Interest of Billy Joe E.** Reversed and remanded for further proceedings. Sievers, Hannon, and Moore, Judges.

No. A-02-407: **Petersen v. Petersen**. Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-450: **State v. Thompson**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-02-469: **In re Interest of Remy T.** Affirmed. Hannon, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-483: **Irvin v. Irvin**. Affirmed. Irwin, Chief Judge, and Carlson and Moore, Judges.

No. A-02-502: **State v. Walsh**. Affirmed. Sievers, Inbody, and Carlson, Judges.

No. A-02-508: **State v. Spencer**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-519: **State v. Gunter**. Affirmed. Moore, Hannon, and Inbody, Judges.

No. A-02-539: **Wyman v. Wyman**. Affirmed as modified. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-544: **In re Interest of Jose A. & Juan A.** Affirmed. Moore, Sievers, and Inbody, Judges.

No. A-02-555: **Schuelke v. Walker**. Appeal dismissed. Moore, Hannon, and Sievers, Judges.

No. A-02-596: **Meyers v. Rivera**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-598: **Brunke v. Goodyear Tire & Rubber Co.** Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-02-599: **State v. Woodard**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-02-639: **State v. Grant**. Affirmed. Inbody, Sievers, and Moore, Judges.

No. A-02-644: **Giandinoto v. Giandinoto**. Affirmed as modified. Irwin, Chief Judge, and Sievers and Inbody, Judges.

Nos. A-02-646, A-02-647: **In re Interest of Dakota S. & Jaelynn S.** Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-02-697: **Martinez v. Martinez**. Affirmed. Hannon and Moore, Judges, and Buckley, District Judge, Retired.

No. A-02-699: **State v. Christlieb**. Affirmed. Inbody, Sievers, and Carlson, Judges.

No. A-02-719: **State v. Jacobson**. Affirmed. Sievers, Inbody, and Moore, Judges.

No. A-02-754: **Arnold v. Ybarra**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-02-780: **State v. McFarland**. Affirmed. Moore, Sievers, and Inbody, Judges.

No. A-02-786: **Ladage v. Ladage**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Hannon, and Inbody, Judges.

No. A-02-788: **In re Interest of Chico B. & Cheri B.** Affirmed. Buckley, District Judge, Retired, and Hannon and Moore, Judges.

No. A-02-805: **State v. Stewart**. Affirmed. Carlson, Judge, and Irwin, Chief Judge, and Hannon, Judge.

No. A-02-808: **State v. Sievert**. Affirmed. Inbody, Sievers, and Moore, Judges.

No. A-02-819: **State v. Blaha**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-02-824: **In re Interest of Shannon M. & Michaela M.** Affirmed. Moore, Hannon, and Sievers, Judges.

No. A-02-844: **In re Interest of Allen M. et al.** Affirmed. Moore, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-890: **Roland v. Snell Services**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-02-895: **Vetrovsky v. Vetrovsky**. Affirmed as modified, and cause remanded with directions. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-940: **State v. Garcia**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-968: **State v. VanWinkle**. Affirmed. Hannon and Moore, Judges, and Buckley, District Judge, Retired.

No. A-02-986: **In re Interest of Desirae D.** Reversed and remanded with directions to dismiss. Hannon, Sievers, and Inbody, Judges.

No. A-02-996: **In re Interest of Taylon S.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-02-1053: **Day v. Cornhusker Motor Lines**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Inbody, Judge.

No. A-02-1063: **Warfield v. Walton**. Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-02-1066: **Lorenz v. Yancey**. Affirmed. Hannon, Inbody, and Moore, Judges.

No. A-02-1134: **Adkisson v. Adkisson**. Affirmed in part, affirmed in part as modified, and in part reversed and remanded with direction. Hannon, Inbody, and Moore, Judges.

Nos. A-02-1168 through A-02-1170: **In re Interest of Matthew K.** Appeal in No. A-02-1169 dismissed. Judgments in Nos. A-02-1168 and A-02-1170 affirmed in part, and in part vacated. Inbody, Hannon, and Sievers, Judges.

No. A-02-1171: **Rhye v. Quality Tree Care**. Affirmed. Hannon, Carlson, and Moore, Judges.

No. A-02-1183: **Cramer v. Hoover Material Handling Group**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-02-1211: **State v. Santee**. Affirmed. Moore, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-1230: **In re Interest of Duff**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-1268: **Montenegro v. IBP, inc**. Affirmed. Sievers, Judge, and Irwin, Chief Judge, and Carlson, Judge.

No. A-02-1270: **State v. Micheels**. Affirmed. Hannon, Sievers, and Inbody, Judges.

## LIST OF CASES DISPOSED OF WITHOUT OPINION

Nos. A-01-009, A-01-242: **Tomhave v. Tomhave**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-153: **Dearie v. Baker-Mellon Stuart Constr.** Affirmed. See, rule 7A(1); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

No. A-01-269: **City of Lincoln v. PMI Franchising**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000); *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

No. A-01-300: **Bolliger v. Bolliger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-334: **Foard v. Nebraska Dept. of Corr. Servs. Appeals Bd**. Appeal dismissed.

Nos. A-01-367, A-01-368: **State v. Trump**. As appellant is no longer in custody, appeal is moot, and on the court's own motion, appeal is dismissed.

No. A-01-372: **Allensworth v. Allensworth**. Affirmed. See, rule 7A(1); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

No. A-01-471: **State v. Tejral**. Motion of appellee for summary affirmance sustained. Appellant's sentence, as modified, is affirmed. Appellant's sentence modified to 20 months' to 4 years' imprisonment. See, Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2000); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. A-01-481: **Sims v. Martin Luther Homes of Nebraska**. Stipulation allowed; appeal and cross-appeal dismissed; each party to pay own costs.

No. A-01-514: **Campbell v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-541: **Brownrigg v. Brownrigg**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-01-569: **Tyler v. Schwartz**. Affirmed. See rule 7A(1).

No. A-01-596: **State v. Turner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-01-625, A-01-936: **State v. Mackey**. Motions of appellee for summary dismissal sustained. See rule 7B(1).

No. A-01-670: **Bert Murphy, L.L.C. v. Carhart**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-01-675: **Caton v. Nebraska Dept. of Corr. Servs.** Appeal dismissed as moot. See *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-01-692: **In re Interest of Shaylyn B. & Shanice G.** By order of the court, appeal dismissed for failure to file briefs.

No. A-01-792: **Antillon v. Wertz**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-01-809: **Todd v. Barta**. Stipulation allowed; appeal dismissed.

No. A-01-819: **State v. Dawson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-837: **State v. Thompson**. Motion of appellee for summary affirmance sustained. See, *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998); *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998). See, also, *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998); *State v. Gangahar*, 9 Neb. App. 205, 609 N.W.2d 690 (2000); *State v. Linn*, 3 Neb. App. 332, 526 N.W.2d 683 (1995); *State v. Stuthman*, 2 Neb. App. 317, 509 N.W.2d 410 (1993).

No. A-01-921: **In re Interest of Emilio L.** Affirmed. See rule 7A(1).

No. A-01-937: **State v. Burrell**. 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. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999).

Nos. A-01-945, A-01-946: **State v. Tyler**. By order of the court, appeals dismissed for failure to file briefs.

No. A-01-950: **Stahla v. Stahla**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-955: **Sims v. Martin Luther Homes of Nebraska**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-01-980: **Quick v. Quick**. Stipulation allowed; appeal dismissed.

No. A-01-987: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1000: **State ex rel. State of New Mexico v. Steelman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1002: **State v. Chapman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1016: **Hardcopf-Bickley v. Bickley**. Affirmed. See, Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2000); *Dobrovolny v. Waniska*, 224 Neb. 77, 395 N.W.2d 480 (1986).

No. A-01-1020: **Marvin v. City of West Point**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. §§ 25-217 and 25-502.01 (Reissue 1995).

Nos. A-01-1024, A-01-1050: **State v. Miller**. Affirmed. Per Curiam.

No. A-01-1030: **In re Interest of Katherine G.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1061: **City of Lincoln v. Nebraska Pub. Power Dist.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-01-1066: **Bert Murphy, L.L.C. v. Carhart**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-01-1088: **State v. Roan Eagle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1091: **Koenig v. Bullock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1113: **State v. Stewart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

No. A-01-1114: **State v. Gunter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1116: **State v. Salines**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1125: **State v. Herrera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997) (accused cannot generally take advantage of delay in being brought to trial where he is responsible for delay by either action or inaction); *State v. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999).

No. A-01-1127: **Chapman v. Dewitt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1128: **Nebraska Furniture Mart v. Duffy**. Because transcript does not properly show that judgment was either entered or vacated in accordance with Neb. Rev. Stat. § 25-2729(5) (Reissue 1995) and existence of such judgment must initially be judicially determined in a trial court, appeal dismissed for lack of jurisdiction under rule 7A(2).

No. A-01-1132: **Baldridge v. Pawnee County**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1134: **State v. Lurz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-01-1143: **Stoller v. NWE Homeowners' Assn**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-01-1144: **Alick v. Hudson**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2000).

No. A-01-1147: **Malleck v. Reliable Pest Control Servs**. Stipulation allowed; appeal dismissed.

No. A-01-1154: **State v. Knox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1171: **Stahlecker v. Ford Motor Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000). See, also, *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-01-1172: **Olson v. Fricke**. Appeal dismissed. See, rule 7B(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

No. A-01-1181: **In re Interest of Emilio L.** Affirmed. See rule 7A(1).

No. A-01-1186: **Cole v. Crosby**. Motion of appellee for summary dismissal sustained. See, Neb. Rev. Stat. §§ 81-8,209 (Reissue 1996) and 81-8,210 (Cum. Supp. 2000); *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999).

No. A-01-1196: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1201: **State v. Price**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1210: **State v. Graybeal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1224: **State v. Lebrato**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1228: **State v. Dailey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1229: **State v. Vinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1234: **Bazer v. G & G Mfg**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-01-1235 through A-01-1237: **In re Interest of Christopher S**. Affirmed. See rule 7A(1).

No. A-01-1248: **State v. Roeder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1259: **Anderson v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1264: **State v. Lococo**. Motion of appellee for summary affirmance sustained. Record is not sufficient to review appellant's assignment of error regarding ineffective assistance of counsel.

No. A-01-1266: **In re Estate of Malmsten**. Stipulation allowed; appeal dismissed.

No. A-01-1276: **State v. Dornan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1279: **State v. Balandran**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-01-1280: **State v. Borders**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1282: **State v. Thies**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1284: **Gragert v. Neth**. Affirmed. See rule 7A(1).

Nos. A-01-1289, A-01-1290: **State v. Roush**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-01-1291: **State v. Dornan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1294: **In re Guardianship of Gratol**. Motion of appellee for summary dismissal sustained. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

No. A-01-1297: **Dillon v. Ossler**. Motion of appellee for summary affirmance sustained. See *Janet K. v. Kevin B.*, 5 Neb. App. 169, 556 N.W.2d 270 (1996).

No. A-01-1302: **State v. Dlouhy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1303: **State v. Herringer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1305: **State v. Finn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1307: **Graves v. Nebraska Dept. of Motor Vehicles**. Affirmed. See rule 7A(1).

Nos. A-01-1311, A-01-1317: **State v. Smaus**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-01-1312: **State v. Portales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1316: **Pioneer Chemical Co. v. City of North Platte**. Appeal dismissed. See rule 7A(2).

No. A-01-1319: **State on behalf of Moyer v. Moyer**. Affirmed. See, rule 7A(1); *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000).

No. A-01-1322: **In re Interest of Marie S.** Affirmed. See rule 7A(1).

No. A-01-1323: **State v. Daniels.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1335: **McBride v. McBride.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1338: **State v. Chapman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1340: **State v. Nelson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1343: **State v. Woodrum.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1346: **In re Interest of Cole S.** By order of the court, appeal dismissed for failure to file briefs.

No. A-01-1357: **Tyler v. Clerk of District Court Chase Cty.** By order of the court, appeal dismissed for failure to file briefs.

No. A-01-1363: **State v. Ernesti.** Affirmed. See rule 7A(1).

No. A-01-1364: **State v. Daniels.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-01-1368: **State ex rel. Tyler v. County Court of Madison Cty.** By order of the court, appeal dismissed for failure to file briefs.

No. A-01-1369: **State v. Harvey.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1370: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1373: **Washington v. Kruzt.** By order of the court, appeal dismissed for failure to file briefs.

No. A-01-1376: **State v. Landanger.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1381: **Ramirez-Urbina v. IBP, inc.** Appeal dismissed. See, rule 7A(2); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002).

No. A-01-1382: **State v. Smith.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1388: **State v. Meduna**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1389: **State v. Meduna**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1390: **State v. Steele**. Motion of appellee for summary affirmance sustained. See *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

No. A-01-1392: **Farmland Serv. Cooperative v. Southern Hills Ranch**. Appeal dismissed. See rule 7B(1).

Nos. A-01-1403, A-01-1404, A-01-1414, A-01-1415: **State v. Schlotfeld**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-01-1407: **State v. Nuss**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1409: **Plymate v. Chapin**. Appeal dismissed. See rule 7A(2). When a motion for attorney fees is made prior to judgment, the judgment is not final and appealable until a ruling is made on said motion. See *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-01-1411: **State v. Hudson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1412: **State v. Mason**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1417: **State v. Reno**. Appellee's motion for summary affirmance granted and sentencing order modified giving appellant credit for 135 days served prior to sentencing. See rule 7B(2).

No. A-01-1418: **State v. Serr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-01-1422: **Ettleman v. Nebraska Dept. of Corr. Servs. Appeals Bd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-01-1425: **State v. Spangler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-001: **State v. Burns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-002: **State v. Pofahl**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-003: **State v. Anway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-004: **Kinser v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-02-006: **State v. Cox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-015: **State v. Kurbis**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001); *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950) (filing of mandate vests jurisdiction).

No. A-02-016: **Clark v. Thurston Cty. Sch. Dist. No. 16**. Appeal dismissed.

No. A-02-018: **Abdullah v. State**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

No. A-02-020: **State v. Allen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-027: **Lade v. Hall Cty. Dept. of Corrections**. Motions of appellees for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-028: **State v. Page**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-029: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-030: **State v. Cheshek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000).

No. A-02-034: **Russell v. State**. Appeal dismissed. See rule 7A(2).

No. A-02-036: **Cole v. Truell**. Affirmed. See rule 7A(1).

No. A-02-037: **State v. Jernigan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-038: **State v. Zeigler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-039: **State v. Luebbert**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2000); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001). District court directed to vacate order and dismiss appeal.

No. A-02-040: **State v. Metzger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-041: **Wright v. Arp**. Stipulation allowed; appeal dismissed with prejudice.

No. A-02-044: **Seffron v. Seffron**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-045: **Cooper v. Rexroth**. Appeal dismissed for lack of jurisdiction. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-02-048: **State v. Kolbo**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-049: **State v. Hingst**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-055: **Hansen v. Melia**. Appeal dismissed by the court pursuant to rule 7A(2). See *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-02-059: **Billingsley v. Department of Corr. Servs.** Appeal dismissed as moot. See *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-02-066: **In re Guardianship of Hutton**. Appeal dismissed as moot.

No. A-02-067: **Arias v. Arias**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-070: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

Nos. A-02-073, A-02-074: **State v. Poppleton**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-078: **State v. Kellogg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-079: **Norman v. Norman**. Stipulation considered; appeal dismissed; each party to pay own costs.

No. A-02-082: **Tyler v. Kenney**. Summarily affirmed. See Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000). See, also, Third District rule 3-2(F).

No. A-02-085: **State v. Prochaska**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-087: **State v. Rawson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-090: **State v. McDonald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-091: **State v. Watkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-092: **Ostrow v. Hooper**. Order of December 28, 2001, granting appellee's motion to reinstate case is summarily affirmed. See, rule 7A(1); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

No. A-02-094: **Young v. Caughlin Enters**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-096: **Ainsworth v. Hinrichs**. Appeal dismissed pursuant to rule 7A(2). Orders which specify that trial court will exercise its jurisdiction based upon future action or inaction by party are conditional and are therefore not appealable. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-02-101: **State v. Reynoso**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-102, A-02-103: **State v. Thorne**. Affirmed. See, rule 7A(1); *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999).

No. A-02-105: **State v. Hardy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-108: **State v. Roundtree**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-02-109: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-111: **Rowe v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-112: **State v. Welker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-113: **State v. Poisel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-114: **Brown v. White**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-02-116: **Webb v. Webb**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-117: **In re Interest of Patrick G.** Affirmed. See rule 7A(1).

No. A-02-118: **Peterson v. Olsten Health Care Staffing Corp**. Stipulation allowed; appeal dismissed.

No. A-02-121: **State v. Howington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-122: **State v. Stanton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-02-123: **Cutler v. D & S Realty**. Appeal dismissed. See, rule 7A(2); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-02-125: **State v. Stovall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-126: **Witmer v. Ashcroft**. Pursuant to appellant's motion to dismiss, appeal dismissed.

No. A-02-127: **Denison v. Pfizer Animal Health**. Stipulation allowed; appeal dismissed.

No. A-02-130: **State v. Hauck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-132: **State v. Kurtzhals**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-137: **State v. Durst**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-143: **Husker Roofing v. Provider Constr.** Stipulation allowed; appeal dismissed.

Nos. A-02-144, A-02-145: **State v. Erving.** Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-147: **In re Interest of John S.** Affirmed. See rule 7A(1).

No. A-02-152: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-153: **State v. Nation.** Motion of appellee for summary affirmance sustained; judgment affirmed. See *Thompson v. O'Grady*, 137 Neb. 641, 290 N.W. 716 (1940).

No. A-02-156: **In re Trust of Del Castillo.** Motion of appellant to vacate the January 11, 2002, and February 5, 2002, orders of the Douglas County Court is granted. See *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002). This cause is remanded to the Douglas County Court for a new evidentiary hearing.

No. A-02-159: **Wolzen v. Neth.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-163: **In re Interest of Tiffany H.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-164: **In re Interest of Stephanie H. & Alisha H.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-165: **Tyler v. Watermeier.** By order of the court, appeal dismissed for failure to file briefs.

No. A-02-166: **Heitman v. Buckley.** Affirmed. See, rule 7A(1); *Vilcinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997).

No. A-02-173: **In re Estate of Preuss.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-181: **In re Charitable Remainder Unitrust No. 1 of Reece.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-182: **In re Charitable Remainder Unitrust No. 2 of Reece.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-183: **In re Charitable Remainder Unitrust No. 3 of Reece**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-184: **In re Estate of Ode**. Order of November 6, 2001, is reversed and case remanded for a new evidentiary hearing. See, rule 7A(3); rule 5A(1); *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001).

No. A-02-188: **Leiding v. Gamel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-190: **Fundco v. Armstrong**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-192: **State v. Poessnecker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-193: **State v. Robinson**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-02-195: **State v. Nguyen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-197: **State v. Taylor**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(3) (Cum. Supp. 2000).

No. A-02-198: **State v. Plasencio**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-199: **Schneiderman v. Anderson Forest Products**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-204: **Tyler v. ABC 20/20**. Affirmed. See rule 7A(1).

No. A-02-205: **State v. Hopp**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1912(1) and 25-2301 (Cum. Supp. 2000).

No. A-02-210: **State v. Tiller**. Affirmed. See, rule 7A(1); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

No. A-02-211: **State v. Goings**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

Nos. A-02-212, A-02-213: **State v. Lopez**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-217: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-218: **Siahpush v. Sykora**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-02-220: **Matthews v. Stockton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2000).

No. A-02-223: **Tyler v. Bataillon**. Appeal dismissed. See rule 7A(2).

No. A-02-225: **VanDeWalle v. VanDeWalle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-229: **State v. Schmidt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-230: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-233: **Doe v. Spidel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000).

No. A-02-237: **State v. Spellman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-238: **Motor Club Ins. Assn. v. American Family Mut. Ins. Co**. 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).

No. A-02-240: **State v. Hovendick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-241: **State v. Witmer**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-02-243: **In re Interest of Janita M.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-245: **State v. Thomas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-247: **State v. Chamberlain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-248: **State v. Chamberlain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002).

No. A-02-249: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-251: **Autumn Grove, L.L.C. v. Nordberg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. A-02-262: **State v. Billups**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-267: **Claypool v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Gilmore v. Nebraska Crime Vict. Rep. Bd.*, 225 Neb. 640, 407 N.W.2d 736 (1987).

No. A-02-268: **Tyler v. Stennis**. Appeal dismissed. See, rule 7A(2); *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001).

No. A-02-271: **Collins v. Collins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-275: **State v. Heil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-276: **Tyler v. Williams**. Appeal dismissed. See rule 7A(2).

No. A-02-277: **State v. Kuhnel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

Nos. A-02-279 through A-02-281: **State v. Preister**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-282: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-286: **Anderson Excavating Co. v. Department of Health and Human Servs.** Appeal dismissed. See, Neb. Rev. Stat. § 84-917 (Reissue 1999); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

No. A-02-291: **State v. Cullum**. Appeal dismissed. See rule 7A(2).

No. A-02-294: **Tyler v. Kenney**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-299: **Svoboda v. Nebraska Dept. of Corr. Servs. Appeals Bd**. Appeal dismissed. See, rule 7A(2); *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

No. A-02-300: **State v. Kinsey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-301, A-02-302: **State v. Heidelberg**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-303: **State v. Vandemark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-304: **Ryan v. Ryan**. Appeal dismissed for lack of jurisdiction pursuant to rule 7A(2) as filed out of time. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-307: **State v. Rasmussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-311, A-02-371: **State v. Licona**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-313: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-314: **State v. Grindstaff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-02-315: **Burdue v. State**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002).

No. A-02-317: **Cole v. Foster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-318: **Yates v. Yates**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-319: **State v. Bowder**. Appeal dismissed for lack of jurisdiction pursuant to rule 7A(2). The matter is remanded to the district court to vacate its order and dismiss the appeal from county court. See *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

No. A-02-320: **State v. Rupe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-321: **Gall v. Gall**. Stipulation allowed; appeal dismissed.

No. A-02-326: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-328: **State v. Hiatt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-329: **State v. Classen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-330: **Sharp v. Sharp**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-02-334: **Voss v. Voss**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-335: **Barnhart v. Christians**. Appeal dismissed. See, rule 7A(2); *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997) (after appeal has been perfected to appellate court, lower courts are divested of subject matter jurisdiction over that case).

No. A-02-337: **Tyler v. Delgado**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-341: **Hoven v. Hoven**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-1557 (Cum. Supp. 2002); *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

No. A-02-343: **State v. Greve**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-344: **State v. Trujillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-345: **State v. Carpenter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-346: **Sailors v. State**. Stipulation allowed; appeal dismissed.

No. A-02-350: **State v. Allgood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-353: **State v. Slavicek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-354: **State v. Anderson**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-02-354: **State v. Anderson**. Motion of appellant for rehearing sustained; appeal reinstated.

No. A-02-357: **Shoemaker v. Janulewicz**. Appeal dismissed for lack of jurisdiction. See *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001).

No. A-02-360: **State ex rel. Tyler v. Goodroe**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-362: **Llanes v. Countryside of Hastings, Inc.** Affirmed. See, rule 7A(1); *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002); *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000).

No. A-02-364: **Hayes v. Hayes**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2000).

Nos. A-02-365, A-02-368: **State v. Johnson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-367: **State v. Wahlstrom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-369: **State on behalf of Johnson v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-370: **State v. Brenagh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-372: **State v. Caughlin**. Affirmed. See rule 7A(1).

No. A-02-377: **State v. Hubbard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-378: **Ed Peeks Elec. Co. v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-379: **Judd v. Olmeda**. Appeal dismissed. See, rule 7A(2); *In re Interest of Saville*, 10 Neb. App. 194, 626 N.W.2d 644 (2001).

No. A-02-383: **Shelton v. Jedlicka**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-386: **Myers v. Nebraska State Patrol**. Appeal dismissed for lack of jurisdiction pursuant to rule 7A(2) as filed out of time. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-387: **General Serv. Bureau v. Moller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-395: **Gonzalez v. Apker**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-02-397: **Onuachi v. Meylan Enters**. Appeal dismissed. See rule 7A(2) as filed out of time. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-399: **State ex rel. Tyler v. Johans**. Appeal dismissed. See rule 7A(2).

No. A-02-400: **In re Interest of Sandra V.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-401: **State v. Root**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-402: **State on behalf of Chaney v. Hill**. Appeal dismissed. See, rule 7A(2); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-02-408: **In re Interest of Savaria W. et al.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-410: **Tyler v. Nebraska Board of Parole**. Appeal dismissed. See rule 7A(2).

No. A-02-411: **Beers v. Clarke**. Summarily affirmed. See, *Hathaway v. Coughlin*, 37 F.3d 63 (2d Cir. 1994); *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001).

No. A-02-412: **State v. Atkins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-419: **Vermeer Equip. v. McCune**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-02-421: **State v. Lillard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-422: **Silverstrand v. Silverstrand**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-423: **State v. Meyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-424: **State v. Siems**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-425: **State v. Siems**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-426: **Kozak v. Department of Revenue**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000).

No. A-02-427: **Battershaw v. Cherry Cty. Bd. of Equal.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019 (Supp. 2001). See, also, *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-02-428: **Battershaw v. Cherry Cty. Bd. of Equal.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019 (Supp. 2001). See, also, *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-02-430: **MacDonald v. Board of Ed. of Scotts Bluff Cty**. Motion of appellee for summary dismissal for mootness sustained; appeal dismissed.

No. A-02-431: **State v. Prochaska**. Appeal dismissed. See rule 7A(2).

No. A-02-432: **State v. Prochaska**. Appeal dismissed. See rule 7A(2).

No. A-02-434: **In re Interest of Tyler F.** By order of the court, appeal dismissed for failure to file briefs.

No. A-02-435: **In re Interest of Tyler F.** By order of the court, appeal dismissed for failure to file briefs.

No. A-02-436: **Ashley v. Omaha-Douglas Public Bldg. Comm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-437: **State v. Gutz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-440: **Tank v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-441: **Witmer v. Clarke**. Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-02-442: **State v. Gardiner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-443: **State v. Eckstein**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 29-824(3), 29-825, and 29-826 (Cum. Supp. 2000).

No. A-02-448: **Bridgestone/Firestone v. Caeli Assocs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-02-449: **Russell v. Alegent Health Clinics**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-451: **State v. Gresham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-454: **State v. Hayes**. State's suggestion of remand sustained. Matter remanded to the district court for Richardson County for the purpose of correcting defendant's sentence to reflect the credit to be afforded appellant for time served.

No. A-02-456: **In re Interest of Frederick W.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

Nos. A-02-457, A-02-458: **State v. Rogers**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-461: **Adams v. Lint**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-467: **State v. Stetz**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-470: **State v. Mata**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-473: **Washington v. Wilson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000).

No. A-02-474: **State v. Cole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-476: **State v. Large**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

No. A-02-480: **R Excavating v. Alan Baer & Assocs**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-02-481: **Crawford v. Crawford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-482: **State v. Gratto**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-02-483: **Irvin v. Irvin**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-02-483: **Irvin v. Irvin**. Motion of appellant for rehearing granted. Dismissal vacated and appeal reinstated.

No. A-02-484: **Jeffrey Lake Dev. v. Central Neb. Pub. Power**. Appeal dismissed. See rule 7A(2). A partial summary judgment does not resolve all of the issues, and therefore, the district court's order is not a final, appealable order. See *Tri-Par Investments v. Sousa*, 263 Neb. 209, 640 N.W.2d 371 (2002).

No. A-02-485: **Beers v. Tallon**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-02-486: **Coleman v. Coleman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-488: **State ex rel. Tyler v. Clerk of Dist. Ct. for Furnas Cty**. Affirmed. See rule 7A(1).

No. A-02-489: **State v. Partida-Esparza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-492: **Mayer v. Nebraska Dept. of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-497: **State v. Montes**. Motion of appellee for summary affirmance sustained to the extent appellant claims he should have been given probation, since failure to grant probation was not an abuse of discretion. However, court notes plain error with respect to the lower portion of the sentence of 24 to 36 months, since such sentence must be 20 months on the lower end. Therefore, district court is ordered to modify appellant's sentence to 20 to 36 months. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. A-02-501: **Martin v. Cameron**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000). See, also, *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976).

No. A-02-505: **Martin v. Nesbitt**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-506: **Martin v. Bagley**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000). See, also, *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976).

No. A-02-507: **State v. Novak**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-509: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-510: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-511: **State v. Rickman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-513: **Vela v. Vela**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-02-515: **State v. Thomas**. Stipulation allowed; appeal dismissed.

No. A-02-516: **State v. Padilla**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-02-517: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

Nos. A-02-518, A-02-520: **State v. Merrick**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-521: **In re Interest of Melinda B.** Affirmed. See rule 7A(1).

No. A-02-522: **Hooker v. Neth**. Affirmed. See rule 7A(1).

No. A-02-525: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-526: **Eckhardt v. Eckhardt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-532: **Kuhns v. W N Morehouse Truck Lines**. Stipulation allowed; appeal dismissed.

No. A-02-533: **State v. Bowers**. Appeal dismissed. See rule 7A(2).

No. A-02-534: **In re Interest of Nicholas K. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-02-535, A-02-536: **State v. Woods**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-02-537, A-02-538: **State v. King**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-542: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-545: **In re Estate of Singley**. Appeal dismissed. See, rule 7A(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-02-546: **In re Interest of Andre R**. Appeal dismissed. See, rule 7A(2); *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997).

No. A-02-548: **C & L Indus. v. Kiviranta**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-02-549: **Thomas v. Lamson, Dugan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. A-02-551: **State v. Roth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-555: **Schuelke v. Walker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-556: **State v. Miller**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-557: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-561: **State v. Tillman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-566: **Chase v. Nebraska Dept. of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

Nos. A-02-567, A-02-568: **State v. Schade**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-569: **State v. Rein**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-570: **State v. Buggs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-571: **State on behalf of Warfield v. Warfield**. Affirmed. See, rule 7A(1); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). See, also, *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985).

No. A-02-572: **State on behalf of Cardona v. Cardona**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-574: **State v. Cappellano**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-575: **State v. Muhs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-576: **State v. Rein**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-580: **Tincher v. Earp**. Stipulation allowed; appeal dismissed with prejudice.

No. A-02-582: **Gloe v. Centeon Bio-Services**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-583: **State v. Belger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-584: **State v. Sababu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-587: **Schwartz v. ITT Hartford**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-588: **State v. Neemann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-589: **Kugler v. Nebraska Bd. of Parole**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-02-590: **El-Tabech v. State**. Appeal dismissed. See *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-02-591: **Kern v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 84-901(2) (Reissue 1999); *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

No. A-02-594: **Niobrara River Ranch, L.L.C. v. Liquor Control Comm**. Appeal dismissed. See, rule 7A(2); *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999).

No. A-02-595: **State v. Herman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-597: **Prater v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-02-600: **State v. Jackett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-601: **State v. Waller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-602: **State v. Ferguson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

No. A-02-603: **State v. Tagge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-609, A-02-610: **State v. Starks**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-611: **State v. Olsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-613: **Martin v. Nebraska Dept. of Corr. Servs**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2000).

No. A-02-615: **Pabst v. Robidoux**. Stipulation allowed; appeal dismissed.

No. A-02-617: **McDermitt v. McDermitt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-620: **State v. Thille**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

Nos. A-02-622, A-02-623: **State v. Doty**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-625: **State v. Jones**. Appeal dismissed. See *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-02-626: **State v. Tinnell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-627: **State v. Trackwell**. Affirmed. See rule 7A(1).

No. A-02-628: **State v. Theodoropoulos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-631: **State v. Kenley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-634: **Lute v. Lute**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997).

No. A-02-640: **State on behalf of Schincke v. Schincke**. Appeal dismissed. See, rule 7A(2); *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000); *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988).

No. A-02-643: **TCF National Bank v. Hayden**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-02-645: **Forney v. Forney**. Appeal dismissed; trial court's order of May 3, 2002, is vacated as void. See, rule 7A(2); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

No. A-02-648: **State v. Bolden**. Case disposed of under rule 11. This court takes judicial notice of its order requiring defendant to file a replacement brief and of the district court's order of May 31, 2002, denying defendant's motion for reimbursement for briefing expenses. That order is reversed, and the case is remanded with directions to enter an order reimbursing defendant for such expenses since appellant has already been granted in forma pauperis status. See Neb. Rev. Stat. § 25-2307 (Cum. Supp. 2000).

No. A-02-649: **In re Interest of Amanda S.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998). See, also, rule 1B(4).

No. A-02-650: **In re Interest of Kathleen M.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998). See, also, rule 1B(4).

No. A-02-651: **In re Interest of Patrick M.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998). See, also, rule 1B(4).

No. A-02-654: **State v. Couey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-657: **State v. Steskal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-658: **State v. Pelc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-659: **In re Interest of Andrew F.** Appeal dismissed; trial court's order of May 3, 2002, is vacated as void. See, rule 7A(2); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

No. A-02-661: **Thornton v. Thornton**. Appeal dismissed. See, rule 7A(2); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-02-664: **State v. Hampton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-669: **State v. Brown**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-670: **Village Realty Co. v. Alltel Communications**. Stipulation for dismissal considered; appeal dismissed.

No. A-02-672: **Finn v. Neth**. Affirmed. See rule 7A(1).

No. A-02-674: **Tyler v. GOODBAN**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-675: **In re Interest of Anna H.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 43-287.03 (Reissue 1998); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-02-677: **State v. Vargas-Godinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-678: **Tyler v. Clark**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-681: **State v. Powers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-682: **Russell v. Johanns**. Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-02-683: **Automatic Equip. Mfg. Co. v. Fehrman Indus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-685: **State v. Wilcox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001).

No. A-02-686: **State v. Vyhnalek**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-687: **State v. Vyhnalek**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-02-690: **Gray v. Britten**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-693: **State v. Forney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-694: **State v. Smith**. Stipulation allowed; appeal dismissed.

No. A-02-696: **State v. Gibbs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-698: **State v. Bubnas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-700, A-02-701: **State v. Gast**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-702: **State v. Gast**. Appeal dismissed. See rule 7A(2).

No. A-02-703: **State v. Burton**. Appellee's suggestion of remand granted. Cause is remanded to the district court for the limited purpose of holding an evidentiary hearing relating to appellant's allegation that trial counsel failed to file an appeal from his conviction and sentence.

No. A-02-705: **State v. Munhall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-706: **State v. Anderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-712: **Quignon v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-714: **State v. Sutton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-715: **State v. Lyle**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-720: **State v. Ellis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-723: **Wynne v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-726: **Columbine Carpet Corp. v. Wanek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-727: **State v. Cyr**. Appellee's suggestion of remand granted. Cause is remanded to the district court with instructions to credit appellant's sentence for the time served in jail prior to sentencing on the original possession charge. See, Neb. Rev. Stat. § 83-1,106 (Reissue 1999); *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999).

No. A-02-731: **State v. Sculley**. Appeal dismissed. See, rule 7A(2); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

No. A-02-732: **State v. Sculley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-733: **State v. Stull**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-734: **State v. Wessling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-02-735: **State v. Marty**. Relief contained in State's suggestion of remand is granted.

No. A-02-744: **State v. Polston**. Motion of appellee for summary affirmance sustained. See rule 7B(2).

No. A-02-745: **State v. Core**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-746: **Dixon v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-747: **Allied Mut. Ins. Co. v. City of Lincoln**. Motion of appellee for summary dismissal sustained. See *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-02-752: **Prinsco, Inc. v. Kaywood, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-753: **Ag Servs. of America, Inc. v. Brooks**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-755: **In re Estate of Rossenbach**. Stipulation allowed; appeal dismissed with prejudice.

No. A-02-757: **Tyler v. Cryne**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-759: **State v. Shade**. Appeal dismissed. See, rule 7A(2); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

No. A-02-761: **Acton v. Acton**. Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-02-763: **In re Interest of Sarah K. et al**. Appeal dismissed. See, rule 7A(2); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

No. A-02-768: **State v. Al-Sayagh**. Appeal dismissed. See, rule 7A(2); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. A-02-770: **State v. Al-Sayagh**. Appeal dismissed. See, rule 7A(2); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. A-02-771: **Twin Towers Condominium Assn. v. D & S Realty**. Stipulation allowed; appeal dismissed with prejudice, each party to pay own costs.

No. A-02-772: **State v. Brown**. Appeal dismissed. See rule 7A(2).

No. A-02-774: **Davis v. Luce**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 316 (2001).

No. A-02-775: **Soule v. Smagacz**. Appellee's suggestion of remand granted. See *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002).

No. A-02-776: **State v. Brody**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-781, A-02-782: **State v. Killen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-783: **State v. Bierman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-784: **State v. Zuck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-787: **Ponseigo v. Whited**. Appeal dismissed. See rule 7A(2).

No. A-02-794: **Chrysler Financial Co. v. Fisher**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1315 (Cum. Supp. 2000) and 25-1902 (Reissue 1995).

No. A-02-798: **Tyler v. Curtis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-799: **State v. Christiansen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-802: **In re Interest of Shirley F.** Affirmed. See rule 7A(1).

No. A-02-804: **In re Interest of Melvin B.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

Nos. A-02-806, A-02-807: **State v. Nickolite**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-813: **State v. Swift**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-02-814: **State v. Turner**. Stipulation allowed; appeal dismissed.

No. A-02-820: **Campbell v. Madison Cty. Bd. of Equal.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Supp. 2001); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-02-821: **State v. Soby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-825: **State v. Thille**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-827: **State v. Hembertt**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

Nos. A-02-829, A-02-830: **State v. Jacobson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-838: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

No. A-02-840: **Fremont Hospitality, L.L.C. v. Dodge Cty. Bd. of Equal**. Stipulation allowed; appeal dismissed.

No. A-02-845: **Cauffman v. Jenkins**. Motion of appellant to dismiss appeal sustained; appeal dismissed as moot.

No. A-02-847: **Anderson v. Birge**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-850: **Village of Homer v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

No. A-02-854: **Pioneer Chemical Co. v. City of North Platte**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. A-02-854: **Pioneer Chemical Co. v. City of North Platte**. Motion of appellant for rehearing sustained without prejudice to reconsideration of jurisdiction. Case reinstated.

No. A-02-856: **Prokop v. Columbus Irrigation**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-859: **State v. Rohrick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Hannon, Judge, dissenting.

No. A-02-860: **Dittoe v. State**. Appeal dismissed for lack of jurisdiction.

No. A-02-861: **Dittoe v. State**. Appeal dismissed for lack of jurisdiction.

No. A-02-862: **Dittoe v. State**. Appeal dismissed for lack of jurisidiction.

No. A-02-863: **Dittoe v. State**. Appeal dismissed for lack of jurisdiction.

No. A-02-864: **Plant v. Clarke**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1315.02 and 25-1912 (Cum. Supp. 2000).

No. A-02-866: **State v. Finnigan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-868: **Tobin v. Lasauskas**. Appeal dismissed. See, rule 7A(2); *Bass v. Dalton*, 218 Neb. 379, 355 N.W.2d 225 (1984).

Nos. A-02-869, A-02-870: **State v. Thomas**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-02-871 through A-02-873: **State v. Davis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-874: **In re Trust of Rogers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-875: **In re Estate of Rogers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-877: **Tyler v. Clarke**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-878: **Tyler v. Johan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-881: **State v. Ulrich**. Appeal dismissed. See Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2000). District court directed to vacate its order and dismiss appeal for lack of jurisdiction.

No. A-02-882: **State v. Ulrich**. Appeal dismissed. See Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2000). District court directed to vacate its order and dismiss appeal for lack of jurisdiction.

No. A-02-884: **Prokop v. Santin**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986).

No. A-02-886: **In re Interest of Mainer T. & Estella T.** Appeal dismissed. See rule 7A(2). Payment of docket fee on August 7, 2002, when appealing from "order" of June 27, 2002, is untimely. However, the June 27, 2002, "order" is illegible in certain key parts to the point that the court concludes that it is not a final judgment from which an appeal may be taken, but is only a finding which forms the basis for which judgment may be subsequently rendered. See *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001). See, also, *State v. Carney*, 220 Neb. 906, 374 N.W.2d 59 (1985).

No. A-02-887: **Van Natter v. Van Natter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-891: **In re Estate of Jensen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-892: **Corbino v. Corbino**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1142 and 25-1912(1) (Cum. Supp. 2000); *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

No. A-02-897: **State v. Cushing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-898: **State v. Coleman**. Motion considered; appeal dismissed.

No. A-02-902: **Brunner v. Brunner**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

No. A-02-903: **M & S Grading v. City of Omaha**. 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-02-904: **Mumin v. Hart**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). See, also, *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-02-908: **Johnson v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-909: **Montin v. Ramsey**. Affirmed. See, rule 7A(1); *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985).

No. A-02-910: **State v. Overstreet**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-912: **In re Interest of Jasmine P. & Jordin L.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-913: **State v. Eberhardt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-914: **State v. Doxey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-915: **State v. Whitmer**. Affirmed. See rule 7A(1).

No. A-02-916: **Ommert v. Ommert**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-917: **Kotinek v. Willard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-02-919: **In re Interest of Jalisa H.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-922: **State v. Beasley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-923: **State v. Drain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-924: **State v. Ervin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-929: **Smith v. City of Hastings**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-02-931, A-02-932, A-02-938: **State v. Kak**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-935: **Didier v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-937: **State v. Davie**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-943: **State v. Pleines**. Appeal dismissed. See rule 7A(2).

No. A-02-944: **State v. Witmer**. Appeal dismissed. See rule 7A(2). Multiple appeals from the same case are prohibited. See rule 1C.

No. A-02-944: **State v. Witmer**. After reconsideration as ordered by the Nebraska Supreme Court, appellee's suggestion of remand is granted and the matter is remanded to the district court for Lancaster County. See *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958).

No. A-02-945: **Plymate v. Chapin**. Appeal dismissed for lack of a final appealable order.

No. A-02-947: **Knapp v. Jackson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-953: **River City Life Center v. Douglas Cty. Bd. of Equal**. Appeal dismissed. See Neb. Rev. Stat. § 25-1905 (Reissue 1995). See, also, Neb. Rev. Stat. § 77-202.04 (Cum. Supp. 2000).

No. A-02-954: **State v. Van Dorien**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-955: **State v. Steinmetz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-956: **State v. Zakrzewski**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-957: **State v. Burns**. Convictions and sentences affirmed; claim of ineffective assistance of counsel cannot be reviewed due to inadequate record. See rule 7A(1).

No. A-02-958: **State v. Gardiner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-959: **Kellogg v. Department of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-02-964: **Minflow, Inc. v. First District Assn.** Stipulation allowed; matter remanded to district court with directions to vacate judgment and dismiss this action with prejudice; each party to pay own costs.

No. A-02-967: **Mumin v. Dees.** Appeal dismissed. See rule 7A(2).

No. A-02-969: **Petersen v. Neth.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-02-972: **Havel v. Department of Health & Human Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-02-976: **State v. Kaluza.** Appeal dismissed. See rule 7A(2).

No. A-02-977: **State v. Fouts.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-978: **State v. Frese.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-980: **In re Estate of McKamy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-982: **Levander v. The Benevolent & Protective Order of Elks, Lodge No. 159.** Reversed and remanded for further proceedings. See, rule 7A(3); *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

Nos. A-02-990 through A-02-992: **State v. Miner.** Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-993: **State v. Covey.** Appeal summarily dismissed. See, rule 7A(2); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-02-994: **In re Interest of Elizabeth H. et al.** By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1002: **Arrowsmith v. Arrowsmith.** Affirmed. See rule 7A(1).

No. A-02-1006: **State v. Smith.** Appeal dismissed. See, Neb. Rev. Stat. § 29-825 (Cum. Supp. 2000); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-02-1009: **Martin v. Board of Parole.** Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).

No. A-02-1013: **Village of Exeter v. Kahler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). Neb. Rev. Stat. § 25-1552 (Cum. Supp. 2002) does not provide for exemption for real estate.

No. A-02-1014: **State v. Ferrall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1015: **State v. Lombardo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1016: **State v. Lombardo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1017: **State v. Lombardo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1018: **State v. Lechtenberg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1019: **Lechtenberg v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1021: **Brown v. Republican Valley Windworks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-02-1022: **State v. Norgard**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1023: **State v. Aguilera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1025: **State v. Williams**. Affirmed. See, rule 7A(1); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). See, also, *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995) (once defendant informed of constitutional rights, no requirement that court advise defendant on each subsequent court appearance of same rights), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

No. A-02-1029: **Mooney v. Mooney**. Appeal dismissed. See rule 7A(2).

No. A-02-1031: **State v. Pleines**. Appeal dismissed. See rule 7A(2).

No. A-02-1032: **Throckmorton v. Throckmorton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-1034: **Tyler v. Britten**. Appeal dismissed. See rule 7A(2).

No. A-02-1037: **State v. Paige**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1039: **State v. Spurrier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1041: **Ash v. Hehner**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-1042: **State on behalf of Chavez v. Chavez**. Stipulation allowed; appeal dismissed.

Nos. A-02-1044, A-02-1045: **State v. Jefferson**. Affirmed. See, rule 7A(1); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

No. A-02-1048: **State v. Delgado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1049: **State v. Denney**. Affirmed. See, rule 7A(1); *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

No. A-02-1050: **Tyler v. Cole**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1068: **Christiansen v. Park Townhouses**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-02-1075: **State v. Albaugh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1078: **Martin v. Lindner**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

Nos. A-02-1079, A-02-1080: **State v. McCoy**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1082: **State v. Van Meveren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1084: **Lopez-Rayo v. American Family Ins. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2000).

No. A-02-1086: **State v. Hembd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1087: **Lewis v. Omaha Correctional Center**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000).

No. A-02-1088: **Moore v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). Further, pleadings filed by appellant captioned "Order To Show Cause" are dismissed as moot.

No. A-02-1090: **Coffey v. Coffey**. Appeal dismissed. See, rule 7A(2); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-02-1091: **Terry v. Rood**. Affirmed. See, rule 7A(1); *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999).

No. A-02-1095: **State v. Threats**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1098: **State v. Terry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1100: **Fraternal Order of Police v. City of Grand Island**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1103: **Egan v. Egan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rules 7B(2) and 5B(1); *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997) (where there is no bill of exceptions, only issue before court on appeal is whether pleadings are sufficient to support judgment).

No. A-02-1104: **Waite v. Davison**. Appeal dismissed. See rule 7A(2).

Nos. A-02-1106, A-02-1108: **State v. Workman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1107: **State v. Abdul**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1109: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1111: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-02-1113: **State v. Vasser**. Stipulation allowed; appeal dismissed.

No. A-02-1114: **State v. Vasser**. Stipulation allowed; appeal dismissed.

No. A-02-1116: **Bitsoe v. Drivers Mgmt., Inc**. Stipulation allowed; appeal dismissed.

No. A-02-1119: **Hughes v. Franchise Consortium Internat**. Bankruptcy stay lifted; appeal dismissed.

No. A-02-1123: **State v. Colwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1124: **Beers v. Kenney**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1125: **United Nebraska Bank, O'Neill v. Troshynski**. Affirmed. See rule 7A(1).

Nos. A-02-1130, A-02-1131: **State v. Ramos**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1132: **State v. Weddingfeld**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1133: **Osborn v. Osborn**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1135: **State v. Epstein**. There being no poverty affidavit requesting in forma pauperis status, the matter is summarily dismissed.

No. A-02-1136: **Nebraska Furniture Mart v. Duffy**. Appeal dismissed. See rule 7A(2).

No. A-02-1137: **State v. Munson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1139: **State v. Van Auken**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1140: **Marvin v. City of West Point**. Affirmed. See rule 7A(1).

No. A-02-1147: **Diamond Engineering Co. v. City of Grand Island**. Appeal dismissed. See *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-02-1148: **State v. Foutch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1149: **State v. Payer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-02-1150 through A-02-1152: **State v. Hansen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1155: **Reid v. Reid**. Stipulation allowed; appeal dismissed.

No. A-02-1156: **Blaine v. Beyer**. Appeal dismissed. See, rule 7A(2); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

No. A-02-1157: **Blaine v. Beyer**. Appeal dismissed. See, rule 7A(2); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

No. A-02-1158: **Chambers v. Neyland**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-02-1159: **Federal Deposit Ins. Corp. v. Slangal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-02-1162: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 47-503(1) (Reissue 1998).

No. A-02-1164: **Riley v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1176: **Bunkerhill Farms, Inc. v. Sterr**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-02-1177: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1178: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1179: **State v. Rodriguez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-02-1180, A-02-1181: **State v. Zoch**. Affirmed. Per Curiam.

No. A-02-1182: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1187: **State v. Moore**. The case filed in the district court is frivolous. The appeal of the dismissal by the district court is also frivolous. The order of the district court is affirmed. See rule 7A(1). Further attempts to litigate this matter should result in sanctions being imposed against appellant.

No. A-02-1188: **State v. Katzberg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1190: **State v. Peterson**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-02-1191: **State v. Ramos**. Matter summarily dismissed. See, rule 7A(2); *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001).

No. A-02-1192: **State v. Cramer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1193: **State v. Cappa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1194: **State v. Kuil**. Appeal dismissed. See, rules 7A(2) and 1; Neb. Rev. Stat. § 33-103 (Reissue 1998); *State v. Bailey*, 225 Neb. 66, 402 N.W.2d 319 (1987). See, also, Neb. Rev. Stat. § 29-825 (Cum. Supp. 2002); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-02-1195: **State v. Garrelts**. Affirmed. See, rule 7A(1); *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002); *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989).

No. A-02-1200: **Hoatson v. Hoatson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1204: **State v. Bice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1205: **State v. Rand**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1209: **State v. Delaney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1210: **State v. Sims**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1214: **In re Interest of Natasha B.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1215: **In re Interest of Joanna B.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1216: **In re Interest of Laryssa B.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1223: **State v. Woodard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-02-1224: **In re Interest of Seth T.** Stipulation allowed; appeal dismissed.

No. A-02-1225: **Nickolite v. Nickolite**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1228: **Crowley v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1231: **Patz v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1232: **Jones v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1233: **Gray v. Wagner**. Affirmed. See rule 7A(1).

No. A-02-1235: **State v. Henry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1236: **State v. Christlieb**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1238: **State v. Kitt**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-02-1239: **State v. Fruhling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1242: **Smith v. Smith**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-1249: **Miller v. Steichen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

No. A-02-1251: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1252: **State v. Wingard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1253: **State v. Luzum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1263: **In re Trust of Becker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2729(6) (Cum. Supp. 2002).

No. A-02-1264: **In re Estate of Becker**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2729(6) (Cum. Supp. 2002).

No. A-02-1269: **State v. Bush**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1272: **State v. Pospisil**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1273: **State v. Pospisil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1274: **Provancha v. Boche**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-02-1275: **Blanton v. City of Sidney**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-02-1277: **Data Processors Internat. v. Independent Mktg. Servs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-02-1278: **State v. Schmidt**. Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-02-1278: **State v. Schmidt**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-02-1279: **State v. Jackson**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2002).

Nos. A-02-1280 through A-02-1283: **State v. Rue**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1285: **State v. Tickle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1288: **Anzalone v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-02-1291: **State v. Stolpe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1294: **State v. Plenty Arrows**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1295: **In re Interest of Ethan P.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1299: **Hart v. Cornhusker Auto Center**. Motion of appellee for summary dismissal sustained. See, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-02-1303: **State v. Colby**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002); *Design Builders, Inc. v. Heyd-Lamb*, 10 Neb. App. 642, 635 N.W.2d 543 (2001); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-02-1304: **State v. Stacy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1305: **Glass v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999).

No. A-02-1306: **In re Trust of VanDeWalle**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1308: **State v. McCray**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1310: **State ex rel. Tyler v. Carey**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-02-1314, A-02-1315: **State v. Witter**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1317: **Nielsen v. Nielsen**. Appeal dismissed. See, rule 7A(2); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).

No. A-02-1324: **State v. Kurtzer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

No. A-02-1325: **King v. Neth**. Affirmed. See rule 7A(1).

No. A-02-1329: **In re Guardianship & Conservatorship of Peak**. Appeal dismissed. See, rule 7A(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-02-1339: **Bohlmann v. Bohlmann**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

No. A-02-1341: **State v. Crockett**. Appeal dismissed. See, rule 7A(2); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-02-1342: **State v. Allen**. Appeal dismissed for lack of jurisdiction.

No. A-02-1344: **State v. Roundtree**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1350: **State v. Doley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1352: **State v. Avery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1354: **Nelson v. Weiler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-02-1355: **Kirkpatrick v. Wiler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-02-1358: **Holten v. Holten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1362: **Kaltsounis v. Chappelear**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). See, also, *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-02-1368: **State v. Jasper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1369: **WBE Company v. City of Gretna**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1372: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1374: **State v. Frame**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1377: **State v. Schade**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1379: **Pratt v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See, *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997); *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997); *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

No. A-02-1382: **In re Interest of Heaven M.** By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1387: **State v. Peterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

No. A-02-1388: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1391: **Waite v. Hippe**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002); *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996).

No. A-02-1393: **State v. Larkin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1394: **State v. Nievierowski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1399: **Salinas v. Salinas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1400: **State v. Vollman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1402: **State v. Sorensen**. Affirmed. See rule 7A(1).

No. A-02-1404: **In re Estate of Borowiak**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1405: **Hosack v. Hosack**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1301 and 25-1912(1) (Cum. Supp. 2002).

No. A-02-1407: **Material Processing, Inc. v. County Bd. of Dakota Cty**. Stipulation allowed; appeal dismissed.

No. A-02-1409: **Bell v. Kilpatrick**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1413: **Gould v. Gould**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1414: **State v. Ferris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1416: **Jones v. Thurber**. Summarily affirmed. See, rule 7A(1); *Sabers v. Delano*, 100 F.3d 82 (8th Cir. 1996) (inmate brought 42 U.S.C. § 1983 action claiming inadequate library facilities and attorney incompetence; trial court's grant of summary judgment in favor of prison officials affirmed).

No. A-02-1425: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1426: **State v. Marquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1427: **State v. Coates**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1428: **State v. Mekiney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1430: **Tyler v. Williams**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1431: **Tyler v. "Jane Doe" Bailiff**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1432: **Tyler v. Eickhoff**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1434: **State v. Grove**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1440: **In re Guardianship & Conservatorship of Clark**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1444: **State v. Moore**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-02-1445: **Storovich v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-02-1449: **State v. Fulton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1451: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1452: **State v. Addleman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1453: **State v. Malagon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1456: **Smith v. Omaha World Herald Co.** Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-02-1457: **State v. Simon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-02-1462: **State v. Rabanales**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-02-1463: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1466: **Slosburg Co. v. Cort Instant Furniture Rental**. Affirmed. See rule 7A(1).

Nos. A-02-1469 through A-02-1471: **State v. Kellogg**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-02-1472: **Cain v. Williamson**. Appeal dismissed. See, rule 7A(2); *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984).

No. A-02-1474: **Garsombke v. Allstate Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-02-1476: **Sattler v. Egelhoff**. Stipulation allowed; appeal dismissed with prejudice.

No. A-02-1481: **Bigelow v. Gleason**. By order of the court, appeal dismissed for failure to file briefs.

No. A-02-1487: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1488: **State v. Delvaux**. Appeal dismissed. See, rule 7A(2); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2002).

No. A-02-1493: **State v. Tyma**. Appeal dismissed. See rule 7A(2).

No. A-02-1494: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1495: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1496: **State v. Escamilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-02-1497: **Tyler v. Tyler**. Appeal dismissed. See rule 7A(2).

No. A-02-1502: **Thomas v. State**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-03-002: **Nurses, Inc. v. Lecuona**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999); *Gracey v. Zwonecheck*, 263 Neb. 796, 643 N.W.2d 381 (2002); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

No. A-03-003: **TCF National Bank v. Hayden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

No. A-03-004: **Lakin v. Shaw**. Appeal dismissed. See, rule 7A(2); *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

No. A-03-007: **State v. Hernandez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-03-008: **State v. Coplin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-03-011: **Zimmerman v. Fry**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-03-012: **Hanchera v. Board of Adjustment**. Reversed and remanded for further proceedings. See, rule 7A(3); *Eastroads v. Omaha Zoning Bd. of Appeals*, 7 Neb. App. 951, 587 N.W.2d 413 (1998) (summary judgment inappropriate in appeal proceedings to district court).

No. A-03-013: **Benson v. Benson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-016: **Johnson Co. v. Jandrain**. Motion of appellant to dismiss appeal sustained without prejudice to action by trial court on supersedeas bond.

No. A-03-017: **Classic Auto Sales v. Lombardi**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-03-018: **Universal Revenue Servs. v. Burton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-025: **In re Interest of Amanda R.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-026: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-03-030: **Jones v. Zitka**. Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-03-039: **Jones v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-03-043: **Blight v. Jones**. Appeal dismissed. See Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).

No. A-03-044: **Hibler v. Hibler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-03-048: **State v. Townsend**. Appeal dismissed. See, rule 7A(2); *State v. Jones*, 264 Neb. 812, 652 N.W.2d 288 (2002).

No. A-03-053: **Blight v. Poland**. Appeal dismissed. See Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).

No. A-03-053: **Blight v. Poland**. Motion of appellant for reconsideration of dismissal sustained; case reinstated.

No. A-03-061: **In re Interest of Bradey S. & Bailey S.** Appeal dismissed. See, rule 7A(2); *In re Interest of William H.*, 3 Neb. App. 869, 533 N.W.2d 670 (1995).

No. A-03-063: **State v. Royer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

No. A-03-069: **Van Natter v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed. See, rule 8; *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999).

No. A-03-070: **State v. Lang.** Appeal dismissed. See, rule 7A(2); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989).

No. A-03-075: **Armbrust Village Venture v. Purdy & Slack Architects.** Appeal dismissed. See, rule 7A(2); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000). Appellee's motion to dismiss overruled as moot. See Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002).

No. A-03-080: **Martin v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained for lack of jurisdiction.

No. A-03-082: **Holder v. Kenny.** Motion of appellee for summary dismissal for mootness sustained. See rule 7D(1).

No. A-03-093: **In re Interest of Tiffany O.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-03-096: **Cascio v. Cascio.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-097: **Robinson v. Board of Parole.** Summarily affirmed. See, rule 7A(1); *Ditter v. Nebraska Bd. of Parole*, 11 Neb. App. 473, 655 N.W.2d 43 (2002).

No. A-03-108: **Walker v. Walker.** By order of the court, appeal dismissed for failure to file briefs.

No. A-03-110: **State v. Miller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-116: **Smeal Fire Apparatus, Co. v. Kreikemeier.** Appeal dismissed. See, rule 7A(2); *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

No. A-03-123: **Picard v. Allmerica Fin. Life Ins. & Annuity Co.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2002).

No. A-03-125: **Tyler v. Wickenkamp.** Affirmed. See rule 7A(1).

No. A-03-126: **Mumin v. Hopkins.** By order of the court, appeal dismissed for failure to file briefs.

No. A-03-127: **Saylor v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-03-135: **Pollock v. Pickett.** Stipulation allowed; appeal dismissed.

No. A-03-142: **Brandenburgh v. Waste Connections of Nebraska, Inc.** County court order is not final order. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002). Therefore, appeal dismissed for lack of jurisdiction and district court's order vacated.

No. A-03-142: **Brandenburgh v. Waste Connections of Nebraska, Inc.** Joint motion of the parties for rehearing granted. Dismissal vacated and appeal shall proceed.

No. A-03-150: **State v. Jensen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-03-155: **Dannull v. Pipe.** Stipulation allowed; appeal dismissed.

No. A-03-157: **State v. Dyer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-03-161: **Menvielle v. Menvielle.** Appeal dismissed. See rule 7A(2).

No. A-03-163: **State v. Styles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-172: **Sparks v. Sparks.** Stipulation allowed; appeal dismissed with prejudice.

No. A-03-176: **Lynch v. State Farm Mut. Auto. Ins. Co.** Appeal dismissed. See, rule 7A(2); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998).

No. A-03-178: **Tyler v. City of Hadar.** Appeal dismissed. See, rule 7A(2); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

No. A-03-179: **Tyler v. Village Bd. of Hadar**. Appeal dismissed. See, rule 7A(2); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

No. A-03-184: **Blaine v. Beyer**. Appeal dismissed. See, rule 7A(2); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000) (all issues prayed for in petition must be disposed of to be final order).

No. A-03-185: **Blaine v. Beyer**. Appeal dismissed. See, rule 7A(2); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000) (all issues prayed for in petition must be disposed of to be final order).

No. A-03-189: **State v. Abbott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-03-190: **State v. Abbott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-03-196: **State ex rel. Tyler v. Britten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-197: **Martin v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

No. A-03-230: **State v. Cope**. Motion of appellee for summary dismissal sustained. See rule 7D(1).

No. A-03-231: **State v. Foreman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993) (appellant failed to demonstrate he still had legally cognizable interest in outcome of litigation).

No. A-03-232: **Livingston v. Ziegler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

No. A-03-242: **State v. Stewart**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-245: **State v. Svitak**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-03-273: **State v. Chen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2002); *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997). See, also, *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994).

No. A-03-289: **State v. Bowder**. Appeal dismissed. See, rule 7A(2); *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999); *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995).

No. A-03-309: **Criger v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-312: **In re Interest of Terrance M. et al**. Appeal dismissed for lack of jurisdiction.

No. A-03-317: **Barnard v. Belding**. Appeal dismissed. See, rule 7A(2); *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

No. A-03-321: **State v. Schram**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

No. A-03-324: **Ehrman v. Ehrman**. Appeal dismissed. See, rule 7A(2); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001) (order modifying dissolution decree, which transferred custody of child from former wife to former husband but reserved question of child support for later determination, was not final and appealable.)

No. A-03-332: **Hernandez v. Hernandez**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-03-340: **Boykin v. Boykin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-342: **Buse v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-362: **State v. Nelson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-388: **State v. Burks**. Appeal dismissed. See, rule 7A(2); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993).

No. A-03-407: **Sindelar v. Creston Fertilizer Co**. Appeal dismissed. See, rule 7A(2); *State v. Plymate*, 8 Neb. App. 513, 598 N.W.2d 65 (1999); *Forrest v. Eilenstine*, 5 Neb. App. 77, 554 N.W.2d 802 (1996) (time for filing appeal is not tolled unless proceedings leading up to motion for new trial constitute trial).

No. A-03-409: **Giles v. Giles**. Appeal dismissed. See, rule 7A(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-03-410: **In re Interest of Joshua S.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-03-442: **Scurlocke v. Hansen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-03-444: **State v. Camacho**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-450: **Cullum v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2002).

No. A-03-475: **State v. Burdette**. Appeal dismissed. See rule 7A(2).

No. A-03-490: **Lyle v. City of Hastings**. Appeal dismissed. See, rule 7A(2); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-03-492: **Reinhard v. Hitchcock**. Pursuant to stipulation of appellant, motion of appellee for summary dismissal sustained.

No. A-03-515: **Wilson v. S.T.J., Inc**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-03-518: **Tyler v. Clarke**. Appeal dismissed. See rule 7A(2).

No. A-03-565: **State v. Kmiecik**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-03-566: **State v. Kmiecik**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-33-020021: **State v. Mollner**. Appellant's exception to district court's order of dismissal entered May 30, 2002, dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). See, also, Neb. Rev. Stat. § 25-2221 (Reissue 1995); *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

No. A-33-030006: **State v. Inget**. Appellant's exception dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). See, also, *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

No. A-33-030017: **State v. Martinez**. Application to docket appeal under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) denied for lack of final order. See *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-00-421: **City of Lincoln v. Nebraska Pub. Power Dist.**, 10 Neb. App. 713 (2001). Petition of appellant for further review overruled on April 24, 2002.

No. A-00-606: **Detmer v. Bixler**, 10 Neb. App. 899 (2002). Petition of appellee for further review overruled on May 15, 2002.

No. S-00-698: **State v. Davlin**, 10 Neb. App. 866 (2002). Petition of appellee for further review sustained on April 10, 2002.

Nos. A-00-720, A-00-721: **State v. Beers**. Petitions of appellant for further review overruled on August 29, 2002.

No. A-00-786: **State v. Armendariz**. Petition of appellee for further review overruled on May 23, 2002.

No. A-00-835: **Erikson v. Abels**. Petition of appellee for further review overruled on May 23, 2002.

No. A-00-894: **Boren v. Burlington Northern & Santa Fe Ry. Co.**, 10 Neb. App. 766 (2002). Petition of appellant for further review overruled on April 10, 2002.

No. A-00-897: **Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.**, 10 Neb. App. 948 (2002). Petition of appellee for further review overruled on May 15, 2002.

No. S-00-928: **Day v. Heller**, 10 Neb. App. 886 (2002). Petition of appellee for further review sustained on April 17, 2002.

No. A-00-945: **Jacobitz v. Nebraska Dept. of Health & Human Servs**. Petition of appellant for further review overruled on July 17, 2002.

No. A-00-960: **State v. Schlondorf**. Petition of appellant for further review overruled on August 28, 2002.

No. S-00-967: **Rydberg v. I.H.S., Inc**. Petition of appellant for further review sustained on November 20, 2002.

No. A-00-981: **Majerus v. Majerus**. Petition of appellant for further review overruled on April 24, 2002.

No. A-00-995: **State v. Young**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-998: **Real Estate Financing v. Mock**. Petition of appellant for further review overruled on June 26, 2002.

Nos. A-00-1015, A-00-1016: **Andrews Van Lines v. McCampbell**. Petitions of appellant for further review overruled on March 27, 2002.

No. A-00-1020: **Wagner v. Union Pacific RR. Co.**, 11 Neb. App. 1 (2002). Petition of appellant for further review overruled on July 3, 2002.

No. A-00-1031: **Omaha Constr. Indus. Pension Plan v. Children's Hosp.**, 11 Neb. App. 35 (2002). Petition of appellee for further review overruled on May 23, 2002.

No. A-00-1035: **Beshaler v. Spalding Irrigation**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1035: **Beshaler v. Spalding Irrigation**. Petition of appellee Paulsen for further review overruled on August 28, 2002.

No. S-00-1051: **Dominium Illinois Three v. Arbor Dev. Group**. Petition of appellant for further review sustained on November 20, 2002.

No. A-00-1056: **Wright v. Preston Resources, Inc.**, 10 Neb. App. 856 (2002). Petition of appellant for further review overruled on March 27, 2002.

No. A-00-1063: **State v. Hauck**. Petition of appellee for further review overruled on May 15, 2002.

No. A-00-1077: **Bellevue Health & Emerg. Clinic v. Bert Murphy L.L.C.** Petition of appellee Murphy for further review overruled on July 17, 2002.

No. A-00-1088: **McCray v. Pollack**. Petition of appellant for further review overruled on June 12, 2002.

No. A-00-1105: **Ramer v. Ramer**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1109: **Sgambellone v. Dobrovolny**. Petition of appellant for further review overruled on June 19, 2002.

No. A-00-1111: **Neubauer v. Neubauer**. Petition of appellee for further review overruled on August 28, 2002.

No. A-00-1142: **Wright v. Wright**. Petition of appellant for further review overruled on March 27, 2002.

No. A-00-1146: **Robinson v. NABCO, Inc.**, 10 Neb. App. 968 (2002). Petition of appellant for further review overruled on May 8, 2002.

No. A-00-1164: **Kieselhorst v. Schneiderheinz**. Petition of appellant for further review overruled on December 18, 2002.

No. A-00-1201: **State v. Simmons**. Petition of appellant for further review overruled on June 5, 2002.

No. A-00-1224: **Farm Bureau Ins. Co. v. Nawojski**. Petition of appellant for further review overruled on June 26, 2002.

No. A-00-1229: **State v. Leggins**. Petition of appellant for further review overruled on June 5, 2002.

No. A-00-1244: **Randolph Oldsmobile Co. v. Nichols**, 11 Neb. App. 158 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1246: **Paulsen v. Paulsen**, 11 Neb. App. 362 (2002). Petition of appellant for further review overruled on October 23, 2002.

No. A-00-1257: **Parola v. Creighton University**. Petition of appellant for further review overruled on September 18, 2002.

No. A-00-1280: **Heggemeyer v. Heggemeyer**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1292: **State v. Sobey**. Petition of appellant for further review overruled on May 15, 2002.

No. S-00-1293: **State v. Sobey**. Petition of appellee for further review sustained on May 15, 2002.

No. A-00-1314: **Albers v. Atlas Roofing Corp**. Petition of appellant for further review overruled on January 3, 2003.

No. S-01-008: **Herrera v. Fleming Cos.**, 10 Neb. App. 987 (2002). Petition of appellee for further review sustained on July 3, 2002.

No. A-01-036: **D & S Realty v. Cutler**. Petition of appellant for further review overruled on June 11, 2003.

No. A-01-036: **D & S Realty v. Cutler**. Petition of appellee for further review overruled on June 11, 2003.

No. A-01-040: **State v. King**. Petition of appellant for further review overruled on April 25, 2002.

No. A-01-068: **Anderson Excav. & Wrecking Co. v. Argus Dev. Co**. Petition of appellant for further review overruled on April 9, 2003.

No. A-01-072: **Hartman v. Hartman**. Petition of appellant for further review overruled on September 11, 2002.

No. A-01-095: **Classe v. Windsor Group**. Petition of appellee for further review overruled on July 10, 2002.

No. A-01-114: **State on behalf of Hannon v. Rosenberg**, 11 Neb. App. 518 (2002). Petition of appellee for further review overruled on January 30, 2003.

No. A-01-142: **State v. Smith**. Petition of appellant for further review overruled on May 10, 2002. See rule 2F.

No. A-01-164: **Talbot v. Bellevue Fantasy's, Inc**. Petition of appellant for further review overruled on August 28, 2002.

No. A-01-237: **State v. En Maati**. Petition of appellant for further review overruled on September 25, 2002.

No. S-01-251: **Pribil v. Koinzan**, 11 Neb. App. 199 (2002). Petition of appellant for further review sustained on August 28, 2002.

No. A-01-254: **Shilling v. Shanks**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-275: **Haghighi v. State**. Petition of appellant for further review overruled on October 23, 2002.

No. A-01-290: **Neff v. Wenzl**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-296: **Hyde v. Hyde**. Petition of appellee for further review overruled on December 11, 2002.

No. A-01-299: **Barner v. Sunflower Carriers**. Petition of appellee for further review overruled on April 17, 2002.

Nos. A-01-310, A-01-311: **In re Interest of Tyra C. & Tyonna C.** Petitions of appellant for further review overruled on April 10, 2002.

No. A-01-313: **Alderman v. County of Antelope**, 11 Neb. App. 412 (2002). Petition of appellant for further review overruled on June 11, 2003.

No. A-01-327: **Arias v. Krutz**. Petition of appellant for further review overruled on March 19, 2003.

No. A-01-332: **W.F.M., Inc. v. Cherry Cty**. Petition of appellant for further review overruled on August 28, 2002.

No. A-01-337: **State v. Taubenheim**. Petition of appellee for further review overruled on April 17, 2002.

No. A-01-350: **In re Interest of Kenneth S.** Petition of appellant for further review overruled on April 24, 2002.

No. A-01-365: **Duda v. American Family Ins. Group.** Petition of appellant for further review overruled on November 27, 2002; cross-petition for further review also overruled on November 27, 2002.

No. A-01-375: **State v. Brown.** Petition of appellant for further review overruled on March 27, 2002.

No. A-01-378: **Shaffer v. Shaffer.** Petition of appellee for further review overruled on August 28, 2002.

No. A-01-380: **State v. Devitt.** Petition of appellant for further review overruled on June 12, 2002.

No. A-01-389: **State v. Hill.** Petition of appellant for further review overruled on April 17, 2002.

No. A-01-390: **Harvey Oaks Homeowner's Assn. v. Aslan Company.** Petition of appellant for further review overruled on March 12, 2003.

No. A-01-416: **State v. Matson.** Petition of appellant for further review overruled on March 27, 2002.

No. A-01-419: **State v. Hill-Brown.** Petition of appellant for further review overruled on May 21, 2002.

No. A-01-434: **State v. Harvey.** Petition of appellant for further review overruled on May 23, 2002.

No. S-01-440: **State v. West.** Petition of appellant for further review sustained on July 10, 2002.

No. A-01-443: **State ex rel. Free The Innocent, Inc. v. Scotts Bluff Cty. Sheriff.** Petition of appellant for further review overruled on April 10, 2002.

No. A-01-462: **State v. Morgan.** Petition of appellant for further review overruled on August 28, 2002.

No. A-01-484: **In re Interest of John W.** Petition of appellant for further review overruled on April 17, 2002.

No. A-01-501: **State v. Colangelo.** Petition of appellant for further review overruled on June 11, 2002.

No. A-01-507: **Deal v. State.** Petition of appellee for further review overruled on April 23, 2003.

No. A-01-513: **McGuire v. McGuire**, 11 Neb. App. 433 (2002). Petition of appellant for further review overruled on January 23, 2003.

No. A-01-522: **State v. Pestka**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-539: **Luedtke v. Ripa**. Petition of appellant for further review overruled on November 14, 2002.

Nos. A-01-554, A-01-555: **Saunders Cty. v. Metropolitan Utilities Dist.-A**, 11 Neb. App. 138 (2002). Petitions of appellant for further review overruled on July 17, 2002.

No. A-01-562: **Tighe v. Cedar Lawn, Inc.**, 11 Neb. App. 250 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-01-574: **State v. Hayes**, 10 Neb. App. 833 (2002). Petition of appellant for further review overruled on April 17, 2002.

No. A-01-593: **In re Interest of Andrew M. et al.**, 11 Neb. App. 80 (2002). Petition of appellant for further review overruled on July 17, 2002.

No. A-01-596: **State v. Turner**. Petition of appellant for further review overruled on May 23, 2002.

No. A-01-613: **Harvey Oaks Dental v. Peter Letterese & Assocs**. Petition of appellee for further review overruled on March 12, 2003.

No. A-01-616: **State v. Curlile**, 11 Neb. App. 52 (2002). Petition of appellant for further review overruled on May 15, 2002.

No. A-01-636: **Tyler v. Crosby**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-639: **Borowiak v. Neafus Land & Cattle Co**. Petition of appellant for further review overruled on November 14, 2002.

No. A-01-656: **Dyer v. Dyer**. Petition of appellant for further review overruled on June 19, 2002.

No. S-01-664: **Hughes v. Poykko-Post**. Petition of appellee for further review sustained on May 15, 2003.

No. A-01-671: **State v. Robinson**, 10 Neb. App. 848 (2002). Petition of appellant for further review overruled on June 12, 2002.

No. A-01-676: **Carlson v. Skradski**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-693: **Crouse v. Crouse**. Petition of appellant for further review overruled on September 11, 2002.

No. A-01-694: **American Bus. Info. v. Burgess**. Petition of appellee for further review overruled on March 19, 2003.

No. A-01-708: **Kisicki v. Mid-America Fin. Inv. Corp**. Petition of appellee for further review overruled on January 23, 2003.

No. A-01-722: **State v. Relford**. Petition of appellant for further review overruled on April 10, 2002.

No. S-01-755: **State v. March**. Petition of appellant for further review sustained on November 20, 2002.

No. A-01-765: **C. Goodrich, Inc. v. Thies**. Petition of appellee for further review overruled on April 9, 2003.

No. A-01-771: **Washington Cty. Bd. of Equal. v. Rushmore Borglum**, 11 Neb. App. 377 (2002). Petition of respondent for further review overruled on April 9, 2003.

No. S-01-777: **State v. Putz**, 11 Neb. App. 332 (2002). Petition of appellant for further review sustained on October 23, 2002.

No. A-01-780: **State v. Nielsen**. Petition of appellant for further review overruled on April 17, 2002.

No. A-01-802: **In re Trust Created by Charles E. Fleecs**. Petition of appellee for further review overruled on February 12, 2003.

No. A-01-803: **State v. Caldwell**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-807: **Brozek v. Herd**. Petition of appellant for further review overruled on October 30, 2002.

No. A-01-808: **Hamm v. Champion Manuf. Homes**, 11 Neb. App. 183 (2002). Petition of appellant for further review overruled on July 17, 2002.

No. S-01-810: **Lewis v. Reiter**. Petition of appellant for further review sustained on June 5, 2002.

No. S-01-810: **Lewis v. Reiter**. Petition of appellant for further review dismissed on September 25, 2002, as having been improvidently granted.

No. A-01-836: **State v. Harris**. Petition of appellant for further review overruled on May 29, 2003.

No. A-01-849: **State v. Lopez**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-863: **Lacivita v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on June 19, 2002.

No. A-01-868: **Rowland v. Rowland**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-872: **State v. Dvorak**. Petition of appellee for further review overruled on August 28, 2002.

No. A-01-880: **In re Interest of Brettany M. et al.**, 11 Neb. App. 104 (2002). Petition of appellant for further review overruled on June 26, 2002.

No. A-01-887: **State v. Bockman**, 11 Neb. App. 273 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-01-898: **Brown v. Marion**. Petition of appellant for further review overruled on June 5, 2002.

No. A-01-900: **State v. Robles**. Petition of appellant for further review dismissed on September 11, 2002, for lack of jurisdiction.

No. A-01-902: **State v. SapaNajin**, 11 Neb. App. 190 (2002). Petition of appellant for further review overruled on August 29, 2002.

No. A-01-906: **Ebert v. Nebraska Dept. of Corr. Servs.**, 11 Neb. App. 553 (2003). Petition of appellant for further review overruled on June 11, 2003.

No. A-01-907: **Wilson v. Wilson**. Petition of appellant for further review overruled on June 5, 2002.

No. A-01-921: **In re Interest of Emilio L.** Petition of appellant for further review overruled on May 8, 2002.

No. A-01-928: **State v. Sullivan**. Petition of appellant for further review overruled on February 26, 2003.

No. A-01-932: **Wolfenbarger v. Buchanan**. Petition of appellant for further review overruled on November 20, 2002.

No. A-01-948: **State v. Dulitz**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-958: **In re Interest of Nicholas C.** Petition of appellant for further review overruled on October 9, 2002.

No. A-01-958: **In re Interest of Nicholas C.** Petition of appellee Robert C. for further review overruled on October 9, 2002.

No. A-01-959: **In re Interest of Stephanie H. et al.**, 10 Neb. App. 908 (2002). Petition of appellee for further review overruled on April 10, 2002.

No. A-01-977: **Tyler v. Stennis**, 10 Neb. App. 655 (2001). Petition of appellant for further review overruled on March 27, 2002.

Nos. A-01-995, A-01-996: **Bochart v. Glinsmann**. Petitions of appellee for further review overruled on May 23, 2003.

No. S-01-1004: **In re Interest of Merissa F.** Petition of appellant for further review sustained on October 9, 2002.

No. A-01-1006: **State v. Shirley**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-1017: **Security First Bank v. Lockwood**. Petition of appellee for further review overruled on February 26, 2003.

No. A-01-1020: **Marvin v. City of West Point**. Petition of appellant for further review overruled on April 17, 2002.

Nos. A-01-1021, A-01-1022: **In re Interest of Michael C. & Charles C.** Petitions of appellant for further review overruled on September 11, 2002.

Nos. A-01-1024, A-01-1050: **State v. Miller**. Petitions of appellant for further review dismissed on September 11, 2002, for lack of jurisdiction.

No. S-01-1042: **Tafoya v. Chapin**. Petition of appellee for further review sustained on May 21, 2003.

No. A-01-1045: **Keating v. J.C. Penney Life Ins. Co.**, 11 Neb. App. 757 (2003). Petition of appellant for further review overruled on June 11, 2003.

No. A-01-1048: **State v. Daniels**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1049: **State v. Norden**. Petition of appellant for further review overruled on March 27, 2002.

No. S-01-1055: **Big Crow v. City of Rushville**, 11 Neb. App. 498 (2002). Petition of appellee for further review sustained on February 12, 2003.

No. A-01-1062: **Tyler v. Thompson**. Petition of appellant for further review overruled on April 10, 2002.

No. A-01-1071: **State v. Alcorta**. Petition of appellant for further review overruled on October 9, 2002.

No. A-01-1077: **Ignacio v. ConAgra Beef Co.** Petition of appellee for further review overruled on August 29, 2002.

No. S-01-1083: **Zavala v. ConAgra Beef Co.**, 11 Neb. App. 235 (2002). Petition of appellee for further review sustained on August 29, 2002.

No. A-01-1086: **State v. Garcia**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1093: **State v. Wilger**. Petition of appellant for further review overruled on August 29, 2002.

No. S-01-1101: **Bennett v. Labenz**. Petition of appellee City of Omaha for further review sustained on January 15, 2003.

No. A-01-1104: **Keeler v. Whitehead Oil Co.** Petition of appellant for further review overruled on July 17, 2002.

No. A-01-1106: **Van Valkenburg v. Liberty Lodge No. 300**. Petition of appellant for further review overruled on February 26, 2003.

No. A-01-1108: **State v. Miller**. Petition of appellant for further review overruled on September 18, 2002.

No. A-01-1120: **Coffey v. Waldinger Corp.**, 11 Neb. App. 293 (2002). Petition of appellant for further review overruled on September 11, 2002.

No. A-01-1121: **Trouba v. Cather & Sons Constr. Co.** Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1124: **Jones v. IBP, inc.** Petition of appellant for further review overruled on September 11, 2002.

No. A-01-1126: **State v. Griess**, 11 Neb. App. 389 (2002). Petition of appellee for further review overruled on January 23, 2003.

No. A-01-1128: **Nebraska Furniture Mart v. Duffy**. Petitions of appellant for further review overruled on June 19, 2002.

No. A-01-1151: **State v. Henry**. Petition of appellee for further review overruled on August 29, 2002.

No. A-01-1153: **State v. Motschenbacher**. Petition of appellee for further review overruled on July 3, 2002.

No. A-01-1155: **Ditter v. Nebraska Bd. of Parole**, 11 Neb. App. 473 (2002). Petition of appellant for further review overruled on March 12, 2003.

No. A-01-1156: **Svoboda v. Ledford**. Petition of appellant for further review overruled on January 23, 2003.

No. A-01-1170: **In re Estate of Sidles**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1173: **In re Interest of Rodgers F. et al**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-1180: **In re Interest of Zachary H. et al**. Petition of appellant for further review overruled on September 18, 2002.

No. A-01-1181: **In re Interest of Emilio L**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-1191: **State v. Foreman**. Petition of appellant for further review overruled on October 9, 2002.

No. A-01-1192: **State v. Salisbury**. Petition of appellant for further review overruled on March 27, 2002.

No. S-01-1194: **Morris v. Nebraska Health System**. Petition of appellant for further review sustained on January 15, 2003.

No. A-01-1198: **Penton v. Penton**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-1208: **State v. Parks**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1211: **State v. Johnson**. Petition of appellant for further review dismissed on October 9, 2002. See rule 2F(1).

No. A-01-1212: **State v. Mata**. Petition of appellant for further review overruled on September 16, 2002.

No. A-01-1218: **State v. Leibel**. Petition of appellant for further review overruled on October 23, 2002.

No. A-01-1230: **State v. Janis**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1233: **Cook v. Cook**. Petition of appellant for further review overruled on January 3, 2003.

No. A-01-1248: **State v. Roeder**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-1259: **Anderson v. Kenney**. Petition of appellant for further review overruled on May 15, 2002.

No. A-01-1261: **Wunderlich v. Miller**. Petition of appellee for further review overruled on December 11, 2002.

No. A-01-1264: **State v. Lococo**. Petition of appellant for further review overruled on February 20, 2003.

No. A-01-1268: **State v. Arias**. Petition of appellant for further review overruled on February 28, 2003.

No. A-01-1274: **State v. O'Dell**. Petition of appellee for further review overruled on November 14, 2002.

No. A-01-1280: **State v. Borders**. Petition of pro se appellant for further review overruled on June 5, 2002.

No. A-01-1283: **State v. Miller**, 11 Neb. App. 404 (2002). Petition of appellant for further review overruled on January 15, 2003.

Nos. A-01-1287, A-01-1295, A-01-1296: **In re Interest of Marcus W. et al.**, 11 Neb. App. 313 (2002). Petitions of appellant for further review overruled on November 27, 2002.

No. A-01-1303: **State v. Herringer**. Petition of appellant for further review overruled on May 23, 2002.

No. A-01-1309: **Bralick v. Grimm**. Petition of appellee for further review overruled on January 15, 2003.

No. A-01-1322: **In re Interest of Marie S**. Petition of appellant for further review overruled on June 19, 2002.

No. A-01-1327: **Buhrman v. Jayhawk Boxes, Inc**. Petition of appellant for further review overruled on September 18, 2002.

Nos. A-01-1333, A-01-1334: **In re Interest of Emilio L**. Petitions of appellant for further review overruled on September 11, 2002.

No. A-01-1338: **State v. Chapman**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-1344: **State v. Hernandez**. Petition of appellant for further review overruled on March 26, 2003.

No. A-01-1345: **State v. Shock**, 11 Neb. App. 451 (2002). Petition of appellee for further review overruled on January 29, 2003.

No. A-01-1359: **Maxwell v. Cantwell**. Petition of appellant for further review overruled on May 15, 2003.

No. A-01-1374: **Wilke v. McDermott**. Petition of appellant for further review overruled on June 11, 2003.

No. A-01-1375: **State v. Martinez**. Petition of appellant for further review overruled on November 27, 2002.

No. A-01-1387: **State v. Hall**. Petition of appellant for further review overruled on January 15, 2003.

No. A-01-1390: **State v. Steele**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1405: **State v. Wahrman**, 11 Neb. App. 101 (2002). Petition of appellant for further review overruled on July 3, 2002.

No. A-01-1409: **Plymate v. Chapin**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-002: **State v. Pofahl**. Petition of appellant for further review overruled on June 5, 2002.

No. A-02-003: **State v. Anway**. Petition of appellant for further review overruled on July 17, 2002.

No. A-02-018: **Abdullah v. State**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-020: **State v. Allen**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-030: **State v. Cheshek**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-036: **Cole v. Truell**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-040: **State v. Metzger**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-071: **State v. Chairez**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-075: **State v. Conrad**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-078: **State v. Kellogg**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-080: **Johnson v. Martin**. Petition of appellant for further review overruled on June 26, 2002.

No. A-02-088: **In re Guardianship & Conservatorship of Hartwig**, 11 Neb. App. 526 (2003). Petition of appellee for further review overruled on March 12, 2003.

No. A-02-100: **State v. Brown**. Petition of appellant for further review overruled on May 8, 2002.

No. A-02-106: **In re Interest of Jeffrey G.** Petition of appellant for further review overruled on January 29, 2003.

No. A-02-125: **State v. Stovall**. Petition of appellant for further review overruled on June 19, 2002.

No. A-02-137: **State v. Durst**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-150: **Goertzen v. Goertzen**. Petition of appellant for further review overruled on March 19, 2003.

No. S-02-176: **State v. Ways**. Petition of appellant for further review sustained on April 9, 2003.

No. A-02-205: **State v. Hopp**. Petition of appellant for further review overruled on October 23, 2002.

Nos. A-02-214, A-02-215: **State v. Warburton**. Petitions of appellant for further review overruled on October 15, 2002.

No. A-02-220: **Matthews v. Stockton**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-225: **VanDeWalle v. VanDeWalle**. Petition of appellant for further review overruled on December 18, 2002.

No. A-02-235: **State v. Castillo**, 11 Neb. App. 622 (2003). Petition of appellant for further review overruled on April 30, 2003.

No. A-02-240: **State v. Hovendick**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-247: **State v. Chamberlain**. Petition of appellant for further review overruled on November 12, 2002, as untimely filed.

No. A-02-248: **State v. Chamberlain**. Petition of appellant for further review overruled on November 12, 2002, as untimely filed.

Nos. S-02-252, S-02-512: **Nelson v. Nelson**. Petitions of appellees for further review sustained on May 29, 2003.

No. A-02-259: **State v. Eckman**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-262: **State v. Billups**. Petition of appellant for further review overruled on October 15, 2002. See rule 2F(1).

No. A-02-268: **Tyler v. Stennis**. Petition of appellant for further review overruled on May 15, 2002.

No. A-02-275: **State v. Heil**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-282: **State v. Davis**. Petition of appellant for further review overruled on December 11, 2002.

No. A-02-286: **Anderson Excavating Co. v. Department of Health and Human Servs.** Petition of appellant for further review overruled on May 23, 2002.

No. A-02-289: **State v. George.** Petition of appellant for further review overruled on March 12, 2003.

No. A-02-300: **State v. Kinsey.** Petition of appellant for further review overruled on November 27, 2002.

Nos. A-02-301, A-02-302: **State v. Heidelberg.** Petitions of appellant for further review overruled on September 25, 2002.

No. A-02-313: **State v. Marshall.** Petition of appellant for further review overruled on October 9, 2002.

No. A-02-317: **Cole v. Foster.** Petition of appellant for further review overruled on February 20, 2003.

No. A-02-328: **State v. Hiatt.** Petition of appellant for further review overruled on November 14, 2002.

No. A-02-345: **State v. Carpenter.** Petition of appellant for further review overruled on March 12, 2003.

No. A-02-362: **Llanes v. Countryside of Hastings, Inc.** Petition of appellant for further review overruled on May 29, 2003.

No. S-02-379: **Judd v. Olmeda.** Petition of appellant for further review sustained on February 12, 2003.

No. A-02-450: **State v. Thompson.** Petition of appellant for further review overruled on April 9, 2003.

No. A-02-482: **State v. Gratto.** Petition of appellant for further review overruled on November 27, 2002.

No. A-02-501: **Martin v. Cameron.** Petition of appellant for further review overruled on June 17, 2002.

No. A-02-501: **Martin v. Cameron.** Petition of appellant for further review overruled on August 29, 2002.

No. A-02-505: **Martin v. Nesbitt.** Petition of appellant for further review overruled on June 17, 2002.

No. A-02-505: **Martin v. Nesbitt.** Petition of appellant for further review overruled on July 17, 2002.

No. A-02-506: **Martin v. Bagley.** Petition of appellant for further review overruled on June 17, 2002.

No. A-02-506: **Martin v. Bagley.** Petition of appellant for further review overruled on July 17, 2002.

No. A-02-508: **State v. Spencer**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-519: **State v. Gunter**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-524: **In re Interest of Adrian B.**, 11 Neb. App. 656 (2003). Petition of appellant for further review overruled on May 15, 2003.

No. A-02-555: **Schuelke v. Walker**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-570: **State v. Buggs**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-588: **State v. Neemann**. Petition of appellant for further review overruled on December 11, 2002.

No. A-02-600: **State v. Jackett**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-607: **State v. Roth**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-608: **Mihm v. American Tool**, 11 Neb. App. 543 (2003). Petition of appellant for further review overruled on March 12, 2003.

No. A-02-613: **Martin v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled on October 30, 2002.

No. A-02-624: **In re Interest of Dylan M.** Petition of appellant for further review overruled on April 16, 2003.

No. A-02-626: **State v. Tinnell**. Petition of appellant for further review overruled on December 18, 2002.

No. A-02-628: **State v. Theodoropoulos**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-676: **State v. VanWinkle**. Petition of appellee for further review overruled on May 21, 2003.

No. A-02-677: **State v. Vargas-Godinez**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-679: **State v. Mason**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-699: **State v. Christlieb**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-719: **State v. Jacobson**. Petition of appellant for further review overruled on April 16, 2003.

No. A-02-720: **State v. Ellis**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-728: **State v. Silva**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-734: **State v. Wessling**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-744: **State v. Polston**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-745: **State v. Core**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-763: **In re Interest of Sarah K. et al**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-768: **State v. Al-Sayagh**. Petition of appellant for further review overruled on October 9, 2002.

No. A-02-769: **Noordam v. Vickers, Inc.**, 11 Neb. App. 739 (2003). Petition of appellant for further review overruled on May 15, 2003.

No. A-02-770: **State v. Al-Sayagh**. Petition of appellant for further review overruled on October 9, 2002.

No. A-02-776: **State v. Brody**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-784: **State v. Zuck**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-788: **In re Interest of Chico B. & Cheri B.** Petition of appellant for further review overruled on April 30, 2003.

No. A-02-805: **State v. Stewart**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-825: **State v. Thille**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-838: **State v. Jenkins**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-843: **State v. Goree**, 11 Neb. App. 685 (2003). Petition of appellant for further review overruled on May 21, 2003.

No. A-02-856: **Prokop v. Columbus Irrigation**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-890: **Roland v. Snell Servs**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-901: **Mabile v. Drivers Mgmt., Inc.**, 11 Neb. App. 765 (2003). Petition of appellee for further review overruled on June 10, 2003.

No. A-02-910: **State v. Overstreet**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-915: **State v. Whitmer**. Petition of appellant for further review overruled on January 29, 2003.

No. S-02-944: **State v. Witmer**. Petition of appellant for further review sustained on October 30, 2002.

No. S-02-953: **River City Life Center v. Douglas Cty. Bd. of Equal**. Petition of appellant for further review sustained on November 20, 2002.

No. S-02-967: **Mumin v. Dees**. Petition of appellant for further review sustained on March 12, 2003.

Nos. A-02-990 through A-02-992: **State v. Miner**. Petitions of appellant for further review overruled on March 19, 2003.

No. A-02-1009: **Martin v. Board of Parole**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-1025: **State v. Williams**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1041: **Ash v. Hehner**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-1078: **Martin v. Lindner**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-1082: **State v. Van Meveren**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1088: **Moore v. Clarke**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-1095: **State v. Threats**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-1098: **State v. Terry**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-1104: **Waite v. Davison**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-1132: **State v. Weddingfeld**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1136: **Nebraska Furniture Mart v. Duffy**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-1191: **State v. Ramos**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-1231: **Patz v. Department of Corr. Servs**. Petition of appellant for further review overruled on April 9, 2003.

No. A-02-1232: **Jones v. Department of Corr. Servs**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1288: **Anzalone v. Department of Corr. Servs**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-1344: **State v. Roundtree**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1354: **Nelson v. Weiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1355: **Kirkpatrick v. Wiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1393: **State v. Larkin**. Petition of appellant for further review overruled on June 11, 2003.

No. A-02-1402: **State v. Sorensen**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1434: **State v. Grove**. Petition of appellant for further review overruled on June 11, 2003.

No. A-02-1494: **State v. Garcia**. Petition of appellant for further review overruled on May 29, 2003.

No. A-03-070: **State v. Lang**. Petition of appellant for further review overruled on April 9, 2003.

No. A-03-080: **Martin v. Department of Corr. Servs**. Petitions of appellant for further review overruled on June 11, 2003.

No. A-03-082: **Holder v. Kenny**. Petition of appellant for further review overruled on May 6, 2003.

No. A-03-097: **Robinson v. Board of Parole**. Petition of appellant for further review overruled on April 16, 2003.

## LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-00-338: **Thompson v. Nebraska Dept. of Corr. Servs.** 02 NCA No. 19. Affirmed. Moore, Judge.

No. A-00-672: **Rowland v. Rowland.** 02 NCA No. 16. Affirmed in part as modified, and in part reversed and remanded with directions. Inbody, Judge.

No. A-00-786: **State v. Armendariz.** 02 NCA No. 14. Reversed and remanded. Irwin, Chief Judge.

No. A-00-826: **Stahla v. Griffith.** 02 NCA No. 34. Affirmed. Irwin, Chief Judge.

No. A-00-835: **Erikson v. Abels.** 02 NCA No. 13. Reversed and remanded for a new trial. Carlson, Judge.

No. A-00-866: **State v. Stevenson.** 02 NCA No. 18. Reversed and remanded with directions. Inbody, Judge.

No. A-00-945: **Jacobitz v. Nebraska Dept. of Health & Human Servs.** 02 NCA No. 19. Affirmed. Carlson, Judge.

No. A-00-960: **State v. Schlondorf.** 02 NCA No. 22. Affirmed. Carlson, Judge.

No. A-00-995: **State v. Young.** 02 NCA No. 24. Affirmed. Irwin, Chief Judge.

No. A-00-998: **Real Estate Financing v. Mock.** 02 NCA No. 15. Affirmed. Carlson, Judge.

Nos. A-00-1025 through A-00-1028: **State v. Tolston.** 02 NCA No. 39. Affirmed. Sievers, Judge.

No. A-00-1035: **Beshaler v. Spalding Irrigation.** 02 NCA No. 18. Affirmed. Moore, Judge.

No. A-00-1045: **Butler v. Drivers Mgmt., Inc.** 02 NCA No. 35. Former opinion modified. Irwin, Chief Judge.

No. A-00-1051: **Dominium Illinois Three v. Arbor Dev. Group.** 02 NCA No. 38. Affirmed. Carlson, Judge.

No. A-00-1063: **State v. Hauck.** 02 NCA No. 15. Reversed and remanded with directions. Irwin, Chief Judge.

No. A-00-1077: **Bellevue Health & Emerg. Clinic v. Bert Murphy L.L.C.** 02 NCA No. 13. Reversed and remanded with directions. Hannon, Judge.

No. A-00-1088: **McCray v. Pollack**. 02 NCA No. 18. Affirmed. Carlson, Judge.

No. A-00-1090: **Russell v. Cherry**. 03 NCA No. 5. Appeal dismissed. Sievers, Judge.

No. A-00-1096: **Kluthe v. Sindelar**. 02 NCA No. 20. Appeal dismissed. Moore, Judge.

No. A-00-1105: **Ramer v. Ramer**. 02 NCA No. 15. Affirmed. Hannon, Judge.

No. A-00-1111: **Neubauer v. Neubauer**. 02 NCA No. 20. Affirmed in part, affirmed in part as modified, and in part reversed. Irwin, Chief Judge.

No. A-00-1123: **Waldron v. Manthey**. 02 NCA No. 19. Affirmed. Irwin, Chief Judge.

No. A-00-1126: **State v. McDermott**. 02 NCA No. 13. Reversed and remanded with directions. Inbody, Judge.

No. A-00-1133: **In re Application of Fentress**. 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-00-1164: **Kieselhorst v. Schneiderheinz**. 02 NCA No. 39. Affirmed in part, and in part reversed. Irwin, Chief Judge.

No. A-00-1178: **Hetrick v. Union Pacific RR**. 02 NCA No. 16. Reversed and remanded. Sievers, Judge.

No. A-00-1186: **In re Estate of Tvrdy**. 02 NCA No. 37. Affirmed. Irwin, Chief Judge.

No. A-00-1198: **Broomfield v. Broomfield**. 02 NCA No. 16. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-00-1206: **Heupel v. Heupel**. 02 NCA No. 20. Affirmed as modified. Irwin, Chief Judge.

No. A-00-1224: **Farm Bureau Ins. Co. v. Nawojski**. 02 NCA No. 18. Affirmed. Sievers, Judge.

No. A-00-1229: **State v. Leggins**. 02 NCA No. 14. Affirmed. Inbody, Judge.

No. A-00-1237: **Wood v. Wood**. 02 NCA No. 19. Reversed and remanded with directions. Carlson, Judge.

No. A-00-1274: **Ireland v. Ireland**. 02 NCA No. 14. Affirmed as modified. Hannon, Judge.

No. A-00-1280: **Heggemeyer v. Heggemeyer**. 02 NCA No. 27. Affirmed. Irwin, Chief Judge.

No. A-00-1283: **Wooldridge v. Wooldridge**. 02 NCA No. 35. Affirmed as modified. Irwin, Chief Judge.

No. A-00-1314: **Albers v. Atlas Roofing Corp**. 02 NCA No. 36. Affirmed. Hannon, Judge.

No. A-01-011: **Drummond v. Drummond**. 02 NCA No. 40. Affirmed as modified. Hannon, Judge. Irwin, Chief Judge, dissenting.

No. A-01-034: **Blaschke v. Stratbucker**. 02 NCA No. 20. Affirmed. Moore, Judge.

No. A-01-036: **D & S Realty v. Cutler**. 03 NCA No. 2. Affirmed in part, and in part reversed and remanded for further proceedings. Hannon, Judge.

No. A-01-058: **McCroy v. Sprint Communications Co**. 02 NCA No. 35. Appeal dismissed in part, and in part reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-01-068: **Anderson Excav. & Wrecking Co. v. Argus Dev. Co**. 02 NCA No. 50. Affirmed. Moore, Judge. Hannon, Judge, dissenting.

No. A-01-069: **State v. Aldana**. 02 NCA No. 19. Affirmed. Moore, Judge.

No. A-01-081: **Edwards v. City of Fairbury**. 02 NCA No. 31. Affirmed. Carlson, Judge.

Nos. A-01-111, A-01-250: **In re Interest of Ashley D**. 02 NCA No. 18. Judgment in No. A-01-111 affirmed as modified. Appeal in No. A-01-250 dismissed. Hannon, Judge.

No. A-01-155: **Brown v. Brown**. 02 NCA No. 27. Affirmed as modified. Inbody, Judge.

No. A-01-164: **Talbot v. Bellevue Fantasy's, Inc**. 02 NCA No. 22. Affirmed. Irwin, Chief Judge.

Nos. A-01-168, A-01-469: **Trimble v. Wescom**. 03 NCA No. 19. Affirmed. Carlson, Judge.

No. A-01-202: **State v. Billingsley**. 02 NCA No. 48. Conviction and sentence vacated. Sievers, Judge.

No. A-01-208: **Lockling v. Ammon**. 02 NCA No. 28. Affirmed. Carlson, Judge.

No. A-01-235: **Chapman v. Chapman**. 02 NCA No. 48. Reversed and remanded with directions. Inbody, Judge.

No. A-01-243: **Rayburn v. Darrell Bruns Constr.** 02 NCA No. 38. Affirmed in part, and in part reversed and remanded with directions. Irwin, Chief Judge.

No. A-01-254: **Shilling v. Shanks.** 02 NCA No. 43. Affirmed. Hannon, Judge.

No. A-01-256: **Behrens v. Sommers.** 02 NCA No. 34. Affirmed. Moore, Judge.

No. A-01-275: **Haghighi v. State.** 02 NCA No. 35. Affirmed. Sievers, Judge.

No. A-01-290: **Neff v. Wenzl.** 02 NCA No. 48. Affirmed. Moore, Judge.

No. A-01-296: **Hyde v. Hyde.** 02 NCA No. 43. Affirmed as modified. Sievers, Judge.

No. A-01-298: **Holts v. City of Omaha.** 02 NCA No. 34. Affirmed. Sievers, Judge.

No. A-01-327: **Arias v. Krutz.** 03 NCA No. 2. Affirmed. Irwin, Chief Judge.

No. A-01-333: **State on behalf of Peterson v. LaSala.** 02 NCA No. 50. Appeal dismissed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-01-355: **Siebken v. Siebken.** 02 NCA No. 43. Affirmed. Carlson, Judge.

No. A-01-363: **Geller v. Lincoln Housing Authority.** 02 NCA No. 34. Affirmed. Inbody, Judge.

No. A-01-364: **Dockweiler v. Oden Enters.** 02 NCA No. 13. Judgment vacated, and cause remanded with directions. Sievers, Judge.

No. A-01-365: **Duda v. American Family Ins. Group.** 02 NCA No. 39. Affirmed in part, and in part reversed and remanded. Hannon, Judge.

No. A-01-378: **Shaffer v. Shaffer.** 02 NCA No. 31. Affirmed in part, and in part reversed. Inbody, Judge.

No. A-01-380: **State v. Devitt.** 02 NCA No. 18. Affirmed. Carlson, Judge.

No. A-01-386: **DeBoer v. Glenn.** 02 NCA No. 31. Reversed and remanded with directions. Sievers, Judge.

No. A-01-390: **Harvey Oaks Homeowner's Assn. v. Aslan Company.** 02 NCA No. 52. Affirmed. Inbody, Judge.

No. A-01-397: **Brophy v. Brophy**. 03 NCA No. 5. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge.

Nos. A-01-410, A-01-411: **State v. McKinney**. 02 NCA No. 15. Affirmed. Inbody, Judge.

No. A-01-413: **State v. Hawes**. 02 NCA No. 15. Affirmed. Irwin, Chief Judge.

No. A-01-418: **Anderson v. Anderson**. 02 NCA No. 27. Affirmed. Sievers, Judge.

No. A-01-419: **State v. Hill-Brown**. 02 NCA No. 15. Affirmed. Moore, Judge.

No. A-01-421: **Hanline v. City of Bellevue**. 02 NCA No. 52. Affirmed. Per Curiam. Hannon, Judge, concurring.

No. A-01-434: **State v. Harvey**. 02 NCA No. 13. Affirmed. Sievers, Judge.

No. A-01-440: **State v. West**. 02 NCA No. 16. Affirmed. Carlson, Judge.

No. A-01-454: **Quinly v. Quinly**. 02 NCA No. 48. Affirmed as modified. Irwin, Chief Judge.

No. A-01-462: **State v. Morgan**. 02 NCA No. 24. Affirmed in part, and in part reversed and vacated. Moore, Judge.

No. A-01-474: **Vergil v. Department of Motor Vehicles**. 02 NCA No. 43. Reversed and remanded with directions. Moore, Judge.

No. A-01-491: **State v. Scott**. 02 NCA No. 20. Affirmed. Inbody, Judge.

No. A-01-500: **Mace v. Mace**. 02 NCA No. 35. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-01-501: **State v. Colangelo**. 02 NCA No. 19. Affirmed. Carlson, Judge.

No. A-01-507: **Deal v. State**. 03 NCA No. 9. Reversed and remanded with directions to dismiss. Hannon, Judge.

No. A-01-517: **In re Interest of Tomas L.** 02 NCA No. 13. Reversed and remanded. Carlson, Judge.

No. A-01-518: **Donovan v. Hartford Fire Ins. Co**. 02 NCA No. 52. Affirmed. Hannon, Judge.

No. A-01-539: **Luedtke v. Ripa**. 02 NCA No. 39. Affirmed. Sievers, Judge.

No. A-01-568: **Peterson v. Peterson**. 02 NCA No. 48. Affirmed. Moore, Judge.

No. A-01-573: **State v. Fletcher**. 02 NCA No. 23. Reversed and remanded for a new trial. Carlson, Judge.

No. A-01-589: **Gilkerson v. Faulkner**. 02 NCA No. 43. Reversed and remanded for a new trial. Sievers, Judge.

No. A-01-613: **Harvey Oaks Dental v. Peter Letterese & Assocs**. 03 NCA No. 5. Reversed and remanded with directions to dismiss. Sievers, Judge.

No. A-01-614: **State v. Prince**. 02 NCA No. 13. Sentence vacated, and cause remanded for resentencing. Hannon, Judge.

No. A-01-637: **Ferrell v. State Farm Ins. Co**. 03 NCA No. 19. Affirmed. Buckley, District Judge, Retired.

No. A-01-638: **In re Interest of Storee J**. 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-01-639: **Borowiak v. Neafus Land & Cattle Co**. 02 NCA No. 34. Affirmed. Moore, Judge.

No. A-01-651: **Keech v. Village of Raymond**. 03 NCA No. 15. Affirmed. Irwin, Chief Judge.

No. A-01-652: **Templeton v. Templeton**. 02 NCA No. 43. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-01-654: **Gross v. Union Ins. Co**. 02 NCA No. 16. Affirmed in part, and in part reversed and remanded with directions. Irwin, Chief Judge.

No. A-01-656: **Dyer v. Dyer**. 02 NCA No. 19. Affirmed. Moore, Judge.

No. A-01-664: **Hughes v. Poykko-Post**. 03 NCA No. 8. Reversed and remanded for a new trial. Carlson, Judge. Sievers, Judge, concurring.

No. A-01-667: **Bass & Assocs. v. Healthcare Mgmt. Solutions**. 03 NCA No. 11. Vacated and remanded with directions. Sievers, Judge.

No. A-01-668: **Jerry Palmer Homes v. Allender**. 03 NCA No. 24. Affirmed as modified. Moore, Judge.

No. A-01-694: **American Bus. Info. v. Burgess**. 02 NCA No. 50. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-01-695: **MCVI, L.L.C. v. Hartford Fire Ins. Co.** 03 NCA No. 5. Reversed and remanded for further proceedings. Moore, Judge.

No. A-01-703: **Lincolnland Printing v. Stewart.** 02 NCA No. 51. Affirmed. Irwin, Chief Judge.

No. A-01-708: **Kisicki v. Mid-America Fin. Inv. Corp.** 02 NCA No. 48. Reversed and remanded with directions to dismiss. Moore, Judge.

No. A-01-713: **Clevenger v. Rehn.** 03 NCA No. 9. Reversed and remanded with directions. Sievers, Judge.

No. A-01-720: **Rice v. Alegent Health Clinics.** 03 NCA No. 6. Affirmed. Inbody, Judge.

No. A-01-728: **Buchmeier v. Buchmeier.** 02 NCA No. 14. Affirmed. Hannon, Judge.

No. A-01-731: **American Employers Group v. Lentz.** 02 NCA No. 50. Affirmed. Sievers, Judge.

No. A-01-739: **State v. Stroessner.** 02 NCA No. 19. Affirmed. Sievers, Judge.

No. A-01-755: **State v. March.** 02 NCA No. 43. Affirmed. Inbody, Judge.

No. A-01-763: **LaVene v. LaVene.** 02 NCA No. 17. Affirmed as modified. Inbody, Judge.

No. A-01-765: **C. Goodrich, Inc. v. Thies.** 03 NCA No. 2. Affirmed in part, and in part reversed and remanded for a new trial. Carlson, Judge.

No. A-01-770: **Finney v. Finney.** 03 NCA No. 8. Affirmed as modified. Moore, Judge.

No. A-01-783: **Curtis v. Curtis.** 02 NCA No. 34. Affirmed. Sievers, Judge.

No. A-01-784: **Shriver v. Ervin Constr. Co.** 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-01-786: **Ostergard v. North Platte, Neb. Hosp. Corp.** 02 NCA No. 51. Affirmed. Carlson, Judge.

No. A-01-796: **Hatheway v. Neth.** 03 NCA No. 2. Reversed and remanded with directions. Inbody, Judge.

No. A-01-799: **Cole v. Clarke.** 03 NCA No. 22. Affirmed. Moore, Judge.

No. A-01-802: **In re Trust Created by Charles E. Fleecs**. 02 NCA No. 50. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-01-810: **Lewis v. Reiter**. 02 NCA No. 15. Affirmed. Inbody, Judge.

No. A-01-817: **State v. Sebo**. 02 NCA No. 19. Affirmed. Irwin, Chief Judge.

No. A-01-818: **State v. Sills**. 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-01-820: **Vogel v. Experian**. 02 NCA No. 22. Affirmed in part, and in part reversed. Inbody, Judge.

No. A-01-822: **State v. Stamp**. 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-01-825: **Mara v. Mara**. 03 NCA No. 14. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge.

No. A-01-833: **Nieveen v. County of Saunders**. 03 NCA No. 21. Affirmed. Moore, Judge.

No. A-01-834: **Soto v. State**. 02 NCA No. 20. Affirmed. Irwin, Chief Judge.

No. A-01-836: **State v. Harris**. 03 NCA No. 8. Affirmed. Moore, Judge.

No. A-01-841: **Oliver v. Oliver**. 03 NCA No. 11. Affirmed in part, and in part reversed and vacated. Hannon, Judge.

No. A-01-842: **Trapani v. Basile**. 03 NCA No. 21. Reversed and remanded for further proceedings. Carlson, Judge.

No. A-01-844: **In re Interest of Rico W.D**. 02 NCA No. 18. Affirmed. Moore, Judge.

No. A-01-846: **State v. Gooden**. 02 NCA No. 13. Reversed and remanded with directions. Irwin, Chief Judge.

No. A-01-849: **State v. Lopez**. 02 NCA No. 20. Affirmed. Carlson, Judge.

No. A-01-851: **Gogan v. Gogan**. 03 NCA No. 7. Affirmed in part, and in part reversed and remanded with directions. Hannon, Judge.

No. A-01-861: **Jacob v. Hill**. 03 NCA No. 23. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-01-863: **Lacivita v. Drivers Mgmt., Inc.** 02 NCA No. 18. Affirmed. Moore, Judge.

No. A-01-870: **State v. Murphy**. 02 NCA No. 24. Affirmed. Moore, Judge.

No. A-01-872: **State v. Dvorak**. 02 NCA No. 21. Reversed and remanded for a new trial. Sievers, Judge.

No. A-01-878: **Pearson v. Good Samaritan Outreach Servs.** 03 NCA No. 21. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-01-884: **Graf v. Graf**. 03 NCA No. 18. Affirmed as modified. Carlson, Judge.

No. A-01-895: **State v. Cramblet**. 02 NCA No. 20. Affirmed. Sievers, Judge.

No. A-01-905: **Thomas v. State**. 03 NCA No. 24. Affirmed. Carlson, Judge.

No. A-01-913: **Jantzen & Jantzen v. Thorn**. 03 NCA No. 15. Affirmed. Buckley, District Judge, Retired.

No. A-01-927: **Jackson v. Jackson**. 03 NCA No. 17. Affirmed as modified. Moore, Judge.

No. A-01-928: **State v. Sullivan**. 02 NCA No. 48. Affirmed. Moore, Judge.

No. A-01-932: **Wolfenbarger v. Buchanan**. 02 NCA No. 40. Order vacated, appeal dismissed, and cause remanded with directions to dismiss. Carlson, Judge.

No. A-01-942: **State v. Marshall**. 02 NCA No. 21. Affirmed. Carlson, Judge.

No. A-01-956: **Luers v. Luers**. 02 NCA No. 51. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-01-958: **In re Interest of Nicholas C.** 02 NCA No. 34. Affirmed. Irwin, Chief Judge. Hannon, Judge, concurring.

No. A-01-968: **First Nat. Bank of Osceola v. Gabel**. 03 NCA No. 21. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-01-988: **Omaha Fish & Wildlife Club v. Cox/Johnson Corp.** 03 NCA No. 17. Affirmed. Irwin, Chief Judge.

No. A-01-992: **State v. Rose**. 02 NCA No. 34. Sentences vacated, and cause remanded for resentencing. Inbody, Judge.

No. A-01-993: **State v. Wysocki**. 03 NCA No. 5. Reversed and remanded for further proceedings. Hannon, Judge.

Nos. A-01-995, A-01-996: **Bochart v. Glinsmann**. 03 NCA No. 15. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge.

No. A-01-1004: **In re Interest of Merissa F.** 02 NCA No. 34. Affirmed. Carlson, Judge.

No. A-01-1017: **Security First Bank v. Lockwood**. 03 NCA No. 2. Reversed and remanded for further proceedings. Moore, Judge.

No. A-01-1018: **Montgomery v. Jefferson Cty. Sch. Dist. No. 0008**. 03 NCA No. 15. Affirmed. Moore, Judge.

No. A-01-1042: **Tafoya v. Chapin**. 03 NCA No. 11. Reversed and remanded for a new trial. Hannon, Judge.

No. A-01-1053: **In re Trust Created by Ziegman**. 03 NCA No. 22. Affirmed. Sievers, Judge.

No. A-01-1056: **Leonard v. Gross**. 02 NCA No. 35. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-01-1068: **Incontro v. Incontro**. 03 NCA No. 17. Affirmed. Sievers, Judge.

No. A-01-1071: **State v. Alcorta**. 02 NCA No. 34. Affirmed. Irwin, Chief Judge.

No. A-01-1076: **Hassler v. Hassler**. 03 NCA No. 13. Affirmed as modified. Moore, Judge.

No. A-01-1077: **Ignacio v. ConAgra Beef Co**. 02 NCA No. 27. Reversed and remanded with directions. Inbody, Judge.

No. A-01-1080: **Kelty v. North Platte, Neb. Hosp. Corp**. 03 NCA No. 19. Affirmed. Inbody, Judge.

No. A-01-1086: **State v. Garcia**. 02 NCA No. 22. Affirmed. Irwin, Chief Judge.

No. A-01-1097: **In re Trust Created by Russell W. O'Neill**. 03 NCA No. 21. Reversed and remanded with directions to dismiss. Carlson, Judge.

No. A-01-1101: **Bennett v. Labenz**. 02 NCA No. 48. Affirmed in part, and in part reversed and remanded. Inbody, Judge.

No. A-01-1104: **Keeler v. Whitehead Oil Co**. 02 NCA No. 22. Affirmed. Moore, Judge.

No. A-01-1106: **Van Valkenburg v. Liberty Lodge No. 300.** 03 NCA No. 2. Affirmed. Sievers, Judge.

No. A-01-1109: **State v. Atkins.** 02 NCA No. 35. Affirmed. Inbody, Judge.

No. A-01-1119: **Johnson v. K & B Transport.** 02 NCA No. 24. Affirmed. Irwin, Chief Judge.

No. A-01-1121: **Trouba v. Cather & Sons Constr. Co.** 02 NCA No. 31. Affirmed in part, and in part reversed and remanded. Moore, Judge.

No. A-01-1136: **Buettner v. Buettner.** 03 NCA No. 17. Affirmed as modified. Irwin, Chief Judge.

No. A-01-1146: **Medina v. Prairie Constr.** 02 NCA No. 40. Affirmed. Irwin, Chief Judge. Hannon, Judge, dissenting.

No. A-01-1148: **Tkacs v. Sarpy County.** 03 NCA No. 13. Affirmed. Inbody, Judge.

No. A-01-1151: **State v. Henry.** 02 NCA No. 26. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-01-1152: **State v. Borer.** 02 NCA No. 34. Affirmed. Carlson, Judge.

No. A-01-1156: **Svoboda v. Ledford.** 02 NCA No. 48. Affirmed as modified. Irwin, Chief Judge.

No. A-01-1163: **State v. Meyer.** 02 NCA No. 31. Affirmed. Hannon, Judge.

No. A-01-1173: **In re Interest of Rodgers F. et al.** 02 NCA No. 43. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Judge.

No. A-01-1188: **DeBose v. State.** 03 NCA No. 19. Appeal dismissed. Hannon, Judge.

No. A-01-1189: **Duerr v. Armstrong.** 03 NCA No. 15. Affirmed in part, and in part reversed. Sievers, Judge.

No. A-01-1191: **State v. Foreman.** 02 NCA No. 35. Affirmed. Carlson, Judge.

No. A-01-1194: **Morris v. Nebraska Health System.** 02 NCA No. 43. Affirmed. Irwin, Chief Judge.

No. A-01-1197: **Carter v. Wal-Mart Stores.** 03 NCA No. 2. Affirmed. Sievers, Judge.

No. A-01-1198: **Penton v. Penton.** 03 NCA No. 2. Affirmed as modified. Irwin, Chief Judge.

No. A-01-1199: **Baker v. Baker**. 03 NCA No. 5. Affirmed in part, and in part reversed. Per Curiam. Irwin, Chief Judge, dissenting.

No. A-01-1202: **State v. Mackey**. 02 NCA No. 31. Affirmed. Irwin, Chief Judge.

No. A-01-1203: **Quality Pork Internat. v. Rupari Food Servs.** 03 NCA No. 19. Reversed and remanded with directions to dismiss. Irwin, Chief Judge.

No. A-01-1209: **State v. Webb**. 02 NCA No. 43. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Carlson, Judge.

No. A-01-1211: **State v. Johnson**. 02 NCA No. 34. Affirmed. Inbody, Judge.

No. A-01-1212: **State v. Mata**. 02 NCA No. 34. Affirmed. Sievers, Judge.

No. A-01-1218: **State v. Leibel**. 02 NCA No. 35. Affirmed. Irwin, Chief Judge.

No. A-01-1233: **Cook v. Cook**. 02 NCA No. 43. Affirmed. Hannon, Judge.

No. A-01-1243: **Willmann v. Nebraska Dept. of Corr. Servs.** 03 NCA No. 24. Reversed. Sievers, Judge.

No. A-01-1246: **Rau v. Rau**. 03 NCA No. 11. Affirmed as modified. Moore, Judge.

No. A-01-1254: **Spomer v. Greater Omaha Packing Co**. 03 NCA No. 24. Affirmed. Carlson, Judge.

No. A-01-1258: **State v. Dudney**. 02 NCA No. 48. Affirmed. Moore, Judge.

No. A-01-1261: **Wunderlich v. Miller**. 02 NCA No. 43. Affirmed in part, and in part reversed. Sievers, Judge.

No. A-01-1272: **Bechen v. Bechen**. 03 NCA No. 15. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-01-1274: **State v. O'Dell**. 02 NCA No. 39. Reversed. Sievers, Judge. Moore, Judge, concurs.

No. A-01-1275: **State v. Waring**. 02 NCA No. 31. Affirmed. Sievers, Judge.

No. A-01-1292: **State v. Sandoval**. 02 NCA No. 31. Affirmed. Carlson, Judge.

No. A-01-1309: **Bralick v. Grimm**. 02 NCA No. 43. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-01-1318: **Meredith v. Schwarck Quarries, Inc.** 02 NCA No. 26. Affirmed in part, and in part reversed and remanded with directions. Irwin, Chief Judge.

No. A-01-1327: **Buhrman v. Jayhawk Boxes, Inc.** 02 NCA No. 31. Affirmed. Inbody, Judge.

Nos. A-01-1333, A-01-1334: **In re Interest of Emilio L.** 02 NCA No. 31. Affirmed. Carlson, Judge.

No. A-01-1337: **Seward County v. Hauck**. 03 NCA No. 21. Reversed and remanded with directions. Inbody, Judge.

No. A-01-1344: **State v. Hernandez**. 03 NCA No. 5. Affirmed. Sievers, Judge.

No. A-01-1372: **Woerman v. Woerman**. 02 NCA No. 43. Affirmed. Carlson, Judge.

No. A-01-1374: **Wilke v. McDermott**. 03 NCA No. 15. Affirmed. Sievers, Judge.

No. A-01-1375: **State v. Martinez**. 02 NCA No. 48. Affirmed. Irwin, Chief Judge.

No. A-01-1378: **Watson v. Watson**. 02 NCA No. 31. Affirmed. Carlson, Judge.

No. A-01-1387: **State v. Hall**. 02 NCA No. 43. Affirmed. Sievers, Judge.

No. A-01-1393: **Yeutter v. Yeutter**. 02 NCA No. 43. Affirmed. Moore, Judge.

No. A-01-1396: **Schmid v. Schmid**. 03 NCA No. 24. Affirmed as modified. Carlson, Judge.

No. A-01-1402: **In re Interest of Ladarius W.** 02 NCA No. 40. Affirmed. Irwin, Chief Judge.

No. A-02-008: **State v. Evenson**. 03 NCA No. 9. Affirmed. Irwin, Chief Judge.

No. A-02-071: **State v. Chairez**. 03 NCA No. 5. Affirmed. Hannon, Judge.

No. A-02-075: **State v. Conrad**. 03 NCA No. 7. Affirmed. Carlson, Judge.

No. A-02-083: **Fangmeyer v. Jordan**. 02 NCA No. 48. Affirmed. Irwin, Chief Judge.

No. A-02-089: **In re Interest of Fantasye L.** 02 NCA No. 38. Affirmed. Carlson, Judge.

No. A-02-106: **In re Interest of Jeffrey G.** 02 NCA No. 50. Affirmed. Carlson, Judge.

No. A-02-120: **Dale v. Mayhue.** 03 NCA No. 7. Affirmed. Carlson, Judge.

No. A-02-150: **Goertzen v. Goertzen.** 03 NCA No. 5. Affirmed. Carlson, Judge.

No. A-02-160: **In re Adoption of Courtney O.** 03 NCA No. 2. Reversed and remanded with directions. Inbody, Judge.

No. A-02-162: **In re Interest of Nickolas G.** 02 NCA No. 48. Affirmed. Irwin, Chief Judge.

Nos. A-02-167 through A-02-170: **State v. Hulinsky.** 02 NCA No. 48. Affirmed. Irwin, Chief Judge. Hannon, Judge, dissents.

No. A-02-176: **State v. Ways.** 03 NCA No. 7. Affirmed. Inbody, Judge.

No. A-02-191: **Koetter v. Koetter.** 03 NCA No. 2. Affirmed as modified, and cause remanded with directions. Carlson, Judge.

No. A-02-194: **In re Guardianship of Lienemann.** 03 NCA No. 5. Appeal dismissed. Irwin, Chief Judge.

No. A-02-200: **Ludwick v. TriWest Healthcare Alliance.** 03 NCA No. 6. Affirmed. Inbody, Judge.

No. A-02-201: **State v. Smith.** 03 NCA No. 5. Affirmed. Irwin, Chief Judge.

Nos. A-02-214, A-02-215: **State v. Warburton.** 02 NCA No. 36. Affirmed. Hannon, Judge.

No. A-02-243: **In re Interest of Janita M.** 03 NCA No. 5. Affirmed. Sievers, Judge.

No. A-02-250: **County of Hitchcock v. Wood.** 03 NCA No. 24. Reversed and remanded. Inbody, Judge.

Nos. A-02-252, A-02-512: **Nelson v. Nelson.** 03 NCA No. 14. Judgment in No. A-02-252 reversed and remanded with directions. Appeal in No. A-02-512 dismissed. Hannon, Judge. Carlson, Judge, dissenting.

No. A-02-259: **State v. Eckman.** 02 NCA No. 48. Affirmed. Inbody, Judge.

No. A-02-290: **State v. Lux.** 03 NCA No. 5. Affirmed. Carlson, Judge.

No. A-02-295: **Tyler v. Warden, Nebraska State Prison.** 03 NCA No. 24. Affirmed. Moore, Judge.

No. A-02-298: **Moore v. First Nat. Bank of Omaha.** 02 NCA No. 51. Reversed and remanded for further proceedings. Irwin, Chief Judge.

No. A-02-306: **Scheef v. Grimminger.** 03 NCA No. 22. Affirmed. Inbody, Judge.

No. A-02-316: **State v. Vasquez.** 03 NCA No. 5. Affirmed. Moore, Judge.

No. A-02-323: **Dunn v. Metro Area Transit.** 02 NCA No. 51. Affirmed. Sievers, Judge.

No. A-02-325: **State v. Cook.** 03 NCA No. 5. Affirmed. Moore, Judge.

No. A-02-359: **State v. Tesch.** 03 NCA No. 2. Exception sustained. Irwin, Chief Judge.

No. A-02-374: **In re Interest of Alyssia G. & Ofelia C.** 03 NCA No. 10. Affirmed. Carlson, Judge.

No. A-02-375: **State v. Henderson.** 03 NCA No. 10. Affirmed. Irwin, Chief Judge.

No. A-02-380: **State v. Renner.** 03 NCA No. 6. Affirmed. Inbody, Judge.

No. A-02-403: **State v. Turner.** 03 NCA No. 11. Affirmed. Moore, Judge.

No. A-02-405: **In re Interest of Ashlyn H. et al.** 03 NCA No. 2. Affirmed. Carlson, Judge.

No. A-02-413: **State v. Davis.** 03 NCA No. 2. Affirmed. Irwin, Chief Judge.

No. A-02-439: **State v. Prieto.** 03 NCA No. 9. Affirmed. Irwin, Chief Judge.

No. A-02-446: **Delgado v. Cosio.** 02 NCA No. 48. Reversed and remanded with directions. Sievers, Judge.

No. A-02-453: **State v. Guerrant.** 03 NCA No. 17. Affirmed. Carlson, Judge.

No. A-02-462: **James R. v. Mary Ann P.** 03 NCA No. 2. Affirmed. Sievers, Judge.

Nos. A-02-493, A-02-494: **In re Interest of Kayla P. & Rebecca P.** 03 NCA No. 5. Affirmed. Inbody, Judge.

Nos. A-02-528 through A-02-530: **In re Interest of Arhea P. et al.** 03 NCA No. 12. Affirmed. Inbody, Judge.

No. A-02-531: **Solis v. IBP, inc.** 03 NCA No. 9. Reversed and remanded for a new trial. Irwin, Chief Judge.

No. A-02-573: **State v. Simmons.** 03 NCA No. 12. Affirmed. Irwin, Chief Judge.

No. A-02-577: **State v. Villapando.** 03 NCA No. 21. Affirmed. Irwin, Chief Judge.

No. A-02-586: **State v. Jenson.** 03 NCA No. 24. Affirmed. Irwin, Chief Judge.

No. A-02-607: **State v. Roth.** 03 NCA No. 12. Affirmed. Buckley, District Judge, Retired.

No. A-02-612: **State v. Haley.** 03 NCA No. 11. Affirmed. Irwin, Chief Judge.

No. A-02-624: **In re Interest of Dylan M.** 03 NCA No. 8. Affirmed. Irwin, Chief Judge.

No. A-02-629: **Rivera v. K & B Transportation.** 03 NCA No. 9. Affirmed. Irwin, Chief Judge.

No. A-02-632: **Martinez v. Millard Processing Servs.** 03 NCA No. 7. Affirmed. Hannon, Judge.

No. A-02-636: **State v. Williams.** 03 NCA No. 7. Affirmed. Hannon, Judge.

No. A-02-652: **State v. Sabella.** 03 NCA No. 11. Affirmed. Moore, Judge.

No. A-02-653: **State v. Campbell.** 03 NCA No. 21. Affirmed. Inbody, Judge.

No. A-02-676: **State v. VanWinkle.** 03 NCA No. 14. Reversed and remanded for a new trial. Hannon, Judge.

No. A-02-679: **State v. Mason.** 03 NCA No. 13. Affirmed. Inbody, Judge.

No. A-02-680: **State v. Urkevich.** 03 NCA No. 8. Affirmed. Irwin, Chief Judge.

No. A-02-711: **Guerra v. IBP, inc.** 03 NCA No. 12. Affirmed as modified. Inbody, Judge.

No. A-02-718: **State v. Schaeffer.** 03 NCA No. 18. Affirmed. Inbody, Judge.

No. A-02-722: **State v. Hammond.** 03 NCA No. 22. Affirmed. Carlson, Judge.

No. A-02-728: **State v. Silva.** 03 NCA No. 15. Affirmed. Sievers, Judge.

Nos. A-02-730, A-02-963: **In re Guardianship & Conservatorship of Brandon P.** 03 NCA No. 22. Judgment in No. A-02-730 affirmed, and cause remanded with directions. Appeal in No. A-02-963 dismissed as moot. Inbody, Judge.

No. A-02-736: **In re Guardianship of Michaelanne Z.** 03 NCA No. 23. Reversed. Irwin, Chief Judge.

No. A-02-743: **State v. Hill.** 03 NCA No. 23. Affirmed. Sievers, Judge.

No. A-02-765: **State v. Phillips.** 03 NCA No. 15. Affirmed. Sievers, Judge.

No. A-02-809: **Anderson v. Anderson.** 03 NCA No. 24. Reversed and remanded for a new trial. Hannon, Judge.

No. A-02-815: **Eickhoff v. Folkers.** 03 NCA No. 21. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge.

No. A-02-900: **In re Interest of Shelby L.** 03 NCA No. 17. Affirmed. Carlson, Judge.

No. A-02-927: **Picard v. Pinkerton Sec. & Investigation Servs.** 03 NCA No. 16. Affirmed. Moore, Judge.

No. A-02-950: **State v. Smith.** 03 NCA No. 11. Affirmed. Moore, Judge.

No. A-02-985: **State on behalf of Lalley v. Whitt.** 03 NCA No. 21. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge.

No. A-02-987: **State v. Poston.** 03 NCA No. 21. Affirmed. Carlson, Judge.

No. A-02-989: **State v. Borth.** 03 NCA No. 18. Affirmed. Inbody, Judge.

No. A-02-1024: **State v. Rugg.** 03 NCA No. 15. Affirmed. Carlson, Judge.

No. A-02-1083: **In re Interest of Oliviaclaire W. & Tyler W.** 03 NCA No. 24. Affirmed. Irwin, Chief Judge.

No. A-02-1089: **State v. Foster.** 03 NCA No. 15. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-02-1122: **State v. Norton.** 03 NCA No. 23. Affirmed. Irwin, Chief Judge.

No. A-02-1129: **Propp v. Wilfarm L.L.C.** 03 NCA No. 24. Affirmed in part, and in part reversed and remanded with direction. Inbody, Judge.

No. A-02-1154: **State v. Nasser**. 03 NCA No. 19. Affirmed. Irwin, Chief Judge.

No. A-02-1160: **State v. Wuol**. 03 NCA No. 18. Affirmed. Moore, Judge.

No. A-02-1423: **State v. Smith**. 03 NCA No. 21. Sentence vacated, and cause remanded for resentencing. Inbody, Judge.

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# WAYNE WAGNER, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

642 N.W.2d 821

Filed March 26, 2002. No. A-00-1020.

1. **Federal Acts: Railroads.** The Boiler Inspection Act imposes an absolute duty on railroad carriers to ensure that their locomotives are both properly maintained and safe to operate.
2. **Federal Acts: Railroads: Claims.** Because the Boiler Inspection Act does not create an independent cause of action, such a claim must be brought under the Federal Employers' Liability Act.
3. **Federal Acts: Railroads: Claims: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
4. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act.
5. **Jurisdiction.** Unlike substantive issues, procedural matters are governed by the law of the forum.
6. **Summary Judgment: Jurisdiction.** Whether a party is entitled to summary judgment is a matter of procedure generally controlled by the law of the forum.
7. **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.
8. ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
9. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
10. **Summary Judgment.** Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.

11. **Federal Acts: Railroads.** The Boiler Inspection Act imposes upon railroads engaged in interstate commerce an absolute duty to utilize locomotives in a safe manner.
12. **Federal Acts: Railroads: Liability.** Although the Boiler Inspection Act imposes absolute liability on railroads for violations of its provisions, such liability only attaches if the train is in use on the railroad's line at the time of the accident.
13. **Federal Acts: Railroads: Trial.** Whether a locomotive is in use under the Boiler Inspection Act is a question of law for the trial court to decide and not a question of fact for the jury.
14. **Federal Acts: Railroads.** The primary factors in addressing the in-use question of whether a locomotive is in use under the Boiler Inspection Act are (1) the location of the locomotive at the time of the injury and (2) the activity of the injured party.
15. **Records: Appeal and Error.** An appellate brief generally may not expand the evidentiary record and should limit itself to arguments supported by the record.
16. **Federal Acts: Railroads.** A rail carrier can violate the Boiler Inspection Act either by breaching the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary danger of personal injury, in violation of 49 U.S.C. § 20701 (1994), or by failing to comply with the regulations issued by the Federal Railroad Administration, which become a part of the Boiler Inspection Act.
17. **Federal Acts: Railroads: Liability.** A rail carrier who violates a Federal Railroad Administration regulation will incur liability under the Boiler Inspection Act.
18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
19. **Damages: Appeal and Error.** An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
20. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
21. **Damages: Proof: Appeal and Error.** The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
22. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
23. **Damages: Juries.** There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury, which saw the witnesses and heard the evidence.
24. **Evidence.** Generally, the admissibility of evidence is a procedural matter governed by the law of the forum.
25. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded.
26. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
27. **Trial: Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat.

§ 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.

28. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
29. **Rules of Evidence: Words and Phrases.** For purposes of applying Neb. Rev. Stat. § 27-403 (Reissue 1995), probative value is a relative concept which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case.
30. **Evidence: Appeal and Error.** Unfair prejudice means an undue tendency to suggest a decision on an improper basis.
31. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
32. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
33. **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.
34. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
35. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
36. **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.
37. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
38. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

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

Steven W. Olsen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

Robert G. Pahlke of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, and Roger C. Denton, of Schlichter, Bogard & Denton, for appellee.

HANNON, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## I. INTRODUCTION

Wayne Wagner filed suit in the district court for Scotts Bluff County against his employer, the Union Pacific Railroad Company (Railroad), seeking damages under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1994), and the Boiler Inspection Act (BIA), 49 U.S.C. § 20701 et seq. (1994), for injuries sustained in a work-related incident on March 1, 1998. After the trial court sustained Wagner's motion for summary judgment, finding that ice and snow on the walkway of a locomotive constituted a violation of the BIA, Wagner dismissed his cause of action based on the FELA. The case proceeded to trial on the issue of damages, and the jury returned a verdict in Wagner's favor in the amount of $1.9 million, which judgment was entered by the trial court. The district court subsequently overruled the Railroad's motion for new trial. For the reasons stated below, we affirm.

## II. BACKGROUND

Wagner filed an amended petition on December 17, 1998, against the Railroad claiming injuries to his neck, shoulders, arms, back, and legs sustained in a work-related incident on March 1, 1998. In count I of his petition, Wagner alleged, pursuant to the FELA, the negligence of the Railroad in failing to provide Wagner with a safe place to work, failing to inspect and maintain the walkway on the locomotive in question to ensure that it was safe and in good condition and free of ice and snow, and failing to provide safe and adequate walkways throughout the locomotive. In count II, Wagner alleged a violation of the BIA. Wagner specifically asserted that the Railroad violated the BIA by failing to provide safe and adequate walkways on the locomotive as required by 49 C.F.R. § 229.7(a) (1997), allowing ice and snow to exist on the walkways of the locomotive in question in violation of § 229.7(a), and failing to make the required daily inspection report as required by 49 C.F.R. § 229.21 (1997). In its answer to Wagner's amended petition, the Railroad asserted that the locomotive at issue was not "in use" and that the BIA did not apply. The Railroad further asserted the affirmative defenses of Wagner's contributory negligence and his failure to mitigate his damages.

Before trial, Wagner moved for summary judgment on the issue of liability pursuant to the BIA. Wagner asserted that it was undisputed that while in the course of his employment with the Railroad, he slipped and fell on an icy platform on a locomotive that was in service in the Bill, Wyoming, trainyard, sustaining some injury. Wagner's motion for summary judgment was submitted to the district court on the following evidence: the deposition of Wagner, the railroad mechanic's report of his inspection of the locomotive in question following Wagner's injury, an affidavit concerning the locomotive's condition from the same railroad mechanic, and an emergency room record concerning medical treatment of Wagner on the day of the incident.

In his deposition, Wagner testified that he has been a certified locomotive engineer since August 1974. On March 1, 1998, Wagner came on duty at 10:15 a.m. He was working with a conductor. Wagner and the conductor were called to take a train from Bill to the coal mine. Upon reporting for duty that day, the manager, Larry Anderson, gave them a list of instructions regarding some "switching" that was to be completed before they took the train to the mine. Wagner indicated that this was an unusual instruction as they did not usually perform switching in the Bill trainyard. Wagner described the Bill trainyard as "a place to park trains." Anderson instructed Wagner to put together a "consist" of locomotives so that a train could be run. (A consist is a makeup of like units.) The mechanic-in-charge (MIC) was going to accompany them and assist in hooking up air hoses and jumper cables. They were to build a consist for their train to go west and also had to "make some adjustment switching of power" for eastbound trains. Wagner was also instructed to hook up a specific engine to an eastbound train and configure the airbrake setup so that the train would be charged with air.

Wagner was on the job approximately 4 hours, switching around various locomotives, before he fell. The MIC was with Wagner and the conductor only for a brief portion of that time period. The final product of their activities that morning was a consist of three locomotives on track 6, which Wagner believed was the train with which they were to travel west. They also moved several locomotives to tracks 3 and 4, which Wagner believed were for eastbound loads. Wagner testified that the

locomotive on which he fell was on a loaded train set to head east, presumably on either track 3 or 4.

Wagner recalled that when he came on duty that morning, the weather was overcast, that it was approximately 30 degrees, that there was no wind to speak of, and that it was not snowing. Wagner believed that it had snowed in Bill sometime in the previous 24 hours; however, he did not know how long the storm had lasted or how much snow had fallen. Wagner was certain that there were not blizzard conditions in Bill when he was working on March 1, 1998. Wagner indicated that virtually all of the locomotives that they worked on that day were snowy and icy, having quite a bit of snow on their walkways and steps. Some of the locomotive doors were snowed shut, and he and the conductor had to brush the snow away with a broom to gain access. Wagner testified that he called the MIC for assistance in removing snow and ice, but was advised that no MIC's were available. At that time, Wagner did not inform the yard office of the buildup of ice and snow and did not specifically indicate why they needed the assistance of an MIC. Wagner indicated that the removal of ice and snow was a task which he would typically call an MIC to perform, but that he had on occasion shoveled, swept, or put down salt or sand to remedy icy or snowy conditions.

Wagner testified that he and the conductor entered the locomotive in question on March 1, 1998, at its front end. The steps where they entered the locomotive were covered with snow. Once inside the locomotive cab, Wagner attempted to configure the air-brake setup so as to charge the train with air. Wagner understood that the locomotive was part of a consist and was to be a lead-position locomotive. Wagner did not know, but assumed, that the locomotive was running; however, he was unable to tell whether the locomotive was running as he approached it because of the noise from locomotives running on other tracks. Wagner attempted for approximately 10 or 15 minutes to set up the air configuration, but was unable to obtain readings from the gauges to indicate that it was pumping air. Wagner was unable to determine from inside the cab whether the engine was running. He indicated that there were no alarm bells, that the unit switch appeared to be online and was "not isolated," and that the gauges were showing some air.

Because Wagner suspected that the unit was not running, he stepped out of the locomotive cab through the engineer's door behind the control panel to check the car body for vibration. Wagner had to kick the engineer's door open to exit the cab as it was blocked with snow. He walked three to four steps or 6 to 8 feet down the walkway and was unable to feel any vibrations. While doing so, Wagner held onto the "grab iron" with one hand, maintaining his other hand on the car body. At that time, Wagner became aware that there was snow and ice on the walkway and that the walkway was slippery. Wagner indicated that he observed the walkway to be covered in snow for its entire length. The buildup of snow varied in depth from 1 to 6 inches. Wagner also observed that the walkway was icy in spots. He indicated that the buildup of ice varied between 3 and 4 inches. Upon returning to the locomotive cab, Wagner informed the conductor that the engine was not running. Wagner indicated that they then unsuccessfully tried to start the locomotive from the cab.

Wagner testified that since Anderson had apparently believed that the unit was running, he felt it necessary to check to "make sure that the unit [was] drained" because it would "freeze up and break water pipes." Wagner then walked back out the engineer's door onto the walkway, attempting to reach the access panel where he would be able to see the sight glass and determine if there was water in the locomotive. While walking back toward the water gauge, Wagner again kept one hand on the grab iron and his other hand on the car body due to the icy conditions. After progressing along about half of the length of the car body, Wagner slipped and fell off the walkway, grabbed the grab iron with both hands, and was left suspended from the grab iron, facing away from the locomotive. He was able to turn himself around to face the engine, but did not have the strength to pull himself back onto the walkway. Wagner banged his right shin in the process of turning around. Wagner then let go of the grab iron, landing on his buttocks in the snow.

After composing himself, Wagner returned to the front of the locomotive, climbed inside the cab, and informed the conductor that he had fallen. Wagner showed the conductor his shin, which was "bumped and bruised and scraped and bleeding." Wagner indicated that they had basically completed the assigned task of

moving the various units around, so they proceeded to return to the yard office. Wagner informed Anderson that he had been hurt and showed Anderson his leg. Wagner indicated that in response to Anderson's inquiry as to whether Wagner wanted go to the hospital, Wagner responded that the injury did not appear "life threatening," so he would simply take himself off duty and return home. Wagner informed Anderson that his leg hurt, that he "hurt all over," and that he was "quite shook up."

Wagner drove himself home, and later that evening, he went to the emergency room at the local hospital. Wagner showed the emergency room staff his leg, informed them what had occurred, and told them that his shoulders, arms, leg, and back were sore. Wagner indicated that his leg was x rayed, that he was given a tetanus shot, and that he then drove himself home. Wagner testified that when he woke up the following morning, his neck, arms, shoulders, back, and leg were quite sore. Wagner then set up an appointment with his family doctor for treatment. The treatment and progression of Wagner's March 1, 1998, injuries, as well as the treatment of his preexisting degenerative back disease, discussed briefly in Wagner's deposition, were described by Wagner in great detail in his trial testimony and are discussed in further detail in the analysis portion of this opinion. Exhibit 12, the emergency room treatment records, was offered and received to show that Wagner received medical treatment on the day of the accident and that the accident caused some injury.

Exhibit 11, the Railroad's "Report of Inspection of Equipment Involved in Accident" received by the court, was signed by an MIC, James J. Allender. This report concerned Allender's inspection of locomotive number UP 8194 "in the use of which Wayne Wagner was Injured." The report indicated that the locomotive walkway was covered with ice approximately 1 to 4 inches thick, which was continuous along the length of the walkway.

The court also received exhibit 13, the affidavit of Allender. Allender stated that after Wagner's slip and fall, he was called to eliminate the ice and snow on the walkways of the locomotive in question. Allender indicated that the walkways were covered with snow and 1 to 4 inches of ice, which required a steel bar and shovel to remove. Allender asserted that there had been a severe blizzard that resulted in a buildup of ice and snow on the

locomotives. Allender indicated that when a crew discovers ice and snow that needs removal, he is called for that purpose, and that when he is unavailable, the crew usually waits for someone on the maintenance staff to remove ice and snow.

Allender stated that the locomotives run with just water and no antifreeze, so at temperatures below 35 degrees, it is necessary to have them running all of the time. Allender further stated that to determine whether a locomotive is running, one looks at the isolation switch, which should be in the online position, and that if the isolation switch is online, if no alarm bells are ringing, and if the computer display does not advise that the locomotive is shut down, one can assume that the engine is running. Before removing ice and snow from the walkways of the engine in question, Allender first checked to see that the engine was running and found that it was. Allender asserted that there was no reason for Wagner to go outside of the locomotive to check whether the locomotive was running, nor was there reason for Wagner to have to check the water gauge.

After a hearing wherein the district court heard arguments from the parties and received evidence as indicated above, the court granted Wagner's motion for summary judgment under the BIA on the issue of liability. The district court reasoned that to recover under the BIA, Wagner must establish by the greater weight of the evidence that the locomotive was "in use" at the time of his injury, that the Railroad violated the BIA, and that such violation was a cause, in whole or in part, of Wagner's injuries. The district court noted that under the BIA, Wagner did not have to prove that the Railroad was negligent, and that his contributory negligence, if any, would not diminish his right to recover damages.

With regard to the in-use question, the district court, relying on the reasoning set forth in *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), concluded as a matter of law that the locomotive in question was in use at the time of Wagner's injury. The district court then considered whether there had been a violation of the BIA. The court noted that the questions of whether there was ice and snow on the walkway and whether such ice and snow was a cause of a railroad employee's injuries could be issues of fact to be determined by a jury. However, the court found that

the facts (1) that ice and snow had accumulated on the walkway and (2) that Wagner slipped on the icy walkway, incurring injury, were not disputed. Accordingly, the court found as a matter of law that the ice and snow on the walkway at issue constituted a violation of the BIA. Finally, the district court found that it did not have to determine whether the ice and snow on the walkway constituted an " 'unnecessary peril' " per se, because it had already found that the ice and snow on the walkway constituted a slipping hazard in violation of the BIA and its regulations.

Wagner thereafter filed a motion seeking to dismiss the negligence count of his amended petition without prejudice, which was granted by the court. The case was tried to the jury on July 12 through 14 and 17 and 18, 2000, on the issue of damages only.

At trial, Wagner presented evidence indicating that his principal injury related to his lower back, although he did receive minor injuries to his shin and shoulder. Wagner asserted that the March 1, 1998, incident resulted in a permanent low-back injury which precluded his return to work as a locomotive engineer. The Railroad, through its evidence, contended that Wagner's preexisting low-back condition was the source of his disability, contested the extent of Wagner's limitations, asserted that Wagner could return to work as a locomotive engineer with accommodations, and also claimed that Wagner failed to mitigate his damages by not cooperating with the Railroad's vocational rehabilitation expert. Wagner asserted that the Railroad's vocational rehabilitation offers were not made in good faith and that the Railroad had no genuine intent to allow him to return to work with accommodations. The relevant trial evidence is outlined more fully in the discussion section below.

Following the completion of Wagner's evidence, the district court denied the Railroad's motion for directed verdict and also denied Wagner's motion for directed verdict regarding the issue of mitigation at the close of all the evidence. The jury returned a verdict in favor of Wagner in the amount of $1.9 million, and judgment was entered accordingly.

The Railroad filed a motion for new trial on July 27, 2000. In its order entered August 29, the district court summarized the Railroad's assertions that the court had erred in (1) finding that the locomotive was in use and thus entering summary judgment

on the issue of liability and (2) making certain evidentiary rulings at trial related to vocational rehabilitation services. Additionally, the Railroad asserted that the judgment entered was excessive. The district court readopted its memorandum order dated September 16, 1999, wherein summary judgment was entered on the issue of liability pursuant to the BIA. The court again stated that Wagner's duties on March 1, 1998, were incidental to operating the locomotive as an engineer. The district court found that the verdict in the present case was not so disproportionate to the evidence presented that the court could disregard the jury's decision. The district court overruled the Railroad's motion for new trial, and the Railroad subsequently perfected its appeal to this court.

## III. ASSIGNMENTS OF ERROR

The Railroad asserts, restated and renumbered, that the district court erred in (1) sustaining Wagner's motion for summary judgment on the issue of liability under the BIA by (a) finding that the locomotive was in use at the time of the accident, (b) finding that ice and snow on the walkway of the locomotive constituted a violation of the BIA, and (c) finding liability under the BIA as a matter of law rather than allowing the jury to decide issues under the BIA; (2) not reversing the jury's verdict based on the fact that it was excessive and appeared to be given under the influence of passion or prejudice; (3) making evidentiary rulings that served to prejudice the Railroad, including allowing testimony as to the accommodation restrictions of employees other than Wagner; (4) refusing the Railroad's evidence as to offers of vocational assistance and jobs in locations other than in the Bill-Casper-Douglas, Wyoming area; (5) instructing the jury that Wagner was not required to move from his current home to minimize his damages; and (6) overruling the Railroad's motion for new trial.

## IV. ANALYSIS

### 1. Summary Judgment as to Liability Under BIA

The Railroad asserts that the district court erred in sustaining Wagner's motion for summary judgment on the issue of liability under the BIA by (a) finding that the locomotive was in use at the time of the accident, (b) finding that ice and snow on the walkway of the locomotive constituted a violation of the BIA, and

(c) finding liability under the BIA as a matter of law rather than allowing the jury to decide issues under the BIA.

(a) Standard of Review

[1,2] The BIA imposes " 'an absolute duty' " on railroad carriers to ensure that their locomotives are both properly maintained and safe to operate. *Matson v. Burlington Northern Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001). Because the BIA does not create an independent cause of action, such a claim must be brought under the FELA. *Id.*

[3-5] Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the FELA. *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991); *Crafton v. Union Pacific RR. Co.*, 7 Neb. App. 793, 585 N.W.2d 115 (1998). See 45 U.S.C. § 56. In disposing of a claim controlled by the FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the FELA are determined by the provisions of the act and interpretative decisions of the federal courts construing the FELA. *Chapman, supra*; *Crafton, supra*; *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. 924, 552 N.W.2d 778 (1996). Unlike substantive issues, procedural matters are governed by the law of the forum. *Kirwan v. Chicago Title Ins. Co.*, 261 Neb. 609, 624 N.W.2d 644 (2001).

[6,7] Whether a party is entitled to summary judgment is a matter of procedure generally controlled by the law of the forum. *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996); *Crafton, supra*. In Nebraska, 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. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

[8-10] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001). In reviewing a summary judgment,

an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Fontenelle Equip., supra.* Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000).

(b) Introduction to BIA

[11] "The BIA imposes upon railroads engaged in interstate commerce an absolute duty to utilize locomotives in a safe manner." *Rivera v. Union Pacific R. Co.*, 868 F. Supp. 294, 298 (D. Colo. 1994). However, "[a]bsolute liability under the [BIA] arise[s] only if the locomotive in question is 'in use.' " *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998). The BIA, § 20701, provides:

> A railroad carrier may *use or allow to be used* a locomotive or tender *on its railroad line* only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

(Emphasis supplied.)

The BIA was formerly found at 45 U.S.C. § 23 (repealed by Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994)) and was transferred as amended to 49 U.S.C. § 20701 by Pub. L. No. 103-272 § 1(e), 108 Stat. 885 (1994). Although the BIA was recodified in 1994, the majority of the cases published to date discussing the BIA were decided before 1994, or while § 23 was still in effect, and thus discuss § 23 rather than § 20701. Section 23 was substantially similar to the current § 20701, although it used the language "unnecessary peril to life or limb" instead of "unnecessary danger of personal injury." "[I]t has been held consistently that the Boiler Inspection Act supplements the Federal Employers' Liability Act by imposing on interstate railroads 'an

absolute and continuing duty' to provide safe equipment." *Urie v. Thompson*, 337 U.S. 163, 188, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). See, also, *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 63 S. Ct. 347, 87 L. Ed. 411 (1943); 49 U.S.C. § 20301 et seq. (1994 & Supp. V 1999) (current Federal Safety Appliance Act (FSAA)). "[R]ailroads whose employees are injured as a result of violations of the BIA will incur strict liability under the FELA." *McGinn v. Burlington Northern R. Co.*, 102 F.3d 295, 299 (7th Cir. 1996), citing *Vaillancourt v. Illinois Cent. R. Co.*, 791 F. Supp. 734 (N.D. Ill. 1992).

> The Supreme Court emphasized in *Lilly* that when a railroad violates the Boiler Inspection Act, "the partial defense of contributory negligence and the bar of assumption of risk are not available" to the railroad. . . . Thus, to recover under the Act, an injured railroad worker need only prove that a violation on the part of the railroad was a cause of his injury.

(Citations omitted.) *Topping v. CSX Transp., Inc.*, 1 F.3d 260, 261 (4th Cir. 1993).

The Railroad presented evidence in conjunction with the summary judgment hearing going to the issues of whether Wagner assumed the risk in walking on the snow- and ice-covered walkway and whether he was contributorily negligent in not taking further action to clear the walkway of the locomotive in question. As the affirmative defenses of contributory negligence and assumption of risk were not applicable in the present case, we find that any assertions by the Railroad in its brief on appeal suggesting that Wagner was contributorily negligent or assumed the risk involved in walking on the snow- and ice-covered walkway on March 1, 1998, are without merit.

(c) Was Locomotive "In Use"?

[12,13] We first consider the threshold question of whether the locomotive in question was in use within the meaning of the BIA at the time of Wagner's accident. As indicated above, although the BIA imposes absolute liability on railroads for violations of its provisions, such liability only attaches if the train is in use on the railroad's line at the time of the accident. See, *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998); *Crockett v. Long Island R.R.*, 65 F.3d 274 (2d Cir. 1995);

*Rivera v. Union Pacific R. Co.*, 868 F. Supp. 294 (D. Colo. 1994). Accordingly, if the locomotive in the present case was in use at the time of Wagner's accident, the BIA applies, and the Railroad can be held strictly liable for any injuries resulting from any violation of the BIA. Whether a locomotive is in use under the BIA is a question of law for the trial court to decide and not a question of fact for the jury. *Phillips v. CSX Transp., Inc.*, 190 F.3d 285 (4th Cir. 1999), *cert. denied* 529 U.S. 1004, 120 S. Ct. 1269, 146 L. Ed. 218 (2000); *McGrath, supra*; *Crockett, supra*; *Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983).

The purpose of the in-use limitation in the BIA and FSAA is to "exclude from . . . coverage only such functions as are necessary to detect and correct those defective conditions for which absolute liability will be imposed." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). " 'Congressional intent and the case law construing the statute clearly excludes those injuries directly resulting from the inspection, repair and servicing of railroad equipment located at a maintenance facility.' " *McGrath*, 136 F.3d at 842, quoting *Angell, supra*. See, also, *Phillips, supra* (observing that purpose of in-use limitation is to give railcar operators opportunity to inspect for and correct defects before being exposed to strict liability for such defects).

[14] A locomotive may be considered in use even though it is motionless. See *McGrath, supra*. See, also, *Brady v. Terminal R.R. Assn.*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938); *Crockett, supra*. The primary factors considered by some federal courts in addressing the in-use question are (1) the location of the locomotive at the time of the injury and (2) the activity of the injured party. *McGrath, supra*, citing *Pinkham v. Maine Cent. R. Co.*, 874 F.2d 875 (1st Cir. 1989) (both interpreting BIA). See, also, *Phillips, supra*; *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir. 1998) (both interpreting FSAA and employing similar factors). Compare *Trinidad v. Southern Pacific Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (interpreting FSAA and employing bright-line test based on whether train is fully assembled and crew has completed predeparture inspection). Due to the fact-specific nature of this inquiry, we find it appropriate to apply the factors set forth in *McGrath* to the present case.

In *McGrath, supra*, the plaintiff incurred injuries when he stepped on a loose nut on the cabin floor of a locomotive, which was idling on a trainyard track within the confines of the defendant's trainyard. Trainyard tracks were identified as those tracks used to store, inspect, classify, and switch locomotives and railcars. The locomotive at issue was neither being serviced in a place of repair nor operating on the railroad's main line, but was scheduled that day to service the railroad's industrial customers in South Boston. McGrath was responsible for operating the train, and also for attaching individual railcars to the locomotive. McGrath was part of the transportation crew, but as engineer, he was also required to perform certain inspection duties before moving the locomotive.

The court in *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), noted that the locomotive was not being stored on the trainyard track or awaiting removal to the engine house for repairs. The court concluded that as the locomotive in that case was idling on a trainyard track ready to move into service and as McGrath's inspection duties were incidental to his tasks of operating the locomotive as an engineer, the locomotive was in use for purposes of the BIA.

Also instructive is the Fourth Circuit's decision regarding whether an engine was in use in *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260 (4th Cir. 1980). In *Angell*, the employee's accident occurred after service and maintenance activities had already been performed and while a "readied" engine was being uncoupled at the direction of railway officials to move to another track to pull a train a few hours later. The Fourth Circuit found that the engine was not in need of further repair or servicing and was in reality "okayed" for service as contemplated by the BIA and that thus, the engine was in use when the accident occurred. The *Angell* court determined that a train could be considered in use even before the engineer took the controls. More recently, the Fourth Circuit considered *Deans, supra*. Deans, the injured conductor, and his engineer were assigned to take a particular train on the date of Deans' injury. Deans' tasks that day were to couple the engines to the railcars, release the railcars' handbrakes, and conduct a predeparture airbrake test. The railroad cars making up the train were already coupled

together when Deans arrived. When the accident occurred, the engine had been coupled to the train and was standing on a track in the trainyard in preparation for departure. The court noted that Deans, as the train's conductor, was part of its transportation crew and not involved in its repair or maintenance, that it was his job to put the train into motion, and that he was attempting to release the handbrakes to do so at the time of his injury. Accordingly, the *Deans* court held as a matter of law that the train was in use at the time of Deans' injury.

We also note the case of *Rivera v. Union Pacific R. Co.*, 868 F. Supp. 294 (D. Colo. 1994). In *Rivera*, the plaintiff, Rivera, was a locomotive engineer, who upon reporting for work was transported to his train located on a service track. The service department had completed its maintenance, repair, and servicing of the locomotive. The engine in question had left the servicing area, was attached to other railcars, and was idling. As a part of his routine duties, Rivera was to check the locomotives on the train to make sure that all of the handbrakes had been released and that the engines were in the "run" position. While engaged in this activity, Rivera slipped on an automatic brake valve handle left on the floor of a locomotive, receiving injuries. The court found that Rivera's "inspection" was not a comprehensive one designed to discover "defects" on the train, but was purely incidental to his task of operating the train as engineer. Compare *Paul v. Genesee & Wyoming Industries, Inc.*, 93 F. Supp. 2d 310 (W.D.N.Y. 2000) (holding railcar and train not in use where plaintiff not member of train crew, his inspection would not have been incidental to his operation of train, and no one at trainyard had started to join engines to train).

[15] In the present case, Wagner was in the process of putting locomotives on trains being readied for departure from the Bill trainyard. The record does not indicate that the locomotive was being stored or awaiting removal to an engine house for repairs. At the time of his injury, Wagner was configuring the airbrake setup for an eastbound train, which is a step in the process of preparing the locomotive for departure. The task of moving the various units around to form the consists as directed by Anderson had been completed. Wagner was not engaged in the detection or correction of defects, activities excluded under the

BIA. Rather, his activities appear to be the type that are incidental to operation of a train as an engineer, although he apparently was not going to be the actual engineer on the locomotive in question. While Wagner determined that the locomotive was not running after checking the engine body for vibration, Allender indicated that when he subsequently went to remove ice and snow from the walkway of the locomotive, he found that it was running. In its reply brief, the Railroad asserts that once the locomotive was started and the brakes charged with air, a task Wagner did not complete, the actual engineer of that train would have to inspect the brakes and airhoses to ensure compliance with federal regulations and then complete a predeparture inspection. The Railroad further asserts that these inspections were never accomplished, since the locomotive was not running. These arguments go beyond what is presented to us in the record from the summary judgment hearing. An appellate brief generally may not expand the evidentiary record and should limit itself to arguments supported by the record. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). Further, the evidence presented by the Railroad in Allender's affidavit suggests that the locomotive was found running subsequent to Wagner's accident.

With regard to the location of the locomotive, the record shows only that it was on tracks located in the Bill trainyard. There is no evidence to indicate that the locomotive on which Wagner was injured was located in a facility or on a track devoted primarily for maintenance, inspection, or repair activities. The record does reveal that the locomotive had been relocated to form part of a consist to pull an eastbound train which was loaded to head east at some unknown time in the future.

Whether the locomotive was in use at the time of Wagner's accident was a question of law to be determined by the trial court, and viewing the evidence with regard to the in-use question in a light most favorable to the Railroad as we must, we find that the trial court did not err in determining as a matter of law that the locomotive was in use at the time of Wagner's injury. Accordingly, the BIA applies to the case at hand, and the Railroad can be held strictly liable for any injuries incurred by Wagner resulting from a violation of the BIA.

(d) Violation of BIA?

[16] A rail carrier can violate the BIA either by breaching the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary danger of personal injury, in violation of 49 U.S.C. § 20701, or by failing to comply with the regulations issued by the Federal Railroad Administration (FRA), which become a part of the BIA. *McGinn v. Burlington Northern R. Co.*, 102 F.3d 295 (7th Cir. 1996); *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088 (4th Cir. 1987), *cert. denied* 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 108.

The Railroad asserts that the existence of ice and snow on the locomotive in question did not constitute a defect under the BIA or any regulations promulgated thereunder, but this argument misconstrues existing case law and is without merit. In *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 63 S. Ct. 347, 87 L. Ed. 411 (1943), the plaintiff was successful in maintaining an action under the BIA for injuries received from a fall caused by ice accumulating on the top of the locomotive tender on which he had to stand to perform his duties. On appeal, the rail carrier argued that the BIA covers only defects in construction or mechanical operation, affording no protection against "the presence of dangerous objects or foreign matter." *Id.* at 487. The U.S. Supreme Court upheld the judgment and held that the BIA requirement that locomotives be kept in proper and safe conditions was not confined to matters of construction or mechanics, but also extended to protection against foreign matter on the surface upon which employees must stand or walk.

In so finding, the Court relied in part on a federal regulation, which provided that the tender top should be kept clean and that means should be provided to carry off waste water. The Court noted that the BIA was to be liberally construed in light of its prime purpose, to protect employees by requiring the use of safe equipment, and concluded that the jury had a right to find a violation of the BIA due to the accumulation of ice on top of the locomotive tender even though there was no defect. See, also, *McGinn*, 102 F.3d at 300 (stating that "[t]he regulation [49 C.F.R. § 229.119(c) (1989)] also places strict liability on a railroad for failure to keep floors free of foreign

substances such as oil and grease or the elements such as snow and ice").

In *Calabritto v. New York, New Haven and Hartford R. Co.*, 287 F.2d 394 (2d Cir. 1961), *cert. denied* 366 U.S. 928, 81 S. Ct. 1649, 6 L. Ed. 2d 387, the plaintiff slipped and fell on sand and oil located on the platform of one of the rail carrier's switching engines. The rail carrier asserted that the BIA imposed liability "only for mechanical or structural defects, and not for dangerous conditions caused by the temporary presence of foreign matter." 287 F.2d at 395. The *Calabritto* court found that the statute had no such limitation, but, instead, required all locomotives to be in proper condition and safe to operate. The court, citing *Lilly*, determined that the use of an engine whose surface had been made slippery by sand and oil could similarly involve "unnecessary peril to life or limb" in violation of the BIA. The court concluded that *Lilly* must be read as holding that dangerous conditions caused by foreign substances may give rise to liability under the BIA even in the absence of a regulatory violation.

In *Whelan v. Penn Central Company*, 503 F.2d 886 (2d Cir. 1974), the court imposed liability under the BIA for a slip from an ice-coated step, resulting from a rain and sleet storm earlier that day. The rail carrier in that case argued that the BIA is not violated by slippery conditions caused by weather and that its failure to violate a specific federal regulation immunized it from liability. The appellate court, relying on *Lilly* and *Calabritto*, rejected these arguments and affirmed the judgment of the lower court.

Accordingly, contrary to the Railroad's assertions in its brief on appeal, conditions other than mechanical imperfections, including ice and snow, can plainly render equipment unsafe to operate without unnecessary peril to life or limb and have been found to violate the BIA both directly as well as through a rail carrier's noncompliance with federal regulations promulgated under the BIA.

*(i) Violation by Noncompliance with Regulation*

[17] We first consider whether the district court correctly determined that the Railroad, by violation of a federal regulation, had violated the BIA, thus incurring liability. A rail carrier who

violates an FRA regulation will incur liability under the BIA. *McGinn v. Burlington Northern R. Co.*, 102 F.3d 295 (7th Cir. 1996); *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088 (4th Cir. 1987), *cert. denied* 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 108. Although not one of the specific Code of Federal Regulations sections asserted in Wagner's amended petition, the district court relied on 49 C.F.R. § 229.119(c) (1997) to determine as a matter of law that the ice and snow on the walkway at issue created a slipping hazard and thus constituted a violation of the BIA. Section 229.119(c) states that "[f]loors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing."

In *McGinn, supra*, the court recognized that § 229.119(c) places strict liability on railroads for failure to keep floors free of foreign substances such as oil and grease or elements such as snow and ice. See, also, *Vaillancourt v. Illinois Cent. R. Co.*, 791 F. Supp. 734 (N.D. Ill. 1992) (determining that unsafe placement of ice chest on locomotive floor was properly characterized as obstruction that created slipping, tripping, or fire hazard in violation of § 229.119). In the instant case, the district court found that the facts that ice and snow had accumulated on the walkway, that the ice and snow made the walk slippery, and that Wagner slipped on the walkway and incurred injuries were not in dispute. In other words, the district court determined as a matter of law that the ice and snow on the locomotive walkway created a slipping hazard and was accordingly a violation of § 229.119(c), and thus of the BIA.

In asserting that this was a question for the jury, the Railroad relies primarily on *Gregory v. Missouri Pacific R. Co.*, 32 F.3d 160 (5th Cir. 1994). In *Gregory*, a locomotive engineer slipped and fell on oil that was on a locomotive walkway. On appeal, the rail carrier agreed with the plaintiff's assertions that violation of a regulation can be a violation of the BIA, but asserted that § 229.119(c) did not provide that the mere presence of oil on a walkway violated the BIA. The Fifth Circuit found that § 229.119(c) was not violated by the mere presence of any oil, water, or waste on a passageway, but, rather, was violated by the presence of such substances only if they created a slipping,

tripping, or fire hazard. There was a factual dispute as to the amount and location of the oil on the walkway and a dispute as to whether the condition was slippery. The plaintiff testified that he slipped in a large spot or puddle of oil, approximately 12 inches in diameter, and that the oil was wet and plainly visible. The rail carrier presented evidence that the oil did not look slippery, that it did not appear to be a slipping hazard, that the walkway had a nonskid surface, that there were no footprints in the oil or apparent marks of anybody slipping in it, and that relevant parties had not seen oil on the plaintiff's clothing following the accident. Because of this factual dispute, the court held that the question of whether the oil constituted a slipping hazard under § 229.119(c), and thus violated the BIA, was a question for the jury. *Id.* See, also, *Lakin v. Consolidated Rail Corp.*, 545 N.E.2d 843 (Ind. App. 1989) (finding jury question due to conflicting evidence as to whether placement of cable in question created tripping hazard in violation of § 229.119(c) and BIA).

The evidence in the present case, unlike that in *Gregory* and *Lakin* is undisputed. Wagner testified in his deposition that the locomotive walkway was covered with 6 inches of snow and patches of ice 4 inches thick and that when he went to check the sight glass, he slipped and fell on this covering of ice, incurring injuries to his neck, arms, shoulders, back, and leg. Allender's report and affidavit confirm that the walkways of the locomotive in question were covered with snow and 1 to 4 inches of ice, which required a steel bar and shovel to remove.

The evidence before the district court in the present case on Wagner's motion for summary judgment was such that reasonable minds could not conclude other than that the ice and snow created a slipping hazard. Accordingly, the district court correctly ruled as a matter of law that the ice and snow constituted a slipping hazard and thus violated the BIA.

*(ii) Direct Violation*

[18] With regard to the broader, more general duty of the Railroad under the BIA, the act currently requires railroad carriers to keep locomotives or tenders and their parts and appurtenances "in proper condition and safe to operate without unnecessary danger of personal injury." § 20701. The BIA previously

required carriers to keep any locomotive used on its line, its boiler, tender, and all parts and appurtenances "in proper condition and safe to operate . . . without unnecessary peril to life or limb." See 45 U.S.C. § 23 (1988). After determining that the Railroad had violated § 229.119(c), the district court found that it did not have to determine whether the ice and snow on the walkway constituted an "unnecessary [danger]" per se. In other words, the district court did not engage in an analysis of the more general duty imposed by the BIA. We find no error in the trial court's determination in this regard. The case law plainly provides that the BIA can be violated either directly or by means of a regulation. Accordingly, we do not discuss the arguments made by Wagner in his brief that consideration of "unnecessary peril" is no longer a requirement of the BIA, nor the assertion raised by the Railroad that the question of "unnecessary peril" was one for the jury. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001).

(e) Conclusion Regarding Summary Judgment

The summary judgment was appropriately granted in this instance. We find no error in the district court's determination that the locomotive was in use at the time of Wagner's accident and injury. Accordingly, the BIA is applicable to the case at hand. Viewing the evidence most favorably to the Railroad, we find no genuine dispute of material fact with regard to the question of whether the ice and snow on the walkway constituted a slipping hazard. Accordingly, we find no error in the district court's determination that the Railroad violated a regulation, and thus the BIA, and that therefore, the Railroad incurred strict liability for any damages suffered by Wagner as a result of his accident and injury.

2. Excessive Verdict

[19-22] The Railroad next asserts that the district court erred in not reversing the jury's verdict of $1.9 million based on the argument that it was excessive and appeared to be given under the influence of passion or prejudice. An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice,

mistake, or some other means not apparent in the record. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.* However, the amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). On appeal, the fact finder's determination of damages is given great deference. *Norman, supra.*

Wagner sought damages for past and future medical expenses in excess of $5,000, past and future lost wages in excess of $36,000, decreased earning capacity, past and future pain and suffering, and a permanent, disabling injury. The jury was instructed on each of these elements of damages. The Railroad does not assign error to the giving of this instruction.

Wagner began his employment with the Railroad in February 1974, becoming a qualified locomotive engineer in August of that year. Wagner testified that prior to the March 1, 1998, incident, he was working full time as a locomotive engineer, was performing 100 percent of the job requirements without limitation, and was planning to work for the Railroad until he retired at age 65 or 66. Wagner was 47 years old at the time of the accident. Wagner has been unemployed since March 1, 1998.

Wagner suffered from back problems preexisting his March 1998 injury. Wagner injured his back in the late 1980's in a motor vehicle accident, subsequently had an L5-S1 laminectomy on his right side, and suffered various temporary aggravations of back pain in the intervening decade prior to his 1998 injury.

Dr. Robin Ockey, a specialist in physical medicine and rehabilitation, first saw Wagner in January 1999, primarily for low-back pain. Ockey reviewed an MRI scan and report from October 1998 as well as reports of MRI's and other studies conducted prior to Wagner's March 1998 injury. Upon comparing the current and the older studies, Ockey concluded that Wagner's disk protrusion had worsened since his injury in the late 1980's and that Wagner had sustained a new annular tear,

that is, a tear to the annulus, or outer fibers of the disk. Ockey also believed that there was a musculature component to Wagner's pain as well as a radicular component, or a nerve root problem. At trial, Ockey opined within a reasonable degree of medical certainty that both Wagner's "disc problem" and his "muscular pain" were caused by his fall in March 1998 and that Wagner was permanently disabled from his job as a locomotive engineer. Ockey further testified that Wagner would have ongoing pharmacological needs, intermittent physical therapy needs, and likely surgical needs. Ockey discussed various potential surgical options, including disk fusion and a procedure to repair the torn annular disk fiber. Ockey estimated the cost of that procedure at $10,000 to $20,000 and the cost of disk fusion surgery at $30,000 to $40,000.

Dr. Terry Himes, a board-certified neurologist, also opined that Wagner sustained an annular tear to the disk in his lower back as a direct consequence of his March 1998 injury. Himes testified that Wagner is at increased risk of further injury as a consequence of this annular tear and that Wagner now has structural instability in his lower back, which causes abnormal motion and devastating pain. Himes opined that as a direct consequence of the March 1998 injury, Wagner became totally incapable and functionally impaired from performing the duties of a locomotive engineer. Based upon the functional capacity evaluations, Himes found that Wagner was not magnifying any of his symptoms.

Evidence was presented about the wages and fringe benefits received by locomotive engineers employed by the Railroad in general and by Wagner specifically. Evidence admitted at trial indicated that the annual wages for engineers holding seniority positions similar to Wagner's ranged roughly between $63,000 and $90,000 in 1995, 1996, and 1997. The Railroad calculated Wagner's monthly average in the 6 months prior to his March 1998 accident to be $4,520.32. Wagner's wages in January and February 1998 averaged $7,000 per month, which, if multiplied by 12, equals an annual amount of $84,000. The Railroad further calculated that as of July 10, 2000, Wagner had lost $130,034.54 in wages from the time of his March 1998 accident. The total annual contribution by the Railroad to all employees for fringe benefits, including medical and dental coverage, and

retirement contributions, is $25,602 per employee. The most recent union contract provided for 3½-percent wage increases every other year and a 3½-percent cost-of-living lump sum in alternate years. There was evidence presented at trial indicating that Wagner may be employable in the computer field in the future, although such employment would require him to finish additional schooling and then secure a job. At the time of Wagner's deposition in April 1999, he had not taken any action toward embarking on such a career.

Wagner testified at trial that he still had pain in his back every day, that his activities were substantially curtailed by his injury, and that he was often irritable. Wagner's wife, who filed for divorce during the pendency of the present litigation, testified by deposition. She testified that prior to the incident, Wagner was doing well and exercising regularly, that the family used to go fishing and camping, but that Wagner had not participated in these or various family activities involving sitting for long periods since the March 1998 incident. She testified that Wagner suffered constant back pain and often had leg pain. Both Wagner and his wife indicated that his injury had negative effects on their marriage and played a role in their marital difficulties.

The Railroad argues that since Wagner's evidence and argument to the jury supported a loss of income and future earnings that amounted to approximately $1,120,000, the jury must have awarded Wagner $780,000 for pain and suffering, which the Railroad concludes is excessive. The Railroad refers in its brief to a series of factual disputes in the evidence, including whether Wagner injured his back in the March 1998 incident, whether Wagner was properly motivated to return to work, whether Wagner made genuine efforts to mitigate his damages, whether Wagner was malingering, and whether Wagner's preexisting back condition, rather than the March 1998 incident, is the cause of his current back problems. The Railroad then concludes, based upon the "extreme inconsistencies" within Wagner's testimony and the "fact that the jury awarded nearly $800,000 of pain and suffering," that the jury rendered its verdict for reasons other than the facts of the present case, such as a desire to "punish a large corporate business that had plenty of assets to satisfy an exorbitant award." Brief for appellant at 39. It should be

noted that the verdict of $1.9 million was a general verdict and was not divided into economic or noneconomic elements.

[23] There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984). It is a matter left largely to the discretion of the jury, which saw the witnesses and heard the evidence. *Id.* In the present case, the jury obviously accepted as credible Wagner's version of significant damages stemming from the March 1998 incident. We cannot say that the jury abused its discretion in awarding damages for Wagner's pain, suffering, and disability.

The Railroad also asserts that there is no indication that the jury reduced the award to its present value. The jury was in fact instructed in instruction No. 4 as follows:

> If you decide that [Wagner] is entitled to recover damages for any future losses, then you must reduce those damages to their present cash value. You must decide how much money must be given to [Wagner] today to compensate him fairly for those future losses. Bear in mind that your duty to discount to present cash value applies to loss of future earnings or future medical expenses only. If you should find that [Wagner] is entitled to damages for future pain and mental suffering, then such award is not subject to any reduction to present value.

Neither party presented expert testimony on present value reductions. Nor does the Railroad offer any proof to substantiate its claim that the jury failed to follow this instruction. This argument is without merit.

In conclusion, there was evidence that Wagner sustained $1.2 to $2 million in economic losses, chronic and devastating pain and suffering, permanent disability, and future medical expenses potentially exceeding $30,000. Wagner's damages were substantial and were supported by substantial evidence which the jury found to be credible. The damages award of $1.9 million is certainly a large sum, but we do not find it so excessive as to shock the conscience. The amount of damages awarded bears a reasonable relationship to the elements of damages proved in this case, and we will not disturb it on appeal.

### 3. Various Evidentiary Rulings

The Railroad asserts that the district court erred in making certain evidentiary rulings that served to prejudice the Railroad under Neb. Rev. Stat. § 27-403 (Reissue 1995). The Railroad argues that the cumulative effect of these rulings created significant unfair prejudice against it and that it was thus deprived of a fair trial based on Wagner's efforts to prejudice the jury.

#### (a) Standard of Review

[24,25] We note that generally, the admissibility of evidence is a procedural matter governed by the law of the forum. *Crafton v. Union Pacific RR. Co.*, 7 Neb. App. 793, 585 N.W.2d 115 (1998). In Nebraska, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001).

[26-28] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Genetti, supra.* An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[29,30] Section 27-403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." For purposes of applying § 27-403, probative value is a relative concept which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case.

*Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *Id.*

(b) Accommodation of Restrictions

The Railroad asserts that the district court erred in allowing testimony as to the accommodation of restrictions or lack of accommodation made to employees other than Wagner. During Wagner's rebuttal case, the trial court allowed Anderson, Wagner's manager, to testify as to the efforts toward accommodating his own restrictions and those of other employees made by the Railroad. Since the time of Wagner's accident, Anderson himself has suffered a work-related injury and has not worked since June 1999. Anderson testified that he is represented by Wagner's attorney in his own claims against the Railroad. Over the Railroad's objection, Anderson was allowed to testify as to the Railroad's treatment of his own claims following his accident and its treatment of the claims and restrictions of several other employees. Anderson's testimony suggested a refusal by the Railroad to accommodate his own restrictions and those of several other employees, but the Railroad conducted a thorough cross-examination, eliciting testimony from Anderson further explaining the circumstances of each of these employee's injuries and casting the Railroad in a more favorable light.

The Railroad asserts that Anderson's testimony was not relevant because as a manager for the Railroad, he had different job duties from those of Wagner as an engineer, his injuries and restrictions were different from Wagner's, and the Railroad's ability to accommodate those restrictions would be different from its ability with respect to Wagner. The Railroad further argues that Anderson's testimony with regard to other employees of the Railroad was not relevant to this case as there was no showing as to the similarity between the circumstances of those employees and Wagner's circumstances. Finally, the Railroad argues that Anderson's testimony was only produced to inflame the jury.

It seems that testimony regarding the Railroad's treatment of other injured employees in their own attempts to return to work, regardless of their positions and job duties, has some bearing on whether the Railroad's attempts, or lack thereof, to accommodate

Wagner's restrictions were reasonable. Upon our review of the record, we see nothing in Anderson's testimony to unfairly prejudice the Railroad by suggesting to the jury an improper basis on which to base its decision. We find no abuse of discretion in the district court's determination as to the relevancy and admissibility of Anderson's testimony regarding the Railroad's treatment of his requests for accommodation of restrictions following his work-related injury and the Railroad's treatment of requests by other employees.

(c) Vocational Rehabilitation Services in Other Cases

The Railroad asserts the district court erred in allowing testimony relating to the Railroad's failure to offer or provide vocational rehabilitation services to two other plaintiffs following their jury verdicts against the Railroad. The Railroad argues that allowing testimony about or references to these other cases was prejudicial to it, of no relevance, and only adduced to inflame the jury and create unfair prejudice.

Apparently, the Railroad is complaining of testimony elicited from its vocational rehabilitation specialist, John Janzen, during his cross-examination by Wagner's attorney. A review of Janzen's testimony reveals that he was allowed to testify on cross-examination, over the Railroad's relevancy objection, that in a previous lawsuit, he was asked at trial if he would be willing to provide rehabilitation services to the plaintiff, to which he essentially answered in the affirmative. Janzen also testified that he did not have any contact with yet another plaintiff following trial. Janzen was then asked, "[W]hatever you've done . . . after trial, the [R]ailroad doesn't pay for your services, is that true, in this area?" Janzen replied that that was a question that should be asked of a Railroad representative. On redirect, Janzen testified that he had been asked to provide rehabilitation services for two particular plaintiffs, that those individuals were not cooperative with his efforts to provide service, and that those individuals were represented by the same attorney representing Wagner at trial in the present case.

Testimony regarding the extent of services offered by Janzen in other cases has some bearing on whether Janzen's offer of rehabilitation services in the present case was genuine. We see

nothing in this testimony indicating what the outcomes of those other cases were, something that could have unfairly prejudiced the Railroad by suggesting to the jury an improper basis on which to base its decision, nor does the Railroad direct us to any place in the record where such testimony may be found. We find no abuse of discretion in the district court's determination as to the relevancy and admissibility of Janzen's testimony on cross-examination regarding his services offered in these other cases.

(d) Mitigation of Damages

The Railroad next asserts that the district court erred in refusing the Railroad's evidence as to offers of vocational assistance and jobs in locations other than the Bill-Casper-Douglas area. Following the completion of Wagner's evidence, the district court overruled the Railroad's motion for directed verdict. Thereafter, Wagner filed a motion in limine seeking an order from the court precluding the Railroad from asking any questions or offering any evidence of any potential job openings for Wagner that may exist outside the Bill-Casper-Douglas area. Wagner asserted that the law on mitigation precluded any evidence concerning jobs that would require him to move from his area of residence. Wagner asserted that the Railroad should be limited to showing job openings in Wagner's geographical area, citing *Wilson v. Union Pacific R. Co.*, 56 F.3d 1226 (10th Cir. 1995), and *Coleman v. City of Omaha*, 714 F.2d 804 (8th Cir. 1983). This motion was sustained by the district court. Upon the completion of all the evidence, the district court denied Wagner's motion for directed verdict regarding the issue of mitigation. Jury instructions contained in the record indicate that, among other things, the jury was instructed that while Wagner was required to take reasonable steps to minimize his damages, he was not required to move from his current home in the Bill-Casper-Douglas area to minimize or reduce his damages.

In *Coleman, supra*, an age discrimination case, the plaintiff was a deputy police chief employed by the city. The Eighth Circuit considered, among other issues on appeal, whether the city had met its burden with respect to proving the plaintiff's failure to mitigate damages. The court stated that the defendant had to "show that the plaintiff failed to use reasonable care and

diligence and that there were jobs available which the plaintiff could have discovered and for which the plaintiff was qualified." 714 F.2d at 808. The court noted the plaintiff's testimony that he had not sought alternative employment, as well as the city's evidence that several jobs for which the plaintiff was qualified were available, including positions as police chief in two small Nebraska towns and a vice-presidency with an Omaha private security firm. The court found that the evidence presented with regard to the two police chief positions was inadequate to meet the city's burden. The court stated that "[b]oth jobs would have required that [the plaintiff] leave Omaha, his home for most of his life. [The plaintiff] cannot be required to move from his home 'in order to reduce damages caused by the [defendant's] unlawful acts.'" *Id.* After considering the evidence presented with regard to the Omaha position, the court concluded that the evidence was sufficient to present the question of mitigation to the jury. See, also, *Wilson, supra* (FELA case citing *Coleman, supra*, with approval in conjunction with its holding that plaintiff's general failure to seek employment for 18 months before trial did not alone justify mitigation instruction because defendant must also show that appropriate jobs were available).

In the present case, the record shows that while Wagner was a party to a pending divorce, his wife and minor children lived in Douglas, and that Wagner maintained a regular relationship with his children. The record shows that Wagner had moved to Wyoming originally from Chicago and was perhaps contemplating returning to Chicago; however, there is nothing definite about this in the record. Regardless of whether Wagner was contemplating such a move, we can find no error in the district court's ruling limiting the evidence in regard to the availability of jobs, either with the Railroad or elsewhere, to those jobs in the Bill-Casper-Douglas area.

The Railroad argues that it should have been allowed to adduce evidence as to information about available jobs that was provided by Janzen and the lack of any response by Wagner. Contrary to the Railroad's assertion, and somewhat at odds with the above ruling by the district court, our review of the record leads us to conclude that the Railroad was in actuality allowed to adduce such evidence. The Railroad produced evidence showing that it had

communicated to Wagner numerous job openings in various locations. Janzen was allowed to testify that upon being hired by the Railroad to provide vocational rehabilitation services to Wagner, Janzen sent Wagner a letter indicating a willingness to meet with him and provide rehabilitation services, and that he received no response from Wagner. Janzen was allowed to testify about 13 letters that he sent to Wagner concerning job openings at various locations, which letters were also received into evidence over Wagner's numerous relevance objections. The record also clearly shows that the Railroad was allowed to show the jury that Wagner did not respond to any of these letters. Accordingly, to the extent that Janzen's testimony was limited by the trial court's ruling on Wagner's motion in limine, we find no abuse of discretion by the trial court or unfair prejudice to the Railroad.

(e) Conclusion Regarding Evidentiary Rulings

We find nothing in the above evidentiary rulings to unfairly prejudice the Railroad. The district court did not abuse its discretion in making the rulings complained of by the Railroad, as the evidence either was relevant and properly admitted or was properly excluded based on a valid interpretation of current case law. The Railroad's assignment of error is without merit.

4. Jury Instruction

[31-33] The Railroad asserts that the district court erred in instructing the jury that Wagner was not required to move from his current home to minimize his damages. Whether a jury instruction given by a trial court is correct is a question of law. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Id.* 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. *Id.*

As indicated above, the district court denied Wagner's motion for directed verdict regarding the issue of mitigation. The jury instruction No. 4 states in part as follows:

> If you assess damages, then you must consider the [Railroad's] claim that [Wagner] failed to take reasonable

> steps to minimize his damages. The [Railroad] is not liable for any damages that could have been prevented if [Wagner] had done so. The [Railroad] has the burden of proving that [Wagner] failed to take reasonable steps to minimize his damages. However, [Wagner] is not required to move from his current home (Bill-Douglas-Casper, Wyoming area) to minimize or reduce his damages caused by the accident alleged.

[34] We note that the Railroad failed to make any objection to this instruction at the time of the instruction conference in this case and failed to tender an alternative instruction on the subject. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). Nonetheless, based on our review above, we conclude that the district court did not err in giving the instruction complained of in the present case as it correctly stated the law with respect to Wagner's duty to mitigate, was not misleading, and adequately covered the issues. See *id.* (holding that jury instruction is not error if, taken as whole, it correctly states law, is not misleading, and adequately covers issues).

### 5. Motion for New Trial

[35] Finally, the Railroad asserts that the district court erred in overruling the Railroad's motion for new trial. The Railroad assigns this as error, but does not argue it specifically in its brief. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001). However, we take all the arguments made by the Railroad on the above issues to relate to its desire for a new trial.

[36-38] 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. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* A motion

for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001).

Given our rulings as indicated above on the Railroad's other assignments of error, we cannot say that the district court abused its discretion in denying the Railroad's motion for new trial.

## V. CONCLUSION

For the above-stated reasons, we find that the district court did not err in granting Wagner's motion for summary judgment on the issue of the Railroad's liability under the BIA, nor did the district court abuse its discretion in denying the Railroad's motion for new trial.

The amount of damages awarded in this case, while certainly high, bears a reasonable relationship to the elements of damages proved, and we will not disturb the award on appeal.

The district court did not abuse its discretion in making the evidentiary rulings complained of by the Railroad, as the evidence either was relevant and properly admitted or was properly excluded based on the district court's valid interpretation of current case law.

Finally, we conclude that the district court did not err in giving the jury instruction complained of in the present case, as it correctly stated the law with respect to Wagner's duty to mitigate, was not misleading, and adequately covered the issues.

AFFIRMED.

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OMAHA CONSTRUCTION INDUSTRY PENSION PLAN AND OMAHA CONSTRUCTION INDUSTRY HEALTH AND WELFARE PLAN, APPELLANTS, V. CHILDREN'S HOSPITAL, APPELLEE.

642 N.W.2d 849

Filed April 2, 2002. No. A-00-1031.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all 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.

2. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
3. **Pleadings: Appeal and Error.** The determination of whether a cause of action has been stated in the petition is a question of law regarding which the appellate court has an obligation to reach a conclusion independent of that of the lower court.
4. **Mechanics' Liens: Trust Funds: Assignments.** If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreements, is closely analogous to that of an assignment.
5. **Mechanics' Liens: Claims.** The object of a mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Ronald L. Comes and Aaron A. Clark, of McGrath, North, Mullin & Kratz, P.C., for appellants.

Wayne J. Mark and Mary M. Carnazzo, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

INBODY, Judge.

## INTRODUCTION

The Omaha Construction Industry Pension Plan and the Omaha Construction Industry Health and Welfare Plan (the Plans) appeal from the Douglas County District Court's dismissal of their amended petition for failure to state a cause of action. For the reasons recited herein, we reverse, and remand for further proceedings.

## STATEMENT OF FACTS

Children's Hospital (Children's) and Kiewit Construction Company entered into a real estate improvement contract for the improvement of land owned by Children's. Kiewit Construction subcontracted with Borchman Construction Company (Borchman) to construct certain improvements upon land owned by Children's. Borchman hired several union members to perform the work, and Borchman, as part of the total compensation to be

paid to the union employees, was responsible for paying contributions to the Plans at a specified rate. The Plans are pension and health and welfare plans which represent members of various unions, including employees of Borchman.

Borchman and the union workers completed the work on Children's property around October 11, 1998. Although Borchman calculated and reported the hours worked by the union members to the Plans, Borchman did not make the required contributions to the Plans due to financial difficulties, which ultimately led Borchman to file for bankruptcy.

On December 23, 1998, the Plans filed a construction lien against the Children's property in the amount of $9,128.40, which is the amount of the unpaid contributions. The Plans filed a petition to foreclose the lien on November 18, 1999, which was amended on March 10, 2000. Children's filed a demurrer, which was sustained by the district court, and upon the court's finding that the petition could not be amended to state a cause of action, the amended petition was dismissed. The Plans have timely appealed to this court.

## ASSIGNMENTS OF ERROR

The Plans assign and argue that the district court erred (1) in finding that the amended petition did not state a cause of action and in sustaining Children's demurrer and, in the alternative, (2) in concluding that the amended petition could not be further amended to state a cause of action.

## STANDARD OF REVIEW

[1,2] When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all 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. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001).

[3] The determination of whether a cause of action has been stated in the petition is a question of law regarding which the appellate court has an obligation to reach a conclusion

independent of that of the lower court. *Nebraska Beef v. Universal Surety Co.*, 9 Neb. App. 40, 607 N.W.2d 227 (2000).

## ANALYSIS

The Plans contend that the district court erred in finding that the amended petition failed to state a cause of action. In order to make this determination, we must address (1) whether the union employees of a subcontractor who furnished labor during construction upon real property may file a construction lien against the property owner; (2) if the union employees of the subcontractor may file a construction lien, do the Plans have standing to file a construction lien on behalf of the union employees of the subcontractor against the property owner to recover unpaid contributions to the Plans by the subcontractor; and (3) if the Plans have standing, did their petition state a cause of action.

*Right of Union Employees to File Lien.*

The basis for this action is the premise that trustees are assignees of the subcontractor's employees who have the right to file a construction lien for nonpayment of wages by the subcontractor. Thus, the first question we must address is whether an employee of a subcontractor may file a lien against the property owner. The Nebraska Construction Lien Act, Neb. Rev. Stat. §§ 52-125 through 52-159 (Reissue 1998), is an almost verbatim version of article 5 of the Uniform Simplification of Land Transfers Act (Uniform Act). Although the Nebraska Legislature did not adopt the introductory comments of the Uniform Act, we nonetheless look to them in order to understand the Nebraska Construction Lien Act. For purposes of our discussion, we note that the drafters of the Uniform Act, like the Legislature, adopted the title "Construction Liens" in lieu of the synonymous term "Mechanics' Liens." Article 5, 14 U.L.A. 308 (1990). See, also, § 52-125.

The introductory comments to the Uniform Act indicate that it was passed in order to promote uniformity among the mechanic's lien laws of the various states, and the act allows any person, no matter how far removed from the contracting owner, to file a lien for services or materials furnished pursuant to a real estate improvement contract. Pursuant to the Nebraska Construction Lien Act, a person who furnishes services or materials under a

real estate improvement contract may file a construction lien to secure payment of the contract price. § 52-131. There is no language which prohibits employees of a subcontractor from filing a construction lien. The only requirement is that the claimant, or his or her successor in interest, must have furnished services or materials pursuant to a real estate contract.

Only a few states have reported cases on this issue, and through our examination, we have ascertained that only Hawaii treats subcontractors in a manner similar to Nebraska. Hawaii's mechanic's lien law provides that "[a]ny person . . . furnishing labor or material in the improvement of real property shall have a lien . . . for the price agreed to be paid." Haw. Rev. Stat. § 507-42 (1993). Similarly, the Nebraska Construction Lien Act provides that "[a] person who furnishes services or materials pursuant to a real estate improvement contract has a construction lien, only to the extent . . . to secure the payment of his or her contract price." § 52-131.

The Plans cite *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995), in support of their contention that the Borchman employees could file a lien on their own behalf and that thus, the Plans could be their assignees. In *Blue Tee Corp.*, CDI was the general contractor for the construction of a store at a shopping mall. After CDI accepted the bid of a company to provide structural steel for the project, that company ordered and received the steel from Blue Tee. *Id.* The steel was fabricated offsite, and an erection company installed the fabricated steel on the construction site. *Id.* Blue Tee filed a construction lien on the property. *Id.* The Nebraska Supreme Court held that under the Nebraska Construction Lien Act, a supplier to a subcontractor is allowed to file and enforce a lien against the property owner, but a supplier to a supplier or materialman is not allowed to file a lien against the property owner. *Id.*

In the instant case, Borchman was hired as a subcontractor to perform construction on Children's property. Borchman in turn hired union employees to perform the work upon Children's property. Under *Blue Tee Corp., supra*, although a supplier to a supplier or materialman could not file a lien, a supplier to a subcontractor could. We conclude that there is substantially no difference in the relationship of the union employees of a subcontractor to

the property owner than the relationship between a supplier to a subcontractor and the property owner. Thus, under the analysis in *Blue Tee Corp., supra*, the Borchman employees are not denied the right to file a lien under the Nebraska Construction Lien Act.

*Standing of Plans.*

Next, we must address whether the Plans have standing to file and enforce a lien on behalf of the employees. Other jurisdictions which have confronted this same type of action have uniformly held that health and welfare and pension plans may assert and enforce a lien on behalf of employees-beneficiaries who contributed labor or material during construction. See, *United States v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957); *Hawaii Carpenters' Trust Funds v. Aloe Development Corp.*, 63 Haw. 566, 633 P.2d 1106 (1981); *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692 (Iowa 1980); *National Elec. Indus. v. Beth. Steel*, 296 Md. 541, 463 A.2d 858 (1983).

Despite the fact that some of these cases were governed by the federal law known as the Miller Act, 40 U.S.C. §§ 270a through 270d (1994), they are nonetheless persuasive authority, because the purpose behind the Miller Act and the purpose behind the Nebraska Construction Lien Act are the same, which is to protect those who furnish services or materials during construction. Further, the Miller Act and the Nebraska Construction Lien Act are also similar in that each allows persons who have furnished labor or materials under a real estate improvement contract to assert a lien. See, § 270b(a); § 52-131(1). Additionally, the Miller Act requires a contractor to obtain a bond from a surety company, and the Nebraska Construction Lien Act permits the property owner or the prime contractor to obtain a bond from a surety company. See, § 270a; § 52-141. The Miller Act provides that "[b]efore any contract for the construction . . . is awarded to any person, such person shall furnish to the United States [a] performance bond [and a] payment bond . . . for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract . . . ." § 270a. Under the Nebraska Construction Lien Act, the surety company is obligated, to the extent of the penal sum of the bond, to pay all sums due to construction lien claimants other than the prime contractor for

services and materials supplied pursuant to the contract under which the lien would otherwise arise. § 52-141. Both are using a surety bond to protect the interest of the property owner from being subject to a construction lien.

[4] In *United States v. Carter, supra*, Carter entered into a contract with the United States for the construction of various buildings at Air Force bases in California. Although Carter was obligated by collective bargaining agreements negotiated between the local union which represented construction workers and several associations of employers to pay the trustees of a health and welfare fund contributions based upon the hours each employee worked, it failed to make the required contributions to the fund. The U.S. Supreme Court stated that the Miller Act was intended to have a liberal construction in order to effectuate Congress' intent to protect persons who supplied labor and materials for the construction of federal buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. *Id.* The Court rejected an argument that the trustees were not persons who furnished labor or material and thus were not entitled to recover, stating:

> If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment.

353 U.S. at 219-20.

In *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692 (Iowa 1980), a health, welfare, and pension trust filed public improvement liens against a surety after subcontractors on public improvement projects failed to make required contributions to the trust based on the hours worked by the subcontractor's employees. The Supreme Court of Iowa held that the employees, by their labor performed for the subcontractors, earned the right to have contributions paid to the trusts and that the trusts could make claims for unpaid sums which subcontractors were obligated to pay for their employees.

Further, the Hawaii Supreme Court and the Maryland Court of Appeals have reached the same result in cases involving trusts actions against property owners. In *Hawaii Carpenters' Trust Funds v. Aloe Development Corp.*, 63 Haw. 566, 633 P.2d 1106 (1981), the Supreme Court of Hawaii held that the trustees of an employee benefit trust fund could, in order to enforce the employer's obligation to make contributions to the fund, claim a mechanic's lien on real property that was improved through the employees' labor. The court also determined that the agreed-upon price for the labor of the employees-beneficiaries would not be deemed paid in full until the trust fund contributions were received. *Id.*

In *National Elec. Indus. v. Beth. Steel*, 296 Md. 541, 463 A.2d 858 (1983), a subcontractor which was hired by a general contractor to perform electrical work failed to make required contributions to health, welfare, pension, and annuity funds based upon the number of hours worked by each employee. The funds sued the property owner to enforce a mechanic's lien on the portion of the property where the subcontractor's employees had performed work. The Maryland Court of Appeals held that the trust funds had standing to file a petition on behalf of individual employees and also had standing to file petitions as assignee of the individual employees.

In sum, the aforementioned cases have held that health, welfare, and pension funds may assert and enforce a lien on behalf of the employees-beneficiaries who contributed labor or material during construction. Based upon our examination of the jurisprudence from other jurisdictions and our reading of the Nebraska Construction Lien Act, we determine that the Plans may, on behalf of the union employees, assert a construction lien against Children's.

*Stating Cause of Action.*

After determining that the Plans have standing to assert and enforce a lien on behalf of the union employees, we turn to the issue of whether the Plans state a cause of action in their petition.

When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all 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. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). Under the Nebraska Construction Lien Act, a claimant is any person who, under the act, has a right to a lien upon real estate, including his or her successor in interest. § 52-127(1). A person who furnishes services or materials under a real estate improvement contract has a construction lien only to the extent to secure payment of the contract price. § 52-131. The contract price is the amount agreed upon by the contracting parties for the performance of services and furnishment of materials. § 52-127(2).

In the present case, the Plans alleged in their petition that Borchman was hired as a subcontractor to make various improvements upon land owned by Children's; Borchman then hired various union employees and was bound by a collective bargaining agreement to make contributions as part of the total compensation to the Plans based upon the number of hours worked by each employee; Borchman failed to make these contributions, and the Plans, based upon the authority conferred upon them to exercise and enforce the rights of the union members including the right to take any "legal action to enforce payment" of unpaid contributions, filed a construction lien and sought to foreclose upon the construction lien.

In the present case, there is no express contract between Children's and the union employees. However, in *Sorenson v. Dager*, 8 Neb. App. 729, 601 N.W.2d 564 (1999), the court held that where a property owner hired a general contractor to build the property owner's home and the general contractor hired a subcontractor to frame the home, the subcontractor could assert and foreclose a lien against the property owner in order to recover the reasonable value of the labor and materials furnished by his crew during construction. Further, § 52-136(1)(b) provides that "the lien of a claimant other than a prime contractor is for the amount unpaid under the claimant's contract." Thus, because the Borchman employees are lien claimants other than the prime contractor who have not received the full amount of their contract price, they may file a lien under the Nebraska Construction Lien Act.

[5] The object of a mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995). Therefore, under a liberal construction of the Nebraska Construction Lien Act, we find that the Plans stated sufficient facts to state a cause of action and hold that the district court erred in sustaining Children's demurrer based upon a finding that the Plans failed to state a cause of action.

## CONCLUSION

For the reasons stated above, we find that the district court erred in finding that the Plans did not state a cause of action. Therefore, we reverse the district court's finding and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## FRANKIE LEVI COLE, APPELLANT, V. SCOTT ISHERWOOD ET AL., APPELLEES.

642 N.W.2d 524

Filed April 9, 2002. No. A-00-665.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect.
3. **Jurisdiction: Appeal and Error.** It is not only within the power, but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
5. **Political Subdivisions Tort Claims Act.** The requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing duties within the scope of employment.
6. **Constitutional Law: Civil Rights: Pleadings.** Under federal law, only two factual allegations are necessary to state a cause of action under 42 U.S.C. § 1983 (Supp. V

1999): (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) the deprivation occurred under color of law.

7. **Administrative Law: Civil Rights: Prisoners: Tort Claims Act.** Where a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under 42 U.S.C. § 1983 (Supp. V 1999), the Prison Litigation Reform Act requires that the prisoner must exhaust his or her administrative remedies before bringing such action. Included in those administrative remedies is the ability to file a claim under the State Tort Claims Act.
8. **Employer and Employee: Discrimination.** Neb. Rev. Stat. § 20-148 (Reissue 1997) provides a private cause of action for private acts of discrimination by private employers and does not apply to individuals acting in their capacities as public officials.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Frankie Levi Cole, pro se.

Don Stenberg, Attorney General, and Jennifer M. Amen for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

## INTRODUCTION

Frankie Levi Cole appeals from an order of the district court for Lancaster County filed June 12, 2000, sustaining the defendants' demurrer to Cole's third amended petition and dismissing Cole's action. The defendants are Scott Isherwood, Michelle D. Williams, Sgt. Chad J. Haney, William Curtis, John Rudgis, Dan Schmuecker, Dr. John Cherry, Frank X. Hopkins, Harold Clarke, and Karen J. Foster. For the reasons set forth below, we affirm.

## BACKGROUND

At all times relevant to this action, Cole has been in the custody of the Nebraska Department of Correctional Services (DCS). In October 1998, Cole was assigned a new cellmate who smokes. Cole alleged that his cellmate smoked in their cell in violation of DCS rules, causing Cole to experience emphysema-like symptoms. Cole claims that because of this, he wrote an informal grievance to Isherwood, the unit manager in Cole's housing unit, requesting a cell change. The record shows that Cole's request was denied. Cole alleges that he then wrote to Hopkins, the warden of the Nebraska State Penitentiary, about the problem and

subsequently to Karen Shortridge, the associate director of DCS, acting in place of Clarke, the director of DCS. Cole alleges that Shortridge also denied his request for a cell change.

Cole claims that during this same time period, he told DCS that he had tested positive for the tuberculosis virus and that his condition would be adversely affected by secondhand smoke exposure. Cole alleges that DCS medical personnel, under Cherry's direction, refused to acknowledge the risk to Cole's health.

On January 22, 1999, Cole and his cellmate got into an altercation. Cole alleges that his cellmate attacked him, jamming his thumb in the cell door and breaking two of Cole's personal items. Cole alleges that he then wrote an interview request, known as a kite, to the medical department requesting that a doctor examine his hand. Cole alleges that a doctor did not examine his hand until January 26. X rays were taken of Cole's hand on January 28, which showed a broken bone in Cole's hand.

On February 1, 1999, Cole saw an orthopedic doctor who recommended surgery, which was performed on February 11. Cole claims that during this time period, he notified Hopkins on more than one occasion that DCS employees were failing to promptly treat his hand.

On February 5, 1999, a second altercation occurred between Cole and his cellmate. Subsequently, Cole was examined by Cherry and the DCS medical staff and received stitches for a cut to his eye. Cole alleges that the doctor who inserted the stitches was negligent, causing Cole to be disfigured. Subsequently, a disciplinary hearing was held concerning Cole's second altercation with his cellmate, and disciplinary sanctions were imposed against Cole.

Cole alleges that after surgery, his hand remained in a cast until February 27, 1999. Cole claims that prior to the removal of the cast, one of the pins placed in his hand during surgery broke through his skin causing an infection. Cole claims that this happened because of DCS' failure to assign him the lower bunk, even after he made this request to Foster, a housing unit manager. Cole claims that the effort required to get up to the top bunk caused too much stress on his cast. Additionally, Cole states that on January 22, he received a work assignment from Curtis, which he was incapable of performing because of his thumb injury.

Because of Cole's nonperformance, Curtis issued a misconduct report. A disciplinary hearing was held on March 3. After the hearing, Schmuecker and Rudgis, disciplinary committee members, imposed a 14-day room restriction for Cole's behavior.

On July 2, 1999, Cole filed suit against the defendants for the above allegations. The defendants demurred to Cole's initial petition as well as Cole's first and second amended petitions. The subject of this action is Cole's third amended petition, which he filed on April 3, 2000. In that petition, Cole brought suit against the defendants in their individual capacities seeking monetary damages and in their official capacities to the extent that prospective injunctive relief might apply. Cole brought his action pursuant to 42 U.S.C. § 1983 (Supp. V 1999), Neb. Rev. Stat. §§ 25-536 and 24-302 (Reissue 1995), and Neb. Const. art. I, § 13. Cole alleges that the defendants violated his rights under both federal and state law by placing him in a cell with an inmate who smokes and is incarcerated for a violent crime. Cole claims that his rights were also violated by the altercations that arose between him and his cellmate and by the subsequent medical treatment he received for his injuries resulting from those altercations.

On May 8, 2000, the defendants filed an amended demurrer to Cole's third amended petition, stating that the court lacked jurisdiction over Cole's claims and that Cole's petition does not state facts sufficient to constitute a cause of action.

On May 24, 2000, after a telephonic hearing, the trial court issued an order sustaining the defendants' demurrer on all grounds and dismissed Cole's petition. The court found that it was reasonably unlikely that Cole could amend his petition to correct the grounds stated in the defendants' demurrer. Cole appeals.

## ASSIGNMENTS OF ERROR

On appeal, Cole alleges that the trial court erred in sustaining the defendants' demurrer, finding both that he failed to state an action against the defendants in their individual capacities and that it lacked jurisdiction to hear Cole's claims.

## STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well

pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

[2] When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Id.*

## ANALYSIS

On appeal, Cole alleges that the trial court erred in sustaining the defendants' demurrer, finding both that he failed to state an action against the defendants in their individual capacities and that it lacked jurisdiction to hear Cole's claims.

[3,4] It is not only within the power, but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999). When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Id.*

Cole claims that the trial court erred in finding that it lacked jurisdiction over his claims because he had not properly complied with the State Tort Claims Act (Act).

Neb. Rev. Stat. § 81-8,209 (Reissue 1996) states:

> The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state, any state agency, or any employee of the state on any tort claim except to the extent, and only to the extent, provided by the State Tort Claims Act. The Legislature further declares that it is its intent and purpose through such act to provide uniform procedures for the bringing of tort claims against the state or an employee of the state and that the procedures provided by such act shall be used to the exclusion of all others.

Cole brought his action against the defendants in their individual capacities for monetary damages and in their official capacities concerning prospective injunctive relief. Cole contends that because he sued the defendants in their individual capacities, his claims do not fall under the Act. Specifically, Cole

points to Neb. Rev. Stat. § 81-8,210(4) (Reissue 1996) which defines a tort claim as:

> Tort claim shall mean any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death but shall not include any claim accruing before January 1, 1970, *and any claim against an employee of the state for money only on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of the employee while acting within the scope of his or her employment occurring on or after August 25, 1989*[.]

(Emphasis supplied.)

Cole erroneously interprets § 81-8,210(4) to read that any claim against a state employee occurring on or after August 25, 1989, is not included as a tort claim under the Act. Rather, we read the definition of a tort claim to include claims against the State for monetary damages accruing on or after January 1, 1970, and claims against a state employee for monetary damages accruing on or after August 25, 1989.

In 1989, the Legislature added to § 81-8,210(4) the language emphasized above, "any claim against an employee of the state . . . while acting within the scope of his or her employment occurring on or after August 25, 1989." See 1989 Neb. Laws, L.B. 541.

The Introducer's Statement of Intent for L.B. 541 reads:

> The purpose of LB 541 is to require that any claim filed against an employee of the State of Nebraska be subject to and controlled by the provisions of the State Tort Claims Act.
>
> Current law permits a litigant to file action against a state employee without naming the State as party in the claim. If processed in this manner, the litigant is not bound by the provisions of the State Tort Claims Act. Consequently, the two-year statute of limitations is not applicable and the case

> may be decided by a jury instead of a judge. The legislative review of an award exceeding $50,000 is also denied. Once a judgment is awarded, [t]he State's statutory duty of indemnity requires it pay the judgment on behalf of the employee.
>
> LB 541 will eliminate circumvention of the State Tort Claims Act while preserving assurances to employees that they are not personally liable while performing duties as state workers.

Committee on Business and Labor, 91st Leg., 1st Sess. (Feb. 27, 1989).

[5] In addition to the legislative history above, we have held that the requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing duties within the scope of employment. *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001). See, also, *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995). In the instant case, it is clear from the allegations in Cole's petition that all of Cole's claims against the various defendants arose within the scope of the defendants' employment. Therefore, Cole's claims fall within the Act, and the requirements of that Act apply.

Neb. Rev. Stat. § 81-8,213 (Reissue 1996) states, in relevant part, "[n]o suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim . . . ."

The record shows that Cole initially filed suit against the defendants on July 2, 1999. In his third amended petition, Cole claims that he filed his claim with the State Claims Board on March 31 and that his claim was denied on August 11. Clearly then, Cole did not meet the mandatory requirement set forth in § 81-8,213, because he filed suit in district court prior to the State Claims Board's final disposition of his claim. Given this fact, the district court correctly granted the State's demurrer regarding Cole's claims under the Act. Because Cole filed his petition prior to the denial of his claims by the State Claims Board, the district court lacked jurisdiction to hear Cole's claim under the Act. Given that the district court was without jurisdiction, this court is also without jurisdiction to consider this claim.

[6] Nonetheless, there remains a question as to whether Cole has a valid cause of action against the defendants under § 1983. Under federal law, only two factual allegations are necessary to state a cause of action under § 1983: (1) a defendant's deprivation of a plaintiff's right secured by the Constitution and laws of the United States and (2) the deprivation occurred under color of law. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

[7] The district court found that Cole had met this liberal pleading standard, but failed to allege that he had exhausted his administrative remedies prior to filing an action pursuant to § 1983. In his third amended petition, Cole sought both monetary damages and injunctive relief. The Nebraska Supreme Court has concluded that where a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under § 1983, the Prison Litigation Reform Act requires that the prisoner must exhaust his or her administrative remedies before bringing such action. *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999). Included in those administrative remedies is the ability to file a claim under the Act. See 68 Neb. Admin. Code, ch. 2, § 005.01 (1994).

In *Pratt v. Clarke*, the Nebraska Supreme Court specifically held that the remedies of the Act must be exhausted prior to the bringing of an action under § 1983. In the instant case, Cole failed to exhaust his remedies under the Act because he filed his claim under the Act in an untimely manner. Because Cole failed to exhaust his remedies under the Act, Cole may not bring an action under § 1983. Therefore, the district court lacked jurisdiction to hear Cole's § 1983 claims and correctly granted the defendants' demurrer based on this fact.

Last, Cole claims that the district court erred in finding that Neb. Rev. Stat. § 20-148 (Reissue 1997) does not apply to the instant case to grant Cole relief. Section 20-148(1) states:

> Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil

action or other proper proceeding for redress brought by such injured person.

[8] We note that although Cole included a claim under § 20-148 in his previous petitions, Cole did not include such a claim in his third amended petition. Even if a liberal construction of Cole's third amended petition includes a claim under § 20-148, in *Cole v. Clarke*, 8 Neb. App. 614, 598 N.W.2d 768 (1999), we stated that § 20-148 provides a private cause of action for private acts of discrimination by private employers and does not apply to individuals acting in their capacities as public officials. Therefore, the trial court did not err in concluding that Cole does not have a cause of action under § 20-148.

## CONCLUSION

For the reasons set forth above, we conclude that the trial court lacked jurisdiction to hear either Cole's claims under the Act or Cole's § 1983 claims. Additionally, Cole has no cause of action under § 20-148. Accordingly, the district court properly sustained the defendants' demurrer on lack of jurisdiction. The district court's order is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
JOHN L. CURLILE, APPELLANT.
642 N.W.2d 517

Filed April 9, 2002. No. A-01-616.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction on appeal, it is not the duty of the appellate court reviewing the defendant's conviction to 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 the defendant's conviction must be affirmed if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. ____: ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for the appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Judgments: Appeal and Error.** The findings of the court have the effect of a jury verdict and cannot be disturbed by an appellate court unless they are clearly wrong.

4. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law can an appellate court set aside a guilty verdict as being unsupported by evidence beyond a reasonable doubt.
5. **Criminal Law: Words and Phrases.** A threat may be written, oral, physical, or any combination thereof.
6. ____: ____. To threaten is commonly understood to mean promising punishment, reprisal, or distress.
7. **Criminal Law.** Except in extreme circumstances, terroristic threats cases will largely be determined by the context of the interaction between the involved people.
8. **Intent: Words and Phrases.** A direct expression of intention by the actor is not required because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
9. **Intent: Circumstantial Evidence: Proof.** Whether a defendant possesses the requisite state of mind is a question of fact and may be proven by circumstantial evidence.
10. **Criminal Law.** To aid in determining the innocence or guilt of a defendant, a fact finder is allowed to consider the defendant's voluntary flight immediately or soon after the occurrence of a crime.

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

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

John L. Curlile appeals from his convictions and sentences on charges of making a terroristic threat and using a weapon in the commission of a felony. The charges arose out of a situation wherein Curlile, while parked in a vehicle outside a convenience store, waved a firearm up and down and shouted in the direction of an employee inside the convenience store. On appeal, Curlile alleges there was insufficient evidence to convict him of the charged crimes. We cannot find that the trial court was clearly wrong in finding the evidence sufficient, and we affirm.

## II. BACKGROUND

The record in this case indicates the following undisputed facts:

Karen Ann Fanda was working as a cashier at a Gas 'N Shop in Grand Island, Nebraska, at approximately 7:30 p.m., on August 11, 2000, when she looked up and observed Curlile outside the store window. Curlile was seated in his car and was yelling in Fanda's direction while waving a gun up and down. After testifying that it "looked like" Curlile was looking at her, Fanda described that she felt "very scared," "ducked down behind the counter," pulled the store alarm, and yelled to another female coworker who was in the store to "get down."

Sgt. Dale Hildebrand, of the Grand Island Police Department, was dispatched to respond to the incident. Hildebrand was informed by dispatch that a man, later identified as Curlile, had waved or pointed a gun toward the business and then drove off. Hildebrand was informed that Curlile was traveling eastward on U.S. Highway 30 in an older model Chevelle- or Malibu-type vehicle, black in color, with "red flames" on the side. Hildebrand was traveling westward on Highway 30 when he observed the described car pass him, heading in the opposite direction. Hildebrand "jumped the island and got in behind [Curlile]." Curlile did not stop his vehicle immediately, but drove "half a mile to the next turn-off [and] continued on over the Second Street overpass" before turning onto Grant Street and finally bringing his vehicle to a stop.

A "felony traffic stop" was then conducted of Curlile, with a second police officer providing backup. Curlile was the sole occupant of the stopped car. A .38-caliber revolver and six rounds of ammunition were recovered in a search of the car. Two of the rounds were located lying beside the gun.

On October 31, 2000, the State filed an information in the district court for Hall County charging Curlile with one count of making a terroristic threat, under Neb. Rev. Stat. § 28-311.01 (Reissue 1995), and one count of using a deadly weapon in the commission of a felony, under Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). After a bench trial, the court found the evidence sufficient to support verdicts of guilty on both counts and imposed consecutive sentences of 1 to 2 years' imprisonment for terroristic threats and 2 to 3 years' imprisonment for use of a deadly weapon. Curlile appeals.

## III. ASSIGNMENT OF ERROR

On appeal, Curlile claims that there is insufficient evidence to support his convictions.

## IV. ANALYSIS

### 1. Standard of Review

[1-4] When reviewing a criminal conviction on appeal, it is not the duty of the appellate court reviewing the defendant's conviction to 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 the defendant's conviction must be affirmed if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Long*, 8 Neb. App. 353, 594 N.W.2d 310 (1999). The relevant question for the appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001). The findings of the court have the effect of a jury verdict and cannot be disturbed by an appellate court unless they are clearly wrong. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985). See, also, Black's Law Dictionary 563 (7th ed. 1999) (defining "clear error" as decision or action that is unquestionably erroneous). Further, it has been frequently said that only where evidence lacks sufficient probative value as a matter of law can an appellate court set aside a guilty verdict as being unsupported by evidence beyond a reasonable doubt. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

### 2. Terroristic Threat

Given the above standard of review, the issue presented for us is whether, viewing the evidence and the undisputed facts as set forth above, any rational trier of fact could conclude that the State had proven the elements of terroristic threats beyond a reasonable doubt. Curlile specifically argues that the State failed to prove two elements of the crime: (1) a threat to commit a crime of violence

and (2) an intent to terrorize. We find that a rational trier of fact could conclude that the State did prove both of these elements.

(a) Threat to Commit Crime of Violence

The initial issue presented on appeal is whether the defendant's actions constituted a threat to commit a crime of violence. According to Curlile, under current case law, the State must show that he "pointed" the gun directly "at" someone to establish a "threat," and Curlile argues that the evidence shows that he never actually "pointed" the gun "at" anyone. We disagree with Curlile, however, and conclude that a rational trier of fact could conclude that his actions constituted a threat to commit a crime of violence.

[5] For purposes of § 28-311.01, a threat may be written, oral, physical, or any combination thereof. *State v. Tillman*, 1 Neb. App. 585, 511 N.W.2d 128 (1993). In *State v. Tillman*, the officer's duty weapon was taken from him, and the defendant pointed it at the officer and said to the officer, " '"Now you are going to get yours." ' " 1 Neb. App. at 587, 511 N.W.2d at 130. This court described the situation as a face-to-face confrontation and as a situation in which a threat can be conveyed in many ways. In *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000), the defendant was charged with terroristic threats and use of a weapon to commit a felony. The trial judge sustained a plea in abatement, and the State appealed. The Supreme Court reversed, indicating that the preliminary hearing evidence supported a finding of probable cause and reciting evidence that the defendant approached the victim after fighting with the victim's companion, pulled out a knife, and pointed the knife at the victim while threatening her. The Supreme Court held that the evidence was sufficient to conclude that the defendant threatened to commit a crime of violence against the victim. Nowhere in either *State v. Tillman* or *State v. Bottolfson* was it held that pointing the weapon directly at the victim is a necessary prerequisite.

[6] In *State v. Methe*, 228 Neb. 468, 470, 422 N.W.2d 803, 806 (1988), quoting *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986), the Supreme Court stated, " '[t]o "threaten" is commonly understood to mean promising punishment, reprisal, or distress. Webster's Third New International Dictionary,

Unabridged 2382 (1981).' " The undisputed evidence in the present case that the "victim," Fanda, was frightened enough for her safety to seek cover behind a counter and yell for others in the area to seek immediate cover, although not determinative on the question of whether the actions of waving a gun up and down while not pointing it directly at Fanda was a threat, is probative on the issue of whether Curlile's actions constituted a threat. See *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001) (crime of terroristic threats does not require evidence that victim actually feel threatened).

[7] Curlile urges us to hold that he could not have committed the crime of terroristic threats without pointing the gun directly at Fanda. We reject that position. Except in extreme circumstances, terroristic threats cases will largely be determined by the context of the interaction between the involved people. Thus, the angle at which a gun is pointed directly at someone is not the determinative factor, although it is clearly an important factor. Certainly, the determination of whether Curlile's actions constituted a threat must be made in context, considering the facts of this case.

The evidence is undisputed that Curlile was parked immediately in front of the store where Fanda worked. The evidence is undisputed that Curlile was visible from inside the store. The evidence is undisputed that Curlile was yelling in Fanda's direction while waving a .38-caliber revolver up and down, albeit not with the barrel pointed immediately in Fanda's direction. The evidence is undisputed that Fanda experienced a visceral feeling of fright severe enough to prompt her to seek cover behind a store counter, pull the alarm, and yell to another employee to "get down." Although Fanda candidly conceded that she could not hear the specific words being yelled by Curlile, she was able to see his face and identify his demeanor as he yelled and waved the gun up and down. In light of our high standard of review concerning the trier of fact's factual conclusion, the question becomes whether any rational trier of fact could find this to be a threat. We cannot conclude that no reasonable person could conclude that the actions committed by Curlile in Fanda's presence constitute a threat as defined by Nebraska law, a conclusion that would be necessary to reverse Curlile's conviction on this basis.

(b) Intent to Terrorize

The second step in the analysis of whether Curlile's actions constituted a terroristic threat is to determine whether Curlile intended to terrorize the victim. Curlile argues that because the State alleged only "intent" in the information, the State is precluded from relying on the "reckless disregard" portion of the statute. Brief for appellant at 9. We agree with this assertion by Curlile. An information must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense and be enabled to plead the judgment as a bar to a later prosecution for the same offense. *State v. Scott*, 206 Neb. 451, 293 N.W.2d 114 (1980). Having charged Curlile only with intent to terrorize, and not reckless disregard of causing terror, the State was required to prove that specific intent beyond a reasonable doubt.

[8,9] A direct expression of intention by the actor is not required because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. See, *State v. Broussard*, 235 Neb. 809, 457 N.W.2d 457 (1990); *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989); *State v. Rodriguez*, 6 Neb. App. 67, 569 N.W.2d 686 (1997). Whether a defendant possesses the requisite state of mind is a question of fact and may be proven by circumstantial evidence. *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989). As such, given our standard of review set forth above, the issue here again becomes whether any rational trier of fact could conclude, when viewing the evidence in the light most favorable to the State, that the State has proven Curlile had the intent to terrorize Fanda.

The State argues that Curlile's "intent to threaten [Fanda] may be inferred from the fact he was looking directly at her, yelling, and waving a handgun up and down just outside the window where she was working in a very exposed public place." Brief for appellee at 7. We agree. The evidence set forth above which supported the finding that Curlile made a threat also provides inferential support for the finder of fact's conclusion that Curlile intended to terrorize Fanda. In short, we cannot conclude

that the trial court's factual conclusion that Curlile, in parking his car in front of Fanda's place of employment, looking in her direction, yelling in her direction, and waving a .38-caliber revolver up and down simultaneously, had the requisite intent to terrorize is clearly wrong. We cannot conclude that no rational trier of fact could reach this conclusion, as we would be required to do to reverse Curlile's conviction on this basis.

(c) Additional Evidence

[10] Finally, the record in the present case provides additional evidence to support Curlile's conviction. To aid in determining the innocence or guilt of a defendant, a fact finder is allowed to consider the defendant's voluntary flight immediately or soon after the occurrence of a crime. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993). The circumstances surrounding Curlile's flight reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt. See *State v. Jacob, supra.* Even if Curlile's flight could be explained otherwise, the circumstances are such that the trier of fact was entitled to consider whether Curlile's actions constituted flight. See *id.* However, even without considering Curlile's flight, the evidence was more than sufficient to support the trial court's finding of guilty beyond a reasonable doubt.

3. Use of Weapon

Curlile also challenges the sufficiency of the evidence to support his conviction for using a weapon in the commission of a felony. Curlile's only assertion in this regard is that the evidence was insufficient to support his conviction for the underlying felony, terroristic threats. In light of our discussion of that issue above, we need not further discuss this assertion of error.

## V. CONCLUSION

The judgment of the trial court was not clearly or unquestionably erroneous and was based on a myriad of factual determinations. The evidence was such that it cannot be said that no rational person could conclude as the trial court did, and the trial

court's factual determinations cannot be reversed. The judgment of the trial court is affirmed.

AFFIRMED.

SIEVERS, Judge, dissenting.

I find that with all due respect to my colleagues, I cannot join in the majority opinion. While the majority says that the determination of whether Curlile's actions constitute a threat to Fanda "must be made in context," the majority then fails to recount the most important contextual facts of the case. These omitted facts are that Curlile was a regular customer of a Gas 'N Shop convenience store located on U.S. Highway 30 in Hall County. He went to the store once or twice a day to purchase telephone cards and other items. The store clerk involved in this incident, Fanda, often saw Curlile in the store, but never had any difficulties with him. On August 11, 2000, Curlile purchased a telephone card at the store and then left. Fanda rang up the purchase, but had no conversation with Curlile, and certainly no problem. This leads me to the question: If Curlile was really threatening Fanda with a crime of violence, why?

I know that the State does not have to prove motive, but the evidence reveals behavior which is clearly equivocal: Is it criminal behavior constituting a threat to commit a crime of violence, or is it odd behavior having some other genesis? Thus, it is all the more crucial that we look hard at context for some explanation and understanding of what Curlile was doing. The lack of any reason, past or present, for threatening Fanda means that the inferences which the majority is willing to allow the trial judge to draw do not come so easily to me. And, if the State's burden of proving beyond a reasonable doubt that Curlile committed this crime is to have any real meaning—as opposed to just words that we recite by rote and habit—then I find I cannot agree that the State adduced sufficient evidence to prove the crime.

The standard for the appellate review of criminal convictions is fully articulated in the majority's opinion, and I will not repeat it. Needless to say, the standard of review is difficult because it is phrased so that in order to reverse this conviction, we would have to find that the trial judge's decision was "irrational," a difficult characterization to reach. Nonetheless, this is not a case of a trial judge choosing one version of the facts over

another. Here, the facts are wholly undisputed. Those facts do not prove Curlile guilty beyond a reasonable doubt.

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STATE OF NEBRASKA, APPELLEE, V.
ANN R. SOLTIS, APPELLANT.
644 N.W.2d 160

Filed April 9, 2002. Nos. A-01-699, A-01-700.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel is excludable under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995). A defendant without counsel shall not be deemed to have consented to a continuance unless he or she has been advised by the court of his or her right to a speedy trial and the effect of his or her consent.
4. **Speedy Trial: Waiver.** A defendant may waive his or her right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1995) so long as he or she is properly advised of his or her right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently.
5. **Speedy Trial: Proof.** The State has the burden of proving that one or more of the excluded periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action.
6. **Speedy Trial.** When a defendant is aware of the scheduled trial date and fails to appear on that date, the time for a speedy trial is tolled until such time as the defendant either willingly or unwillingly appears again in court.
7. **Speedy Trial: Waiver.** The primary burden is on the State, the prosecutor and the court, to bring the accused person to trial within the time provided for by law, and a defendant's failure to object at the time the court enters an order setting the trial date after the 6-month period does not constitute a waiver of his or her rights under the statute.
8. ____: ____. When the trial court sets a date for trial outside the 6-month period, the court shall (1) advise the defendant of his or her statutory right to a speedy trial and the effect of his or her consent to a period of delay and (2) ascertain of record whether the defendant does or does not waive his or her right to a speedy trial and consent to the trial date set.
9. **Speedy Trial: Judicial Notice: Records.** In determining excludable periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995), the court may take judicial notice of the files and records of that court.

10. **Trial: Judges: Witnesses.** The 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.
11. **Courts: Affidavits: Records: Proof.** The State can use affidavits or testimony of the court clerk to prove the scheduling of cases on the docket.

Appeals from the District Court for Adams County, STEPHEN ILLINGWORTH, Judge, on appeal thereto from the County Court for Adams County, ROBERT A. IDE, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

## INTRODUCTION

Ann R. Soltis appeals from an order overruling her motion for discharge. Soltis was charged by complaint with a Class I misdemeanor on February 8, 2000. On August 31, 2000, Soltis filed a motion for discharge alleging that the State had not brought her to trial within the statutorily prescribed time under Neb. Rev. Stat. § 29-1207 (Reissue 1995). The county court overruled the motion, and the district court affirmed. We find that the State failed to introduce evidence which would extend the allowable trial time to the date to which the trial was set. We therefore conclude the motion to discharge should have been granted, and we reverse the judgment of the district court and remand the cause with directions to dismiss.

## BACKGROUND

Soltis was charged by complaint on February 8, 2000. On June 9, Soltis appeared without counsel approximately one-half hour late for her bench trial and stated that she did not have an attorney, but would like a public defender appointed. Soltis stated that she planned to hire an attorney, but had found out the day before that her parents did not hire one for her. She requested a continuance and also asked that a public defender be appointed. After inquiring into her financial status, the county

court appointed her counsel, continued the case until June 23, and said that it did not want her to sign a waiver of speedy trial rights because she did not have counsel, but informed her that this time was going to be counted against her because she, not the State, requested the continuance.

The transcript reveals that on June 23, 2000, a further hearing was held in which Soltis' attorney appeared and entered a not guilty plea for her. A jury trial was set for September 11, with a pretrial hearing on August 31. There was no record made of the June 23 hearing, and nothing in the record indicates that Soltis requested a continuance at that hearing.

On August 31, 2000, Soltis filed a motion for discharge arguing that the time for the State to bring her to trial had run under § 29-1207. The county court set the matter for hearing on September 5. At that hearing, no evidence was presented, and merely arguments by counsel and a finding by the trial court took place. The county court announced its decision on the record and found that Soltis was responsible for the delay in bringing her to trial because she failed to appear on time for her bench trial on June 9. The court also found that the court set the trial for the earliest date on the jury trial docket and overruled the motion. Soltis appealed to the district court, which affirmed the county court's decision. Soltis now appeals from the decision of the district court.

## ASSIGNMENT OF ERROR

Soltis alleges that the district court erred in affirming the county court's order denying her motion for discharge.

## STANDARD OF REVIEW

[1,2] In *State v. Tucker*, 259 Neb. 225, 228, 609 N.W.2d 306, 309-10 (2000), the Nebraska Supreme Court stated:

> Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. . . .
>
> To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

See, also, *State v. Thompson*, 10 Neb. App. 69, 624 N.W.2d 657 (2001).

## ANALYSIS

Section 29-1207 states that every person charged for any offense shall be brought to trial within 6 months of the day the indictment is returned or the information filed. Case law holds trial shall be held within 6 months of the filing of the complaint in county court. See *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

[3,4] Section 29-1207(4)(b) states, in relevant part, that the following period shall be excluded in computing the time for trial:

> The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent.

A defendant may waive his or her right to a speedy trial under § 29-1207 so long as he or she is properly advised of his or her right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

[5] The State has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action. *State v. Groves*, 238 Neb. 137, 469 N.W.2d 364 (1991). The State must prove by a substantial preponderance of the evidence that one or more of the time periods are applicable. See *State v. Johnson, supra*. In this case, the complaint was filed on February 8, 2000. The final trial date under § 29-1207 is determined by excluding the date the complaint was filed, counting forward 6 months, and then back 1 day. See, *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991); *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). Therefore, without any excludable period, Soltis should have been brought to trial by August 7, 2000.

*Exclusion from June 9 to 23, 2000.*

[6] When a defendant is aware of the scheduled trial date and fails to appear on that date, the time is tolled until such time as the defendant either willingly or unwillingly appears again in court. *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988). From the record, it appears that Soltis appeared about one-half hour late, but after the court had dismissed the witnesses. Since Soltis appeared on the date set, but late, this rule would perhaps exclude 1 day, but not more. We conclude we need not decide that question.

On June 9, 2000, the court set the next hearing for June 23. The record shows that Soltis, without an attorney, requested the court to appoint a public defender. On that date, the judge stated that the State was prepared to go to trial and that "until the next date that this is set for trial, it's the Court's ruling that this is on your continuance." The judge also said that "[y]ou have a speedy trial right, which was explained to you, and the time from this day forward until our next hearing . . . will be charged to you alone. Do you understand?" Soltis responded, "Uh-huh." The judge then swore her as a witness, examined her on her inability to afford counsel, listened to the prosecutor's arguments against appointing a public defender, and then appointed her counsel. Soltis agreed to be in court on June 23 at 9 a.m. In the record, Soltis did not specifically waive her right to speedy trial nor was she advised of the meaning of her right to a speedy trial. The March 2 arraignment of Soltis was recorded on a pre-prepared form which has a section entitled "RIGHTS EXPLAINED," and a checkmark appears before the line "Speedy trial and by jury if misdemeanor or city ord. with specific penalty."

As stated above, § 29-1207(4)(b) states that a defendant without counsel has not deemed to consent to a continuance unless advised of the speedy trial rights and the effect of consenting therefor. It may be that the situation here amounts to a continuance at Soltis' request or that the record could be somehow interpreted that the continuance was granted with her consent after the court advised her of the effect of her consent. However, even if the record is interpreted to show Soltis requested or consented to the continuance, we can see no basis for holding that she did so in a manner to extend the period past June 23, 2000,

a period of 14 days. The exclusion of this period would only extend the 6-month trial time to August 21, and the motion for discharge was not filed until August 31. This would not extend the permitted trial date to August 31, when the motion to discharge was filed. An appellate court is not obligated to engage in an analysis which is unnecessary to adjudicate the case before it. *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). We will not determine whether the record in this case would justify that 14-day extension, because that time still falls short of when Soltis should have been brought to trial.

*Possibility for Exclusion of Additional Time.*

[7,8] The only record we have of the June 23, 2000, hearing is a journal entry which shows nothing but the appearances of the defendant and counsel, the setting of the pretrial hearing for August 31, and the trial for September 11. The procedural facts in this case are quite near those in *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978). In *Johnson*, the trial was set within the 6-month period, but the defendant did not appear for trial. One month later, he appeared, and without an explanation in the record, the trial was set for approximately 2 months later. Like the case at hand, there was no evidence in the record to show why the trial was set for that time. Upon a motion to discharge, the trial court excluded the time from when the trial date was set to the trial date because the trial date " 'was arrived at with the consent of the defendant's counsel' " and the judge "believe[d]" the defendant's counsel did consent. *Id.* at 325, 268 N.W.2d at 87. The *Johnson* court recognized that it was settled law that the primary burden is on the State, the prosecutor and the court, to bring the accused person to trial within the time provided for by law and that a defendant's failure to object at the time the court enters an order setting the trial date after the 6-month period does not constitute a waiver of his or her rights under the statute. The *Johnson* court further stated:

> Finally, we set down specific guidelines for future cases, stating that when the trial court sets a date for trial outside the 6-month period, the court shall: "(1) Advise the defendant of his statutory right to a speedy trial and the effect of his consent to a period of delay, and . . . (2) Ascertain of

> record whether the defendant does or does not waive his right to a speedy trial and consent to the trial date set."

201 Neb. at 326, 268 N.W.2d at 88, citing *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972). These guidelines were not followed by the county court.

[9] The trial judge in this case made an oral finding in the bill of exceptions that Soltis' trial date was set for the next available jury trial term. However, this finding is not based upon any evidence in the record. In determining excludable periods, the court may take judicial notice of the files and records of that court. *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988). But there is nothing in the record which would establish any consent or waiver.

The trial court used a form entitled "Further Hearing/Judgment" to record the denial of the motion to discharge. The form is largely inapplicable to the hearing it was used to record, and it therefore shows only appearances and that the motion to discharge was overruled. The bill of exceptions of the September 5, 2000, hearing shows no evidence was introduced. On the last page, the trial judge stated, "At that time, the court's docket was of such a nature that it did not permit setting that jury trial until this month," and near the end, there is a statement that "the Court set it for the earliest date which was available on the jury trial docket." Upon consideration of the appeal, the district court cited this page of the bill of exceptions as justification for its decision to affirm the trial court.

[10] "The 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." Neb. Rev. Stat. § 27-605 (Reissue 1995). This rule prohibits the district court or this court from treating the above-quoted statement of the trial judge as evidence of the condition of the trial court's docket. See *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000) (comments by judge stated into record as to reasons trial could not be held within 6-month period held not to be evidence).

[11] Here, there was no evidence introduced, and therefore no evidence in the record, which could support a finding that the docket was such that the trial could not have been set earlier than September 11, 2000. The *Baird* court stated that the State

can use affidavits or testimony of the court clerk to prove the scheduling of cases on the docket. Such evidence would have been appropriate here. The merits of the trial court's action should be judged by the evidence considered on the motion. See *State v. Thompson*, 10 Neb. App. 69, 624 N.W.2d 657 (2001). Like the *Baird* court, we have no record to review in order to determine whether facts exist which would have justified the belated trial date.

## CONCLUSION

We conclude that Soltis is entitled to discharge because the State failed to present any evidence of good cause which would exclude time after June 23, 2000. We reverse the judgment of the district court and remand the cause with directions to dismiss the complaint against Soltis.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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## STATE OF NEBRASKA, APPELLEE, V. JEAN-PIERRE BROWNELL, APPELLANT.

644 N.W.2d 166

Filed April 16, 2002. No. A-01-545.

1. **Lesser-Included Offenses: Statutes: Evidence.** In determining whether a particular crime is a lesser-included offense of a greater crime, the statutory elements of each offense are compared to determine if it is impossible to commit the greater offense without also committing the lesser offense. The elements test involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial.
2. **False Imprisonment.** The restraint required to commit the offense of first degree false imprisonment must necessarily be without legal authority.
3. **Lesser-Included Offenses: False Imprisonment.** Second degree false imprisonment is a lesser-included offense of first degree false imprisonment.
4. **Convictions: Evidence: 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 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; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

George E. Clough, of Clough, Dawson & Piccolo, for appellant.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

## INTRODUCTION

Jean-Pierre Brownell appeals his conviction for second degree false imprisonment. On appeal, he contends that the district court erred in concluding that second degree false imprisonment is a lesser-included offense of first degree false imprisonment and that the evidence was insufficient to support his conviction.

## STATEMENT OF FACTS

On September 19, 2000, an information was filed in Lincoln County District Court charging Brownell with first degree sexual assault, first degree false imprisonment, and burglary. A trial to the court was held on February 21 and 22, 2001.

The victim in this case, Rebecca Simpson, testified that on April 20, 2000, at approximately 9:30 p.m., she returned to her home in North Platte, Lincoln County, Nebraska, and found Brownell sitting on her son's bed in the dark. Simpson testified that she had dated Brownell for approximately 1 year, but that they had broken up 6 months earlier and were having difficulty "calling it quits." Simpson testified that Brownell asked her where she had been, to which she replied that it "was none of his business." Brownell then suggested that they go rent a movie and get something to eat. Simpson testified that in order to avoid a scene and to keep the situation calm, she agreed to go through the drive-in window of a fast-food restaurant and to a video store.

After returning to the residence, the parties began eating their food and watching the movie. Simpson testified that Brownell drank some "Verve," which she stated is "a date-rape drug that . . . makes you goofy." According to Simpson, Brownell had consumed the drug on approximately 10 previous occasions, and the drug would

alter his moods in such a way that if he was angry when he drank the drug, he would become more angry, and that if he was happy, then he would act "goofy" or drunk.

Brownell asked Simpson to " 'have sex,' " but she declined and asked him to leave. At that point, Simpson testified that Brownell sexually assaulted her. Brownell again asked Simpson where she had been earlier that evening, to which Simpson responded that she had been with her friend. Brownell then telephoned the friend and became upset when he learned that Simpson had not been with the friend that evening. Simpson testified that she attempted to leave the residence, but that Brownell physically prevented her from leaving and would not let her make any telephone calls. Later, Simpson tried to jump out of a window, but Brownell held her legs and pulled her back inside the residence. Brownell left Simpson's residence at approximately 2:30 the following morning.

Following the State's case, Brownell moved to dismiss the charges against him. The court sustained the motion with regard to the burglary charge, which it dismissed for lack of evidence. Brownell then presented evidence, including Brownell's testifying in his own defense.

Brownell testified that he entered Simpson's house through the back upstairs door by putting a ladder up against the house and that he intended to "surprise" Simpson. Brownell admitted that sexual intercourse occurred, but claimed it was consensual. He further admitted that he and Simpson argued, but alleged that he was the one trying to escape Simpson, even though he is 6 feet 2 inches tall and weighed 240 pounds and Simpson is 5 feet 2 inches tall and weighed 123 pounds. Brownell further admitted that he did restrain Simpson, but contended that such restraint was necessary in order to defend himself and/or to keep Simpson from hurting herself.

Following the close of the defense's evidence, the court found Brownell not guilty of first degree sexual assault and found, sua sponte, that although Brownell was not guilty of first degree false imprisonment, he was guilty of the lesser-included offense of second degree false imprisonment.

On February 27, 2001, the district court, sua sponte, entered an order setting aside Brownell's conviction for second degree

false imprisonment, because the court found that although the court could make a determination that the trier of fact may consider a lesser-included offense over a defendant's objections, due process demanded that the defendant be given the right to object and the right to be heard prior to the court's determining the consideration of a lesser-included offense in a criminal action. Thus, the court set the matter for hearing to allow objections and argument on the consideration of the lesser-included offense. The hearing, held on April 26, presented issues to the court of whether second degree false imprisonment is a lesser-included offense of first degree false imprisonment and whether the procedure used in the instant case comported with the due process requirements of the U.S. and Nebraska Constitutions. Additionally, Brownell's counsel argued that "the Court has no jurisdiction at this point because the Court found the defendant not guilty on the counts that were charged and the counts that the defendant had notice of."

On April 26, 2001, the court filed an order finding that second degree false imprisonment is a lesser-included offense of first degree false imprisonment. Additionally, the court found that Brownell was on notice that the court could consider lesser-included offenses of the charged offenses. Brownell was sentenced to 1 year's probation. Brownell has timely appealed to this court.

## ASSIGNMENTS OF ERROR

On appeal, Brownell contends that the district court erred in concluding that second degree false imprisonment is a lesser-included offense of first degree false imprisonment and that the evidence was insufficient to support his conviction of second degree false imprisonment.

## ANALYSIS

*Lesser-Included Offense.*

Brownell's first assignment of error is that the district court erred in concluding that second degree false imprisonment is a lesser-included offense of first degree false imprisonment.

[1] In determining whether a particular crime is a lesser-included offense of a greater crime, we compare the statutory elements of each offense to determine if it is impossible to commit

the greater offense without also committing the lesser offense. See *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). The elements test " 'involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial.' " *State v. Al-Zubaidy*, 253 Neb. 357, 362, 570 N.W.2d 713, 716 (1997) (quoting *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989)).

A person commits first degree false imprisonment "if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude." Neb. Rev. Stat. § 28-314(1) (Cum. Supp. 2000). A person commits second degree false imprisonment if he or she knowingly restrains another person without legal authority. Neb. Rev. Stat. § 28-315 (Reissue 1995).

A textual comparison of these two statutes reveals that both statutes require a person to knowingly restrain another person. Further, the offense of first degree false imprisonment requires that this restraint be either under terrorizing circumstances, under circumstances which expose the person to the risk of serious bodily injury, or with the intent to hold the individual in a condition of involuntary servitude. None of these conditions can be accomplished without restraining the individual without legal authority. See *Grebe v. State*, 113 Neb. 327, 331, 202 N.W. 909, 911 (1925) (adding elements of " 'without . . . consent' " and " 'without process of law' " to statutory crime of false imprisonment).

This reasoning is supported by the Nebraska Supreme Court decision of *State v. Schwartz*, 219 Neb. 833, 366 N.W.2d 766 (1985), in which the court had occasion to consider whether second degree false imprisonment was a lesser-included offense of first degree false imprisonment. In *State v. Schwartz*, the defendant was charged with first degree false imprisonment, among other offenses. After being convicted by a jury, the defendant appealed to the Nebraska Supreme Court, arguing, inter alia, that the trial court erred in failing to instruct the jury on the lesser-included offense of second degree false imprisonment. At that time, a lesser-included offense was defined as " 'one which must be committed if the greater offense is committed or, put slightly

different, is one which is fully embraced in the higher offense' " and " 'if, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser.' " *Id.* at 836-37, 366 N.W.2d at 769.

The Nebraska Supreme Court held that the defendant's argument that the jury should have been instructed on second degree false imprisonment was without merit. In making this determination, the court stated that first and second degree false imprisonment were differentiated by the requirement of the former that the victim be restrained " 'under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury.' " *Id.* at 838, 366 N.W.2d at 770. The court then found that there was no evidence contradicting the fact that the victim had been exposed to the risk of serious bodily injury and that such conduct constituted terrorizing circumstances. Thus, the evidence did not support a lesser-included offense instruction, and the trial judge properly refused to instruct the jury as to second degree false imprisonment. The statutory elements of first and second degree false imprisonment have not been modified since *State v. Schwartz, supra*, was decided.

[2,3] Thus, the restraint required to commit the offense of first degree false imprisonment must necessarily be without legal authority. Consequently, because it is impossible to commit first degree false imprisonment without also committing second degree false imprisonment, second degree false imprisonment is a lesser-included offense of first degree false imprisonment. Accordingly, this assigned error is without merit.

*Insufficiency of Evidence.*

Brownell's second assigned error is that the evidence was insufficient to support his conviction of second degree false imprisonment.

[4] 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 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; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

A person commits second degree false imprisonment if he or she knowingly restrains another person without legal authority. § 28-315.

In the instant case, Brownell admitted that he had restrained Simpson. He further alleged that the restraint was done in self-defense and to protect Simpson from herself, which claims were rejected by the district court. Finally, it is clear that Brownell did not have the legal authority to restrain Simpson. Thus, the evidence, when viewed in the light most favorable to the State, supports Brownell's conviction for second degree false imprisonment.

## CONCLUSION

Having considered and rejected Brownell's assigned errors, we affirm his conviction and sentence.

AFFIRMED.

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DAVID EVERSON, APPELLANT, V.
MARK O'KANE, DOING BUSINESS AS
HEARTLAND REFRIGERATION, APPELLEE.
643 N.W.2d 396

Filed April 16, 2002. No. A-01-1122.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a judgment, order, or award of the Workers' Compensation Court when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. The findings of fact made by the trial judge of the Workers' Compensation Court will not be disturbed on appeal unless clearly wrong.

3. **Judicial Notice.** A judge may take judicial notice, whether requested or not, of adjudicative facts.
4. ____. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
5. **Evidence: Words and Phrases.** A fact is adjudicative if the fact affects the determination of a controverted issue.
6. **Judicial Notice: Judgments: Records.** A court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the same case or a related case.
7. **Trial: Judges: Witnesses.** A judge presiding at a trial may not testify at that trial.
8. **Judicial Notice: Records: Appeal and Error.** 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. The trial court's ruling should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for a new trial.

Phillip G. Wright, of Quinn & Wright, for appellant.

John K. Green, of Pickens, Green & Gleason, L.L.P., for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

HANNON, Judge.

David Everson appeals from the dismissal of his petition for workers' compensation benefits from Mark O'Kane, doing business as Heartland Refrigeration, upon the basis that a claim due to an accident occurring on October 3, 1996, was barred by the 2-year statute of limitations provided in Neb. Rev. Stat. § 48-137 (Reissue 1998). Everson sought to toll the statute of limitations by pleading that O'Kane had failed to file a report of injury based upon Neb. Rev. Stat. § 48-144.04 (Reissue 1998), which provides that the statute of limitations does not begin to run until the employer files a report of injury. At trial, the parties stipulated that O'Kane had not filed the first report, but the judge found such a report (probably prepared and filed by court personnel) in the file of a case which had been dismissed without prejudice, took judicial notice of the document without putting

it in the record, and dismissed the case while refusing to receive further evidence on the subject. The review panel affirmed. We conclude that by not placing a copy of the judicially noticed document in the bill of exceptions, the trial court made it impossible for the review panel or this court to review the trial court's action and, thus, deprived Everson of due process of law. Accordingly, we reverse, and remand for a new trial.

## BACKGROUND

The record shows that Everson was injured in an automobile accident on October 3, 1996, while in the course of his employment with O'Kane. He filed a petition in the Workers' Compensation Court on November 21, 1996. On February 12, 1997, the case was dismissed without prejudice upon the joint motion of the parties. Apparently, this was done with a view to Everson's proceeding against the driver of the other automobile in the accident. For whatever reason, Everson filed a new petition on January 10, 2000. Eventually, the case came for trial on an amended petition alleging injuries as a result of the accident and alleging O'Kane had not filed a first report of accident. The answer amounted to a general denial and an affirmative defense of the statute of limitations.

On August 21, 2000, the action came on for hearing. The parties stipulated (1) that Everson was injured in an automobile accident on October 3, 1996, (2) that he recovered $22,500 from an uninsured motorist policy of Heartland Refrigeration due to that accident, and (3) that Heartland Refrigeration had not filed a first report of injury. After Everson testified and was cross-examined, but before he rested his case, the judge interrupted, stating that a first report of accident was filed on November 25, 1996, and O'Kane's counsel agreed to the date. The judge then inquired and counsel agreed that no payments had been made to Everson or to the medical providers for Everson by O'Kane. Everson's counsel stated that he had checked with the compensation court to see if there had in fact been a first injury report and that he was told that none had been filed, except "this dummy first injury report." The judge informed counsel that he was taking judicial notice

> of a file that is in front of me at the present time that indicates that you filed a petition for workers' compensation

> benefits in the same case, 196-2606, back in November of '96. At the time there was not a first report on record and is the practice the workers' compensation court prepared a first report and filed it concurrent with the petition or at least four days after the petition was filed back in 1996.

The judge then stated the reasoning by which he concluded that the statute of limitations had run.

Everson's counsel offered exhibit 23, which consists of copies of correspondence and forms filed by Everson's counsel with the Workers' Compensation Court inquiring of the existence of a first report in this case. Counsel then stated the court had sent him the "dummy report." Counsel argued that that document was not the required report of injury. Counsel then asked leave of the court to "file" the "dummy report." The judge then stated the record shows that the statute was not tolled by payments and that exhibit 23 was received. Everson's counsel asked leave to mark exhibit 24, the "dummy report." The judge did not state he would not receive the exhibit, but indicated that they were wasting time and that he would dismiss the action on the basis of the statute of limitations. Everson's counsel persisted in requesting that the "dummy report" be made a part of the record, and the judge stated the request was specifically denied. The action was dismissed.

## APPLICABLE STATUTES

The significant part of Neb. Rev. Stat. § 48-144.01 (Reissue 1998) provides as follows: "In every case of reportable injury occurring in the course of employment, the employer or insurance carrier shall file a report thereof with the Nebraska Workers' Compensation Court." (The statute goes on to provide what information shall be included when certain injuries are suffered.)

Section 48-144.04 provides in significant part:

> Any employer . . . who fails, neglects, or refuses to file any report required of him or her by the Nebraska Workers' Compensation Court shall be guilty of a Class II misdemeanor for each such failure . . . . In addition to the penalty, where an employer, risk management pool, or insurance carrier has been given notice, or the employer, risk management pool, or the insurance carrier has knowledge, of any injury or death of an employee and fails, neglects, or

> refuses to file a report thereof, the limitations in section 48-137 and for injuries occurring before December 1, 1997, the limitations in section 48-128 shall not begin to run against the claim of the injured employee or his or her dependents entitled to compensation or against the State of Nebraska . . . until such report shall have been furnished as required by the compensation court.

## ASSIGNMENTS OF ERROR

Everson claims the trial court erred in (1) dismissing his petition and finding that his action was barred by the statute of limitations and (2) failing to allow him leave to complete his case and offer evidence or exhibits during or after the hearing.

## STANDARD OF REVIEW

[1,2] An appellate court may modify, reverse, or set aside a judgment, order, or award of the Workers' Compensation Court when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Hoffart v. Fleming Cos.*, 10 Neb. App. 524, 634 N.W.2d 37 (2001). The findings of fact made by the trial judge of the Workers' Compensation Court will not be disturbed on appeal unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determination as to questions of law. *Id.*

## ANALYSIS

The record shows that the judge took judicial notice of a document in a file of that court without making that document a part of the bill of exceptions and that then, the trial court actually denied Everson's counsel's request to make it a part of the record. These actions require this case to be reversed for several reasons.

[3-5] We realize that a judge may take judicial notice, whether requested or not, of adjudicative facts. Neb. Rev. Stat. § 27-201(3) (Reissue 1995). Section 27-201(2) provides: "A judicially noticed fact must be one not subject to reasonable

dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." When neither of the alternative tests prescribed in § 27-201(2) is satisfied, judicial notice of an adjudicative fact is improper. *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). A fact is adjudicative if the fact affects the determination of a controverted issue. *Id.* The issue of fact was whether O'Kane did or did not file a first report of injury as required by the compensation court. Since the parties stipulated that O'Kane did not file a first report of injury, the fact which the trial court judicially noticed could not have affected the determination of the controversy and hence is not really an adjudicative fact.

[6-8] A court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the same case or a related case. *Wolgamott v. Abramson*, 5 Neb. App. 478, 560 N.W.2d 859 (1997). Judicial notice is not the same as extrajudicial or personal knowledge of a judge. *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992). A judge presiding at a trial may not testify at that trial. Neb. Rev. Stat. § 27-605 (Reissue 1995).

> "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. Trial court's ruling . . . should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible."

*In re Interest of C.K., L.K., and G.K.*, 240 Neb. at 709, 484 N.W.2d at 73, quoting *In re Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980). See, also, *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

The need for such a rule is made clear by this case. The existence of the document in the file could, if marked and made a part of the record, undoubtedly be judicially noticed, but the existence of the document is only a part of the fact in issue. Did O'Kane or someone for him file the document? Did the document, which presumably contained some sort of heading indicating it was a first report, meet the requirements of such a

report? Part of the colloquy between the court and counsel indicates that it was the practice of the Workers' Compensation Court to file such a document if the employer did not file it. The record does not establish that fact, but it must be clearly settled before an appellate court considers the effect of such a practice. We naturally wonder if the document, which Everson's counsel called the "dummy report" was signed. Counsel's position and argument clearly raises the question of whether the facts the judge judicially noticed on his own motion were really facts "not subject to reasonable dispute" as required by § 27-201(2) for judicial notice.

## CONCLUSION

The record before us leaves many unanswered pertinent fact questions which, if answered, might lead to an interesting legal question. However, upon the record before us, there is nothing we can do but reverse the judgment of the review panel and remand the cause for a new trial with direction that upon retrial, the bill of exceptions shall contain all of the evidence upon which the trial court bases its decision, including that judicially noticed.

REVERSED AND REMANDED FOR A NEW TRIAL.

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## IN RE INTEREST OF ANDREW M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KATHLEEN M., APPELLANT.

643 N.W.2d 401

Filed April 23, 2002. No. A-01-593.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record; while appellate review is independent of the juvenile court's findings, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Evidence.** An order terminating parental rights must be based on clear and convincing evidence.

3. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
5. ____: ____: ____. The State must prove one of the grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) and that termination of parental rights is in the child's best interests by clear and convincing evidence, that is, by the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
6. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
7. ____. A child in interest cannot and should not be suspended in foster care, nor made to await parental maturity.
8. ____. Neb. Rev. Stat. § 43-283.01 (Reissue 1998) is only incorporated into Neb. Rev. Stat. § 43-292(6) (Reissue 1998), not into the remaining subsections of § 43-292.
9. **Juvenile Courts: Parental Rights.** The issue of reasonable efforts if required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998) must be reviewed by the juvenile court in the following situations: (1) when removing from the home a juvenile adjudged to be under Neb. Rev. Stat. § 43-247(3) and (4) (Reissue 1998) pursuant to Neb. Rev. Stat. § 43-284 (Reissue 1998); (2) when the court continues a juvenile's out-of-home placement pending adjudication pursuant to Neb. Rev. Stat. § 43-254 (Reissue 1998); (3) when the court reviews a juvenile's status and permanency planning pursuant to Neb. Rev. Stat. § 43-1315 (Reissue 1998); and (4) when termination of parental rights to a juvenile is sought by the State under Neb. Rev. Stat. § 43-292(6) (Reissue 1998).

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Eileen Reilly Buzzello, of Holthaus Law Office, for appellant.

James S. Jansen, Douglas County Attorney, and Kim B. Hawekotte for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

INBODY, Judge.

## INTRODUCTION

Kathleen M. appeals from the April 19, 2001, order of the Douglas County Juvenile Court terminating her parental rights to Andrew M., Ashley M., Thomas M., Troy M. II, and Megan M. upon a finding that the children are within the meaning of Neb.

Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). For the reasons recited herein, we affirm.

## STATEMENT OF FACTS

Kathleen is the natural mother of Andrew, Ashley, Thomas, Troy, and Megan. The five minor children were removed from Kathleen's home on July 22, 1999. The Douglas County Juvenile Court found that the five children were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). Kathleen was ordered by the court during a review and permanency hearing to (1) complete a psychiatric evaluation, (2) attend individual counseling with a licensed mental health practitioner or therapist, (3) participate in a family preservation program, (4) consistently attend visits with her children, (5) obtain and maintain stable housing, and (6) obtain and maintain a legal source of income. On December 15, 2000, the State filed a motion to terminate Kathleen's parental rights to Andrew, Ashley, Thomas, Troy, and Megan. The State specifically alleged that pursuant to § 43-292(2), termination was appropriate because Kathleen had substantially and continuously or intentionally neglected and refused to give her children necessary parental care; pursuant to § 43-292(6), termination was appropriate because Kathleen failed to comply with a reasonable plan of reunification; and pursuant to § 43-292(7), termination was appropriate because the five minor children had been continuously in out-of-home placements for over 15 of the past 22 months.

The State's petition for termination of Kathleen's parental rights was heard on March 13 and 14, 2001. The State called Dr. Lisa Christensen, a Family Service licensed mental health practitioner who provided counseling for Troy; Tiffany Hohwieler, a Family Service mental health therapist who provided counseling for Andrew; Melissa Godfrey, a clinical therapist for Family Service who provided counseling for Ashley; Dr. Glenda Cottam, a licensed clinical psychologist who evaluated Kathleen; Erica Anderson, a licensed mental health practitioner who worked in the intensive family preservation department at Family Service; Marcia Pitlor, a therapist for Family Service who provided counseling for Thomas; Marti Arndt, a Department of Health and Human Services (DHHS) employee who completed the initial

assessment upon Kathleen's family; Darin Nelson, a protection and safety worker for DHHS, Christy Strawder, a Child Protective Services worker with DHHS; Michael Myers, formerly a caseworker for Child Connect; Kathy Grosvenor, a case manager for Child Connect; and Janet Petersen, a case manager for Child Connect. Kathleen testified on her own behalf.

Dr. Lisa Christensen testified that she was Troy's primary therapist from September 1999 through February 2000. She testified that Kathleen continued to blame Troy for the problems the family was having and for the condition the house was in which led to the children's being removed from the home. According to Dr. Christensen, Troy personalizes Kathleen's absence from therapy sessions, and when Kathleen was absent, Troy would "throw himself on the floor, he would cry and scream, tantruming, and it would be for sustained periods of time, up to 30 minutes, where he would just have severe behavioral problems." She stated that Troy is, when "[o]ne-on-one . . . a delight now. He can say please and thank you and he can ask for help when he needs it."

Dr. Christensen testified that in her opinion, it is in Troy's best interests that Kathleen's parental rights be terminated because

> Troy has medical needs. . . . He has to have medication in order to manage. He is on a certain kind of medication where his serum levels have to be checked. And Kath[leen] has not been able to demonstrate that she can make appointments, she cannot follow through on recommendations . . . . He needs to be with somebody who can get him to his medical appointments.

Dr. Christensen also stated that Troy needs a structured, highly predictable environment where he can get one-on-one direction and feedback in order to contain his behaviors and that Kathleen has not shown that she is capable of providing such an environment.

Tiffany Hohwieler testified that she is a mental health therapist who worked with Andrew. According to Hohwieler, Andrew had been treated for depression and anxiety, was falling behind in school, and was having some behavioral disruptions in school. After Andrew was moved to his current foster placement, he was doing well academically and interacting well with other children; however, Hohwieler stated that there were still

emotional concerns regarding Andrew's anxiety and depression regarding Kathleen's failure to follow through on visits and participate in therapy. According to Hohwieler, Andrew is "at risk for internalizing the reason behind his mother's poor choices as something that he failed to do. In many ways he lacks a good sense of himself and tends to associate all of his feelings and thoughts with his mother."

Hohwieler testified that after more than 1 year of therapy, she had not seen any improvement on the part of Kathleen, stating that Kathleen still had poor physical and psychological boundaries with Andrew to such an extent that Kathleen's behavior toward him was inappropriate. In Hohwieler's opinion, it is in Andrew's best interests that Kathleen's parental rights be terminated.

Melissa Godfrey testified that she is a clinical therapist who worked with Ashley. According to Godfrey, when Kathleen was present at family therapy sessions, little interaction between Kathleen and Ashley occurred. According to Godfrey, Ashley has become more assertive with her siblings and talks about her own needs instead of minimizing. Godfrey testified that Ashley likes her school and her foster home and feels like Kathleen has let her down. In Godfrey's opinion, it is in Ashley's best interests that Kathleen's parental rights be terminated.

Marcia Pitlor testified that she was Thomas' therapist. When Thomas first began seeing Pitlor, she stated that he seemed "kind of flat, unemotional, kind of withdrawn, having nightmares." Pitlor testified that she has seen much improvement in Thomas since he first began therapy in that "[h]e seems to be more outgoing, more comfortable, asks questions, admits to his feelings, seems more comfortable expressing them, doesn't have that same flatness to him." Because Pitlor had not had any interaction with Kathleen, she had no opinion regarding whether it was in Thomas' best interests to terminate Kathleen's parental rights.

Erica Anderson testified that beginning in June 2000, she attempted to work with Kathleen's family in the intensive family preservation program. Anderson testified that Kathleen was "discharged" from the program due to her failure to attend any of the scheduled therapy sessions.

Christy Strawder testified that she was assigned as case manager for Kathleen's family in January 2000. She testified that the five children have been in out-of-home placements since July 1999. Strawder testified that Kathleen had not completed a psychiatric evaluation by a licensed psychiatrist, nor did she attend individual counseling with a licensed mental health practitioner or therapist. She also testified that Kathleen had not been consistently involved in the children's family therapy sessions and had only attended five sessions in over 14 months. Regarding the requirements of stable housing and a legal source of income, Strawder testified that Kathleen resides with her father and has not been employed since July 2000. Strawder further testified that Kathleen had not been consistent in visiting her children. In her opinion, it is in the children's best interests that Kathleen's parental rights be terminated because Kathleen had not achieved any of the court-ordered goals, nor had Kathleen been consistent in visiting and providing for her children's emotional or financial needs.

On April 19, 2001, the juvenile court entered an order terminating Kathleen's parental rights to Andrew, Ashley, Thomas, Troy, and Megan under § 43-292(2), (6), and (7). Kathleen has timely appealed to this court.

## ASSIGNMENT OF ERROR

Kathleen's assignments of error can be consolidated into the following assignment: The juvenile court erred in determining that the State proved by clear and convincing evidence that termination of her parental rights was justified under § 43-292(2), (6), and (7).

## STANDARD OF REVIEW

[1-3] In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record; while appellate review is independent of the juvenile court's findings, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001). An order terminating parental rights

must be based on clear and convincing evidence. *Id.* A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *Id.*

## ANALYSIS

On appeal, Kathleen contends that the juvenile court erred in determining that the State proved by clear and convincing evidence that termination of her parental rights was justified under § 43-292(2), (6), and (7).

[4,5] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). The State must prove these elements by clear and convincing evidence, that is, by the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996).

We first address whether the termination was proper pursuant to § 43-292(7), which requires that the State prove that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months and that termination is in the child's best interests.

The evidence adduced by the State establishes that all five of the children were removed from Kathleen's home on July 22, 1999, and have been continuously in out-of-home placements since that time until the motion to terminate Kathleen's parental rights was filed on December 15, 2000. The amount of time these children have been in out-of-home placements clearly exceeds 15 months out of the last 22 months. Thus, the State proved by clear and convincing evidence that Andrew, Ashley, Thomas, Troy, and Megan have been in out-of-home placements for more than 15 months out of the last 22 months.

We proceed to consider whether terminating Kathleen's parental rights to the children is in their best interests. Our review of the record establishes that Kathleen was ordered by the juvenile court to complete a psychiatric evaluation, attend individual counseling with a licensed mental health practitioner or therapist,

participate in a family preservation program, consistently attend visits with her children, obtain and maintain stable housing, and obtain and maintain a legal source of income. The record further establishes that Kathleen failed to comply with every aspect of the juvenile court's order. Additionally, each therapist, except Pitlor, who had no opinion, opined that it was in the children's best interests that Kathleen's parental rights be terminated.

[6,7] Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). A child in interest cannot and should not be suspended in foster care or made to await parental maturity. *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997).

We find that the State proved by clear and convincing evidence that it was in the children's best interests that Kathleen's parental rights be terminated. Therefore, based upon our de novo review of the record, we find clear and convincing evidence to warrant termination of Kathleen's parental rights under § 43-292(7).

Having determined that the State has established by clear and convincing evidence that termination of Kathleen's parental rights is appropriate pursuant to § 43-292(7), we do not consider issues relating to the sufficiency of the evidence concerning the other statutory provisions identified by the trial court as grounds for termination. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). See *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

[8] Furthermore, we note that because we do not consider whether termination of Kathleen's parental rights was proper pursuant to § 43-292(6), Neb. Rev. Stat. § 43-283.01 (Reissue 1998), which requires reasonable efforts to reunify families, is not applicable to the instant case. Section 43-283.01 is only incorporated into § 43-292(6), not into the remaining subsections of § 43-292. *In re Interest of DeWayne G. & Devon G., supra.* In considering when the issue of reasonable efforts under § 43-283.01 must be reviewed by a juvenile court, the Nebraska Supreme Court stated:

> When § 43-283.01 was adopted, the Legislature at the same time amended selected statutes in the juvenile code to indicate the specific stages within juvenile proceedings during

> which the juvenile court must consider reasonable efforts to preserve and reunify families pursuant to § 43-283.01.

263 Neb. at 53, 638 N.W.2d at 518. The court identified the following statutes which were amended: Neb. Rev. Stat. §§ 43-284, 43-254, and 43-1315 (Reissue 1998) and § 43-292(6).

[9] The court then found that the issue of reasonable efforts if required under § 43-283.01 must be reviewed by the juvenile court in the following situations: (1) when removing from the home a juvenile adjudged to be under subsections (3) or (4) of § 43-247 pursuant to § 43-284; (2) when the court continues a juvenile's out-of-home placement pending adjudication pursuant to § 43-254; (3) when the court reviews a juvenile's status and permanency planning pursuant to § 43-1315; and (4) when termination of parental rights to a juvenile is sought by the State under § 43-292(6). *In re Interest of DeWayne G. & Devon G., supra.*

Since we have determined that termination was proper pursuant to § 43-292(7) and that the State need only establish one of the statutory grounds enumerated in § 43-292, § 43-283.01 is not relevant to our determination in the instant case.

## CONCLUSION

For the reasons discussed above, we find that there was clear and convincing evidence presented to warrant the termination of Kathleen's parental rights to Andrew, Ashley, Thomas, Troy, and Megan. Therefore, the judgment of the juvenile court is affirmed.

AFFIRMED.

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MICHAEL S. KEARNEY, APPELLANT, V.
STACEY L. KEARNEY, APPELLEE.
644 N.W.2d 171

Filed April 30, 2002. No. A-01-862.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

2. **Judgments: Evidence: Appeal and Error.** In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Divorce: Mental Health.** Neb. Rev. Stat. § 42-362 (Cum. Supp. 2000) empowers the court to order the payment of such support and maintenance to a mentally ill spouse as it may deem necessary and proper, giving due consideration to the property and income of the parties.
5. ____: ____. Reasonableness is the ultimate criterion to be applied in testing whether support and maintenance is to be awarded a mentally ill spouse under the provisions of Neb. Rev. Stat. § 42-362 (Cum. Supp. 2000) and, if so, the amount and duration thereof.
6. **Divorce: Mental Health: Appeal and Error.** The support and maintenance to be awarded under Neb. Rev. Stat. § 42-362 (Cum. Supp. 2000) is a matter initially entrusted to the discretion of the trial judge, which award, on appeal, is reviewed de novo on the record and affirmed in the absence of an abuse of that discretion.
7. **Divorce: Mental Health.** Although support and maintenance to a mentally ill spouse in some respects parallels alimony, the two are not the same in all respects. The condition which triggers the support and maintenance to be paid under Neb. Rev. Stat. § 42-362 (Cum. Supp. 2000) is the mental illness; thus, the payment of such support and maintenance should continue so long as, and only so long as, the mental illness continues or the mentally ill individual acquires another spouse.
8. **Child Support: Rules of the Supreme Court.** The main principle underlying the Nebraska Child Support Guidelines is the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
9. ____: ____. A court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
10. **Divorce: Attorney Fees: Appeal and Error.** In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed and remanded with directions.

Robert Wm. Chapin, Jr., for appellant.

Steven J. Flodman and Stefanie S. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Michael S. Kearney appeals from the decree of dissolution of marriage entered on June 29, 2001, by the district court for Lancaster County, which dissolved the marriage of Michael and Stacey L. Kearney. For the reasons stated below, we affirm.

## BACKGROUND

The parties began living together in 1995; were married on November 15, 1997, in Lincoln, Nebraska; and separated on February 25, 2000. The parties have one minor child, Dyllen, born March 17, 1998.

Michael filed a petition for dissolution of marriage on April 3, 2000. In his petition, Michael sought custody of Dyllen and asked the court to award him child support, to make an equitable distribution of the parties' property and debts, and to award him a reasonable amount in temporary and final attorney fees. Stacey filed a responsive pleading requesting custody, child support, spousal support, and attorney fees.

Trial was held before the court on May 8, 2001, and the evidence indicated that Stacey suffers from a mental disease, diagnosed as "Schizophrenia Affective Disorder—Depressed Type." Stacey was suicidal and experienced severe depression at times during the parties' marriage. She required hospitalization on several occasions over the 3 years prior to trial. Stacey's mental health problems became more serious after the birth of Dyllen. Michael testified that he was aware that Stacey suffered from mental health problems when they were married.

Stacey was not employed at the time of trial, although she had attempted to obtain some part-time employment against her doctor's advice. Stacey was not employed during most of the parties' marriage, nor did she attend school during that time. Stacey has been employed in the past at fast-food restaurants, convenience stores, and through various temporary service agencies, but she did not work at any of these jobs for any extensive period. When Stacey has worked, she has earned approximately $7 per hour. In the 4 or 5 years prior to trial, Stacey had not held a job for more than 1 or 2 weeks at a time.

At the time of trial, Stacey was receiving Supplemental Security Income (SSI) of $530 per month from the Social Security Administration and was eligible for low-income housing. Stacey had also applied for Social Security disability benefits for herself and Dyllen. Stacey asked the court to award any such benefits for Dyllen to Michael as long as Michael had custody of Dyllen in lieu of any child support payments. Stacey received a lump-sum payment in April 2001 from Social Security for back benefits, the majority of which she used to pay various bills. Stacey indicated that her receipt of SSI would entitle her to receive Medicaid benefits, which would pick up her medical expenses back to November of the previous year. Stacey presented exhibits detailing her significant amount of indebtedness, as well as her monthly living expenses which totaled $1,627 per month and did not include any payments toward her indebtedness.

As to her educational background, Stacey graduated from high school and completed one semester at the University of Nebraska at Kearney, where she was studying accounting, prior to moving to Lincoln with Michael. Stacey was enrolled at Southeast Community College at the time of trial to study business, taking two classes totaling 9 hours.

The court appointed a guardian ad litem to represent Stacey's interests due to her mental illness. Dr. J. Boman Bastani, Stacey's psychiatrist, encouraged Stacey to discontinue holding a job to reduce her stress level. Bastani felt that if Stacey could become asymptomatic for a period of 6 months, he might consider placing Stacey in vocational job training. Bastani was very cautious about Stacey's present ability to work, based on her inability to do so in the past. In his opinion, Stacey's prognosis was "[g]uarded at best." The guardian ad litem agreed with Bastani's assessment that Stacey was unable to be employed at the time of trial. The guardian ad litem testified further that based on her investigation, she felt that Stacey was very limited in her ability to produce income, that Stacey should have support, and that Stacey did not have the ability to provide child support for Dyllen. At the time of the guardian ad litem's written report, dated March 13, 2001, Stacey's mental illness required her to be on as many as eight different medications at one time.

The parties borrowed money from Stacey's parents throughout the marriage to pay expenses related to Dyllen's birth, to purchase a pickup truck and a van, and to purchase furniture for the marital home. Stacey's parents have continued to support her since the parties' separation, helping pay the house payments, medical insurance, vehicle insurance, and attorney fees. Stacey's mother indicated that they had paid divorce-related legal fees amounting to $2,200 up to the date of trial.

Stacey testified that although she would love to have custody of Dyllen, she felt that his care at that time would be more than she could handle. Stacey testified further regarding difficulties encountered with arranging visitation transportation during the pendency of the parties' divorce. Stacey testified that she cannot afford the extra expense of traveling to and from Omaha to see Dyllen for visitations and that when she has had to do so, she needed to borrow gas money from friends and family. Stacey also indicated that it is uncomfortable for her to have to pick up Dyllen from Michael's roommate on occasions when Michael is not present. Stacey's father expressed his concerns that although Stacey was capable of driving to and from Omaha to pick up and return Dyllen for visitations, her vehicle, which had over 130,000 miles on it, was not really "road worthy." Michael testified that he has had some problems with transporting Dyllen to and from visits, that Stacey had asked him a few times to provide transportation, and that he had been unwilling to do so.

At the time of trial, Michael had lived in Omaha with a female friend for a little more than 1 year and had been employed by LaFredo Fresh Produce for approximately 8 months as a delivery driver. Dyllen had resided with Michael in Omaha since approximately March 2000. Michael testified that he made approximately $30,000 per year in 1998 and 1999 and that Stacey did not work during that time period. Joint income tax forms admitted into evidence for 1998 and 1999 show income of $31,468 and $35,039 respectively. Michael recalled receiving gross pay of $34,549 in 1997.

With regard to his income since the parties' separation, Michael indicated that his gross wages for 2000 were $28,500, an amount due in part to his move to Omaha and change in employment. Michael testified further that when he moved to

Omaha, he took a $3 pay cut, which he had since "made up." Michael testified that he made about $1,600 per month at the time of trial, that his take-home pay from his last paycheck was $851 for 2 weeks or 80 hours with 5 hours of overtime. A pay stub from Michael's employment for the pay period from February 11 to 24, 2001, shows gross earnings of $1,197.39 for 80 regular hours and 9.77 overtime hours. This pay stub also indicates that Michael's year-to-date gross earnings through February 24, 2001, were $5,971.37. Michael testified that his hours vary depending on the number of deliveries he makes and the distance that he is required to drive and that he has worked overtime every month at his present job. Michael testified about the monthly living expenses he incurs for himself and Dyllen, which totaled approximately $1,500.

Michael did not have health insurance at his current employment, although it was available after a 3-month probation period. Michael claimed he could not afford the insurance, which would cost approximately $200 per month for himself and Dyllen. At the time Michael left his job at Lincoln Poultry, he had health insurance covering himself and Dyllen, but he did not continue Stacey's coverage under that policy. Michael indicated further that COBRA coverage was available to Stacey, but he did not pay those premiums for her.

The court entered an order on June 29, 2001, dissolving the parties' marriage and granting the permanent custody of Dyllen to Michael pursuant to the parties' oral stipulation at trial. The court found that it was in Dyllen's best interests that Michael be awarded his custody and granted Stacey reasonable rights of visitation.

The court found that Stacey should not be required to pay child support at that time because she was disabled and because of her sporadic past employment. In lieu of child support, the court ordered that any Social Security benefits available to Dyllen as a result of Stacey's disability be paid to Michael. The court further noted that any payment of child support would reduce Stacey's net income below the federal poverty level. The court attached a child support worksheet that showed Stacey's monthly net income as $548 and Michael's as $2,736.13, with monthly support figures of $127.65 and $637.35 attributed to

Stacey and Michael respectively. The worksheet also reflected that Stacey's "Section R Adjusted Monthly Share" under the Nebraska Child Support Guidelines was $50.

The court awarded each party all property then in their respective possession and specifically awarded Michael the 1987 pickup and Stacey the 1992 van. The court found that the parties should be separately responsible for any bills or debts incurred by them and specifically found that Stacey was responsible for debts amounting to at least $24,940, which amount included the $9,000 balance owed on the loans from Stacey's parents and various credit card and medical bills.

The trial court found that the evidence established that Stacey was mentally ill and that it was appropriate to enter a support order as provided by Neb. Rev. Stat. § 42-362 (Cum. Supp. 2000). The court set spousal support and maintenance for Stacey in the amount of $350 per month, which was to continue until Stacey sufficiently recovered from her mental illness, remarried, or died. The court also ordered Michael to pay $1,000 toward Stacey's attorney fee. Michael subsequently perfected his appeal to this court.

## ASSIGNMENTS OF ERROR

Michael asserts that the district court erred in (1) awarding spousal support to Stacey, (2) not awarding Michael at least the minimum level of daycare and child support for Dyllen, (3) not ordering Stacey to pay half of any medical expenses incurred by Dyllen that are not covered by health insurance, (4) requiring Michael to deliver and pick up Dyllen for visitations, and (5) awarding Stacey $1,000 in attorney fees.

## STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[2] In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Harris v. Harris, supra.*

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

## ANALYSIS

*Spousal Support.*

[4-6] Michael first asserts that the district court erred in awarding spousal support to Stacey. The district court found that Stacey was mentally ill and ordered Michael to pay spousal support to Stacey pursuant to § 42-362 in the amount of $350 per month, continuing until Stacey has sufficiently recovered from her mental illness, marries, or dies. Section 42-362 provides as follows:

> When the pleadings or evidence in any action pursuant to sections 42-347 to 42-381 indicate that either spouse is mentally ill, a guardian ad litem or an attorney, or both, shall be appointed to represent the interests of such spouse. Such guardian's fee or attorney's fee, or both, shall be taxed as costs when allowed by the court and shall be paid by the county if the parties are unable to do so. When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties, and the court may require the party ordered to provide support and maintenance to file a bond or otherwise give security for such support. Such an order for support may be entered upon the application of the guardian or guardian ad litem or of any person, county, municipality, or institution charged with the support of such

> mentally ill person. The order for support may, if necessary, be revised from time to time on like application.

Reasonableness is the ultimate criterion to be applied in testing whether support and maintenance is to be awarded a mentally ill spouse under the provisions of § 42-362 and, if so, the amount and duration thereof. *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986). The support and maintenance to be awarded under § 42-362 is a matter initially entrusted to the discretion of the trial judge, which award, on appeal, is reviewed de novo on the record and affirmed in the absence of an abuse of that discretion. *Id.*

Michael questions whether spousal support is appropriate in the present circumstances where he has the custody of Dyllen and is receiving no child support from Stacey. Michael suggests that in these circumstances, ordering him to pay spousal support to Stacey will effectively take away money from the support of the minor child. Michael directs us to Neb. Rev. Stat. § 42-347(4) (Cum. Supp. 2000), which states:

> Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, shall mean alimony or maintenance support for a spouse or former spouse when ordered as a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household.

We are not persuaded by Michael's argument. Section 42-347(4) merely defines "spousal support" in the context of income withholding orders and distinguishes spousal support from child support. See, also, *Kropf v. Kropf*, 248 Neb. 614, 538 N.W.2d 496 (1995) (holding that term "spousal support," as defined by Legislature, means support paid to spouse within confines of order also providing for child support). We do not find the statute to stand for the proposition that spousal support should not be awarded to a party who is not also receiving child support. Such a result would be wholly inconsistent with the intent of § 42-362.

[7] In reviewing the award of spousal support under § 42-362, we note that the only published appellate case in Nebraska on the subject is *Black v. Black, supra*. In *Black*, the husband appealed the monetary award to the wife, made pursuant to § 42-362 on

the basis that the wife was mentally ill. The wife was a 50-year-old registered nurse suffering from schizophrenia. The evidence presented at trial indicated that while the wife had worked in the past and was capable of living independently if she continued treatment, her condition was chronic and would require treatment for the remainder of her life. The wife held full-time employment for a few years, but also lost several jobs due to her condition, and she required hospitalization at various times throughout the marriage. The trial court determined that the wife was mentally ill as defined by § 42-362 and included a provision in its decree awarding the wife monthly "alimony" which was to terminate upon the death of either party or the remarriage of the wife. On appeal, the Nebraska Supreme Court noted:

> [A]lthough support and maintenance to a mentally ill spouse in some respects parallels alimony, the two are not the same in all respects. The condition which triggers the support and maintenance to be paid under § 42-362 is the mental illness; thus, the payment of such support and maintenance should continue so long as, and only so long as, the mental illness continues or [the mentally ill individual] acquires another [spouse].

*Black v. Black*, 223 Neb. 203, 208-09, 388 N.W.2d 815, 820 (1986).

The court found that the evidence established that the wife's ability to support herself was limited by virtue of her mental illness. The court further found that the husband had income above his needs in an amount exceeding the support and maintenance awarded to the wife, while the wife had needs above her income, which exceeded the amount of support and maintenance awarded. The court affirmed the trial court's award of support and maintenance to the wife, but modified the decree to provide that the support and maintenance to the wife should continue only so long as the wife's mental illness continued and she did not remarry. In the present case, the district court specifically found that Stacey was mentally ill and ordered Michael to pay spousal support to Stacey pursuant to § 42-362 in the amount of $350 per month, continuing until Stacey has sufficiently recovered from her mental illness, marries, or dies. We conclude that the award in the present case was in fact an award of "spousal

support" under § 42-362, and not an award of alimony as suggested by Michael.

In the present case, as in *Black v. Black, supra*, Stacey's ability to produce income is clearly limited by her mental illness and her living expenses and indebtedness greatly exceed that limited ability. On the other hand, Michael's net income as determined by the trial court exceeds his monthly expenses. Based on our review of the record in this case, we cannot say that the trial court abused its discretion in awarding Stacey support and maintenance pursuant to § 42-362.

*Child Support.*

[8,9] Michael next asserts that the district court erred in not awarding him at least the minimum level of daycare and child support for Dyllen and in not ordering Stacey to pay half of Dyllen's medical expenses not covered by health insurance. The main principle underlying the Nebraska Child Support Guidelines is the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000). However, a court may deviate from the child support guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C. Paragraph R of the guidelines provides as follows:

> Basic Subsistence Limitation. A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $716 net monthly 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.

(Emphasis supplied.)

The trial court found Stacey's monthly nontaxable income to be $548, which appears to be roughly what Stacey was receiving in SSI. Obviously, this income is already below the poverty level without any deductions for child support. Providing for minimum support is discretionary with the court, and we find that the court did not abuse its discretion in not ordering minimum support. In so finding, we note that the court did order that any benefits available

to Dyllen as a result of Stacey's disability be paid to Michael in lieu of child support.

With regard to Michael's assertion that the district court erred in failing to order Stacey to pay at least a minimum level of day-care expenses and to pay half of any medical expenses incurred by Dyllen not covered by health insurance, we note that the child support guidelines provide as follows:

> N. Child-Care Expenses. Child-care expenses are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines. Child-care expenses for the child for whom the support is being set . . . shall be divided between the parents in proportion to their parental contribution (worksheet 1, line 6) and shall be added to the basic support obligation computed under these guidelines. . . .
>
> O. Health Care. Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law, and the court may apportion all nonreimbursed children's health care costs between the parents according to the same formula used to determine each parent's share of support.

The above provisions of the guidelines are subject to paragraph R quoted above and the same rationale applies, namely, that requiring Stacey to pay for any daycare or medical expenses would further reduce her income which is already below the poverty level. Our review of the record leads us to conclude that Michael is better equipped at this time to provide for Dyllen's health care and daycare needs. Stacey cannot afford to pay for her own medical care much less the daycare or unreimbursed medical costs for Dyllen. Stacey was not employed at the time of trial, and her doctor and guardian ad litem both recommended that Stacey not work. Accordingly, we find that the district court did not abuse its discretion in not ordering Stacey to be responsible for a portion of Dyllen's daycare expenses and unreimbursed medical costs. Michael's assignment of error is without merit.

*Visitation Transportation.*

Michael also asserts that the district court erred in requiring him to deliver and pick up Dyllen for visitations. Although both

parties indicate in their briefs on appeal that the court made such an order, our review of the record in this matter does not reveal any such order by the district court. At trial, Stacey submitted her proposed parenting time schedule, which included a paragraph stating that "[t]he custodial parent shall provide transportation to and from each visitation with the non-custodial parent." The district court in its decree of dissolution set forth a schedule of "Respondent's Parenting Time," which closely, although not exactly, follows that schedule which was proposed by Stacey at trial; however, the schedule adopted by the court in its decree does not include any provision regarding visitation transportation. We have not been able to find any such ruling by the court on the record in our review of the bill of exceptions and transcript. Since the issue of transportation was litigated, the omission of any provision for it in the decree was plain error. We therefore remand the cause to the trial court for a determination of the visitation transportation on the record previously made below.

*Attorney Fees.*

[10] Finally, Michael asserts that the district court erred in awarding Stacey $1,000 in attorney fees. In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). The evidence indicated that Stacey's parents paid Stacey's legal fees amounting to $2,200 up to the date of trial. Given Stacey's disability and the parties' respective income earning abilities, we cannot conclude that the district court abused its discretion in requiring Michael to pay $1,000 toward Stacey's legal fees in this matter.

## CONCLUSION

The trial court did not abuse its discretion in awarding Stacey support and maintenance pursuant to § 42-362. We also conclude that the district court did not abuse its discretion in not ordering Stacey to pay child support and in ordering that any benefits available to Dyllen as a result of Stacey's disability be paid to Michael in lieu of child support. Likewise, the district court did not abuse its discretion in not requiring Stacey to pay a portion of the daycare and unreimbursed medical expenses for

Dyllen or in requiring Michael to pay $1,000 toward Stacey's legal fees in this matter. Finally, we remand the cause to the trial court for a determination of the visitation transportation on the record previously made below.

AFFIRMED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
RAYMOND V. WAHRMAN, APPELLANT.
644 N.W.2d 572

Filed April 30, 2002. No. A-01-1405.

1. **Judgments: Records.** Neb. Rev. Stat. §§ 25-1301(3) and 25-2729(3) (Cum. Supp. 2000) provide that a judgment is entered by the clerk of the court by placing the file stamp and date upon a rendered judgment.
2. **Judgments: Records: Notice: Fees: Appeal and Error.** A notice of appeal or docket fee filed or deposited after the announcement of the decision or final order but before the entry of the judgment or final order shall be treated as filed or deposited after the entry of the judgment or final order and on the day of entry.
3. **Motions for New Trial: Records.** A motion for new trial filed after the trial court announces its decision but before judgment is effective if the record shows that the motion relates to the decision which had been announced by the trial court and the record shows that the judgment was subsequently entered in accordance with the decision which was announced.

Appeal from the District Court for Red Willow County, JOHN P. MURPHY, Judge, on appeal thereto from the County Court for Red Willow County, CLOYD CLARK, Judge. Appeal dismissed, and cause remanded with directions.

Leonard P. Vyhnalek for appellant.

Raymond V. Wahrman, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

IRWIN, Chief Judge, and HANNON and SIEVERS, Judges.

HANNON, Judge.

This case is another example of the great waste of judicial resources in this state which results from the failure of the clerks

of trial courts to enter judgments rendered in the various trial courts in accordance with Neb. Rev. Stat. §§ 25-1301(3) and 25-2729(3) (Cum. Supp. 2000) by placing a file stamp and date upon such judgment or final order. We point out that under Neb. Rev. Stat. § 25-2214 (Reissue 1995), clerks perform their duties under the direction of the court. Inefficiencies such as in this case arise in large part due to the failure of the judges and lawyers participating in specific litigation to see that the judgments rendered by the court are in fact entered.

This case was a criminal prosecution in the county court for Red Willow County. A trial was had on April 18, 2001, and a judgment of conviction and sentence was rendered by the judge on an unknown date, but probably April 18. A notice of appeal was filed on April 18, and the district court filing fee was paid on April 19. A withdrawal of notice of appeal was filed by the defendant's attorney on April 30, and a motion for new trial was filed on the same date. By an order which was both rendered and entered on May 7, the county court denied the motion to withdraw the appeal and the motion for new trial on the basis that the county court had no jurisdiction because of the appeal to the district court. The matter came on for hearing in the district court, and briefs on file show there was serious contest on the legal point in that court. A decision was rendered by the district court and entered by the court clerk on November 14, 2001.

[1] Sections 25-1301(3) and 25-2729(3) provide that a judgment is entered by the clerk of the court by placing the file stamp and date upon a rendered judgment. It follows that without the clerk's doing so, the judgment has not been entered. In going through the normal routine of checking the files of this court, it was observed that the order finding the defendant guilty and sentencing him had never been entered by the clerk of the county court. An order to show cause was entered, and thereafter, we were presented with an amended transcript of the county court via the district court which shows that the order of conviction and sentence was filed on February 15, 2002. The inner workings of statutory provisions and applicable case law justifies publication of this opinion.

The judgment convicting and sentencing the defendant was not entered and therefore was not effective until February 15,

2002. Therefore, on November 14, 2001, when the district court affirmed the county court's decision, the district court did not have jurisdiction, and that action is a nullity. See *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

[2] Section 25-2729(5) provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment or final order shall be treated as filed or deposited after the entry of the judgment or final order and on the day of entry.

At first blush, it would therefore appear that under that statute, the notice of appeal filed April 18, 2001, which clearly refers to the judgment which was rendered but not entered on that date, would be effective when the judgment was rendered on February 15, 2002. However, on April 30, 2001, the defendant had filed a withdrawal of notice of appeal and on the same date filed a motion for new trial. The trial court originally denied these actions because it felt the district court had jurisdiction. This might have been true had the judgment of conviction and sentence been entered, but since it was not, the county court had jurisdiction. However, the motion for new trial was just as premature as the notice of appeal.

[3] A motion for new trial filed after the trial court announces its decision but before judgment is effective if the record shows that the motion relates to the decision which had been announced by the trial court and the record shows that the judgment was subsequently entered in accordance with the decision which was announced. See, *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997); *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979). The record satisfies this requirement. While the order disposing of the motion for new trial did say that it was denied, the order also says it was denied for lack of jurisdiction, and therefore, there has been no ruling upon that motion for new trial. There is therefore a valid motion for new trial which is effective as of February 15, 2002. The notice of appeal had been withdrawn before it was effective, and therefore as the matter now stands, neither this court nor the district court has jurisdiction of the case and that motion for new trial is still pending in the county court. This court does not consider what, if any, issues might be viable under that motion.

Because the district court did not have jurisdiction, this court does not have jurisdiction, and we dismiss the appeal. We nevertheless have jurisdiction to require the district court to vacate its order and to dismiss the appeal from county court, which we do.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

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## IN RE INTEREST OF BRETTANY M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRETT W., APPELLANT.

644 N.W.2d 574

Filed May 7, 2002. No. A-01-880.

1. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the best interests of the children involved.
2. **Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record.
3. **Juvenile Courts: Judgments: Appeal and Error.** Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another.
4. **Parental Rights: Rules of Evidence.** The Nebraska rules of evidence do not apply in dispositional hearings arising under the Nebraska Juvenile Code, including hearings on applications to terminate parental rights.
5. **Parental Rights: Rules of Evidence: Due Process.** The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost.
6. **Parental Rights.** When a parent whose parental rights are at issue has been incarcerated, courts consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated.
7. **Parental Rights: Trial: Expert Witnesses: Rules of Evidence.** Whether a witness is qualified to testify as an expert under the Nebraska Evidence Rules, which serve as a guidepost in termination of parental rights cases, is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1995).
8. **Evidence: Appeal and Error.** Because appellate review is de novo, the remedy for improperly considered evidence is for the appellate court to not consider improper evidence in reviewing the record.

9. **Parental Rights.** Parental incarceration may not be utilized as the sole ground for termination of parental rights.
10. ____. A parent's incarceration may be considered along with other factors in determining whether parental rights should be terminated.
11. **Parental Rights: Evidence.** Incarceration of a parent is not supposed to insulate an inmate from termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent.
12. **Parental Rights.** It is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the crime was perpetrated.
13. ____. Although termination of parental rights cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration, and when the aggregate of these circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper.
14. ____. Generally, it is in a child's best interests that a final disposition of termination of parental rights be made without delay.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Scott A. Calkins, of Byam & Hoarty, for appellant.

James S. Jansen, Douglas County Attorney, and Kim B. Hawekotte for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

Brett W. appeals from an order of the separate juvenile court of Douglas County, Nebraska, terminating his parental rights to Brettany M. and Cinnamon M. On appeal, Brett challenges the court's rulings concerning the admission of certain evidence and the court's finding that the State had proven by clear and convincing evidence that termination of his parental rights was in the best interests of Brettany and Cinnamon. Brett argues that the determination to terminate his parental rights was based on his incarceration. On our de novo review, we affirm the termination of Brett's parental rights.

## II. BACKGROUND

These proceedings involve the termination of Brett's parental rights to Brettany and Cinnamon. Although another child, Darius

M., was also named in the caption of the case, the issues on appeal are limited to Brettany and Cinnamon. Accordingly, we limit the factual background to a discussion of the facts as they relate to those two children.

Brettany was born August 26, 1996. Brettany suffered medical complications at birth and experienced a condition known as gastroschisis, a condition in which she was born with her intestines outside her body. As a result of this condition, Brettany spent the first few months of her life in the hospital and underwent several surgeries before she was discharged and allowed to leave the hospital. Brett testified that he spent as much time as he could, when not working, at the hospital with Brettany during this time and was in the surgery room with Brettany during her surgeries. To be able to care for Brettany's condition when she was allowed to leave the hospital, Brett underwent training and received a state license to act as a certified nursing assistant.

The evidence presented at trial indicated that after Brettany left the hospital, Brett was the primary caregiver taking care of her special needs. Specifically, Brett maintained a feeding tube necessary for feeding Brettany, was initially a stay-at-home parent for Brettany, and ultimately assisted daycare providers with Brettany's special needs.

Brettany's biological mother, Jennifer M., had a poor relationship with Brett. The parties separated numerous times, during which Brett cared for Brettany. Ultimately, Brett underwent court proceedings to establish paternity of Brettany and to be awarded legal custody of Brettany. In those court proceedings, Brett was found to be Brettany's father and was awarded custody of Brettany.

Cinnamon was born 15 months after Brettany, on November 30, 1997. Brett testified that after Cinnamon's birth, he was the primary caregiver to both Brettany and Cinnamon. When Cinnamon was approximately 6 months old, Jennifer took Cinnamon and left town for approximately 1 month without notifying Brett of their whereabouts. After this incident, Brett underwent court proceedings to establish paternity of Cinnamon and to be awarded legal custody of Cinnamon. In those court proceedings, Brett was found to be Cinnamon's father and was awarded custody of Cinnamon.

The record is undisputed that Brett was the primary caregiver for both Brettany and Cinnamon. Brett called several witnesses to testify to this fact and testified in this regard on his own behalf.

The record indicates that Brett and Jennifer were unable to live together and get along. There was apparently some altercation in July 1998, although the details of this altercation are not evident on the record. Following the July altercation, Brett underwent court proceedings and obtained a domestic violence protection order on behalf of himself and Brettany and Cinnamon, which was granted on September 1. In addition, although there is no evidence in the record to indicate that either child ever witnessed or experienced any domestic violence, the relationship between Brett and Jennifer turned violent on at least one occasion.

On November 1, 1998, there was an altercation between Brett and Jennifer. During this altercation, Brett assaulted Jennifer and caused serious bodily injury. Specifically, Brett pled no contest to a charge of first degree assault, and the factual basis for the plea indicated that Brett was observed to have "stomped" on Jennifer's head. As a result, Jennifer spent approximately 1 month in the hospital and was then released to a nursing home where she remained largely uncommunicative and unable to care for herself. The record indicates that Jennifer remained in this condition at least as of June 1999, although there was no evidence presented at trial to indicate her progress.

As a result of Brett's no contest plea, he was sentenced to a term of imprisonment of 19 to 20 years on June 18, 1999. According to the record, Brett is eligible for parole on May 11, 2008, and has a tentative release date of November 11, 2008. By the year 2008, Brettany will be approximately 11 years old and Cinnamon will be approximately 10 years old, and both will have spent more than 9 years away from Brett's care.

On November 17, 1998, an amended petition was filed alleging that Brettany and Cinnamon were within the jurisdiction of the juvenile court through the fault or habits of Brett. A second amended petition was filed on December 4, 1998, which added Darius to the pleadings. On March 4, 1999, the juvenile court entered an order finding that the children were within the jurisdiction of the court through the fault or habits of Brett.

On April 19, 1999, a disposition order was entered by the juvenile court. The court indicated that the permanency objective was reunification and ordered Brett to comply with a case plan developed by the Nebraska Department of Health and Human Services (Department). Various orders were entered after review hearings in October and November 1999 and January and April 2000.

On July 20, 2000, the State filed a motion for termination of Brett's parental rights. The State alleged that termination was appropriate pursuant to Neb. Rev. Stat. § 43-292(2) and (7) (Reissue 1998). The court entered an order terminating Brett's parental rights on July 18, 2001. The court found that termination was appropriate under both § 43-292(2) and (7) and that termination was in the best interests of Brettany and Cinnamon. This timely appeal followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Brett has assigned five errors, which we consolidate for discussion to two. First, Brett asserts that the court erred in various evidentiary rulings. Second, Brett asserts that the court erred in finding clear and convincing evidence that termination of his parental rights is in the best interests of Brettany and Cinnamon; Brett argues primarily that there was not clear and convincing evidence because the State's evidence focused on his incarceration.

## IV. ANALYSIS

### 1. Elements of Proof

[1] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the best interests of the children involved. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Here, the State alleged and the court determined that the statutory grounds set forth in § 43-292(2) and (7) were established. On appeal, Brett has not challenged the juvenile court's finding that there was a statutory basis for termination, but has challenged the court's finding that termination was in the best interests of Brettany and Cinnamon.

### 2. Standard of Review

[2,3] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. *In re Interest of Clifford M. et al., supra.* Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *Id.*

In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Clifford M. et al., supra.* "Clear and convincing evidence" means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Further, clear and convincing evidence is more than a preponderance of evidence, but less than proof beyond a reasonable doubt. *In re Interest of Headrick*, 3 Neb. App. 807, 532 N.W.2d 643 (1995).

### 3. Evidentiary Rulings

Brett first challenges the court's ruling on various evidentiary objections. Brett alleges that the court erred in receiving various evidence offered by the State and in not receiving various evidence offered by Brett.

#### (a) Criminal Sentencing Hearing

First, Brett challenges the court's ruling that exhibit 59 was admissible. Exhibit 59 is a transcription of Brett's plea and sentencing in the criminal action concerning the first degree assault of Jennifer. When exhibit 59 was offered by the State, Brett specifically indicated "[n]o objection on foundation. We'd object on relevance." On appeal, Brett argues that the evidence "has absolutely no probative value in this case." Brief for appellant at 33. We disagree.

[4,5] As Brett recognizes on appeal, the Nebraska rules of evidence do not apply in dispositional hearings arising under the Nebraska Juvenile Code, including hearings on applications to terminate parental rights. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999); *In re Interest of Andrew M., Jr. & Marceleno M.*, 9 Neb. App. 947, 622 N.W.2d 697 (2001); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *Id.* In a termination proceeding, the State must provide the parents with fundamentally fair procedures. *In re Interest of Theodore W., supra.*

> " ' "[I]t is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska Rules of Evidence provide *a guidepost* in that determination." ' "

(Emphasis supplied.) 4 Neb. App. at 436, 545 N.W.2d at 126 (quoting *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993), quoting *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992)). The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the evidence rules serving as a guidepost. See *In re Interest of Theodore W., supra.*

Under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. *In re Interest of Andrew M., Jr. & Marceleno M., supra*; *In re Interest of Theodore W., supra.* There are two components of relevant evidence: materiality and probative value. *In re Interest of Andrew M., Jr. & Marceleno M., supra.* Materiality is defined as the relation between the propositions for which the evidence is being offered and the issues in the case. *Id.* To be probative, the evidence must tend to establish what it is that is being offered to prove. *Id.*

In the present case, the primary issue presented to the court was whether termination of Brett's parental rights was in the best interests of Brettany and Cinnamon. Thus, the issue on appeal is whether Brett was denied fundamental fairness when the court considered the transcription of his plea and sentencing on criminal charges for first degree assault of Jennifer. We conclude that this evidence was probative on the issue of Brettany and Cinnamon's best interests.

Exhibit 59 includes the factual basis for Brett's no contest plea to the charge of first degree assault. The factual basis presented by the State and accepted by the district court was as follows:

> Your Honor, the victim in this case, Jennifer . . . , and [Brett] had a prior relationship. They also had children together. And on November 1st, 1998, in the area of 2014 North 16th Street, officers were called, as well as an ambulance, because there were several witnesses to observe [Brett] stomp the head of Jennifer . . . into the ground.
>
> One of those was a Mr. Williams, who was driving a church van, taking people home from a church function that day. He observed [Brett] doing this, ran up to him and yelled for him to stop. [Brett] said go on, get out of here. Mr. Williams then ran to make sure that 911 was called. But he also observed [Brett] continue to stomp on [Jennifer]'s head. [Jennifer] was taken to the hospital in very critical condition. She had multiple contusions and hematomas. The most significant of which was diffuse brain swelling.
>
> She did eventually leave the hospital, but she is currently [as of April 2, 1999] living in a nursing home. She's not able to go to physical therapy because she doesn't respond completely to stimuli. She has to communicate solely by blinking, and sometimes she can't even do that. So I think that covers it so far as the serious bodily injury. And this assault did occur in Omaha, Douglas County, Nebraska.

Exhibit 59 also contains a transcription of Brett's sentencing for the above crime. During Brett's sentencing, Jennifer's sister testified and provided evidence of Jennifer's condition as of June 18, 1999. She testified that Jennifer was in "the hospital emergency and ICU for a month" and then was transferred to a nursing home where she remained. She further indicated that Jennifer

was unable to speak, was unable to move, had "a trache" in her throat, and had a feeding tube in her stomach. This testimony indicated Jennifer's progress more than 6 months after Brett assaulted her.

[6] As noted, Brett's only objection to this evidence at trial was that it was not relevant. We conclude that the circumstances which led Brett to be sentenced to a prison term of nearly 20 years and which led to Jennifer's being physically incapable of parenting Brettany and Cinnamon, as well as the evidence concerning the extent of her progress in the 6 months of institutional care she received after the assault, are highly probative on the issue of whether Brettany and Cinnamon's best interests would be served by terminating Brett's parental rights. Indeed, the appellate courts of this state have specifically held that when a parent whose parental rights are at issue has been incarcerated, we do consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. See, *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). See, also, *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). As such, this assigned error is without merit.

(b) Testimony Concerning Bonding

Brett also challenges the court's admission of testimony from Miriam Dyson, one of the Department's caseworkers for Brettany and Cinnamon, concerning bonding between the children and Brett. Specifically, Dyson testified that she had concerns about bonding between Brettany and Cinnamon and Brett because of the lack of physical contact between Brett and the children while he is imprisoned. Dyson testified that "I believe if there is going to be significant bonding, there needs to be physical contact." Brett objected to this testimony on the basis of a lack of foundation.

On appeal, Brett argues that there was no foundation presented to establish Dyson's ability to testify concerning bonding. Brett asserts that Dyson's curriculum vitae fails to reference any particular expertise in the area of child and family development

and that no other evidence was presented concerning her expertise, training, or education relating to the issue of bonding.

Dyson testified that she had been employed by the Department for 17 years, spending the last 7 years working as a Child Protective Services worker. Dyson's curriculum vitae indicates that in addition to her years of experience working with children in the juvenile system and promoting reunification between children and parents, she has further relevant training, including in "Educational Psychology," "'Connecting' – Family System/ Relationship Training," "Human Growth & Development," "Family Systems," "Child & Adolescent Depression," "Psychiatric Assessment of Children," and a bachelor of arts degree with majors in sociology and psychology.

[7] Whether a witness is qualified to testify as an expert under the Nebraska Evidence Rules, which as noted above serve as a guidepost in termination of parental rights cases, is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1995). See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). Such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous. *In re Interest of C.W. et al., supra*. Based on the evidence noted above concerning Dyson's qualifications concerning children, families, and relationships, we do not find the court's determination that her opinion concerning bonding was admissible to be clearly erroneous.

(c) Exclusion of Brett's Exhibits

Brett next asserts that the juvenile court erred in excluding several exhibits offered by Brett. Specifically, Brett offered: exhibit 65, court proceedings concerning Brett's legal proceedings to establish paternity and obtain custody of Cinnamon; exhibit 66, the Nebraska State Penitentiary policy on visitation; exhibit 70, court proceedings concerning Brett's legal proceedings to establish paternity and obtain custody of Brettany; and exhibit 71, court proceedings concerning Brett's successful legal proceedings to obtain a domestic abuse protection order against Jennifer. Each of these exhibits was excluded when the court sustained relevancy objections made by the State.

As noted above, although the strict evidence rules do not apply in termination of parental rights proceedings, the evidence

rules do serve as a guidepost in our assessment of whether fundamental fairness was afforded Brett. Our de novo review of the record indicates that each of these exhibits offered by Brett is relevant to whether the best interests of the children would be furthered by terminating Brett's parental rights. The exhibits either present evidence of Brett's relationship with the children and the lengths to which he was willing to go to parent them prior to his incarceration, or present evidence relevant to the assault that led to Brett's incarceration, or present evidence relevant to Brett's ability to provide parental guidance and nurturing while incarcerated. As such, we conclude that the juvenile court erred in not considering this evidence, and we will consider it in conducting our de novo review of the record. Accord, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999) (improper evidence ruling does not, in and of itself, constitute reversible error in de novo review).

(d) Evidence From Prior Proceedings

Finally, Brett asserts that the court erred in considering "evidence from prior proceedings." Specifically, Brett challenges the following comments made by the judge at the conclusion of the case:

> Well, this one needs much thought, and I have to review all of these exhibits, but I've never seen such an overt and egregious act be so stepped around in a case before. Even the pleadings in this case talk about "assaultive behavior towards Jennifer . . ." and "the incident," and what this Court knows is that this was an egregious thing that happened to these children. And I have laid eyes on the mother of these children, and she is clearly disabled. I've heard testimony on that. And I recall statements over the years that I have heard, that the most important thing a man can do for his children is if he can't love their mother, he certainly should not harm their mother on behalf of his children.
>
> But these facts existed two years ago when this case was filed, and [Brett] was a part of these proceedings, and these egregious events all were in place then. And I must say,

> I'm truly troubled by the timing of this process, and I'm troubled particularly in the face of what happened to the mother of these children by the father of these children, and that's not an issue. Everybody agrees to it, but nobody can really call it what it is.
>
> Man, I don't know. There's that — I don't know. If the time were to do this, it might have passed, but I am — And I just have to make those comments, while at the same time I tell [Brett] and the State that I am going to sit and review all of this information and make my best judgment on behalf of justice and the best interests of these children.

Brett asserts that the court, in making the above comments "in addition to demonstrating a decided bias against [Brett], asserted that it has actual private knowledge concerning this case derived from its prior contact with the case, and that it is factoring that prior knowledge into its ultimate decision in this case. This is clearly impermissible." Brief for appellant at 36. Specifically, Brett asserts that the court's personal prior knowledge concerning Jennifer or this case did not provide a proper basis for the court to take judicial notice of the nature of the assault or Jennifer's condition.

[8] We need not rule specifically on whether the juvenile court actually "considered" improper evidence based on the statements made at the conclusion of the hearing. We certainly cannot ignore that the use of such phrases as "I have laid eyes on the mother of these children, and she is clearly disabled" suggests that the court was improperly considering some prior personal knowledge because the record does not indicate that Jennifer was present during any portion of the hearing on Brett's parental rights. Additionally, the only detailed evidence concerning the nature of Brett's assault of Jennifer was contained in exhibit 59, which does not appear to have been reviewed by the court prior to the above comments being made. Nonetheless, because our review is de novo, the remedy for any such impropriety is for this court to not consider improper evidence in reviewing the record. See, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

### 4. Best Interests

Having resolved the evidentiary concerns, the primary issue before us on appeal is whether the record contains clear and convincing evidence that termination of Brett's parental rights is in the best interests of Brettany and Cinnamon. In support of Brett's assertion that the State failed to adduce clear and convincing evidence in this regard, Brett challenges various opinions given by the State's experts and argues that his incarceration alone cannot serve as the basis for terminating his parental rights. In our de novo review, we will set forth the evidence which we believe clearly and convincingly supports a finding that termination of Brett's parental rights is in the best interests of Brettany and Cinnamon.

#### (a) Dr. Rick McNeese

The State presented evidence from Dr. Rick McNeese, a licensed psychologist who performed an evaluation of Brett while Brett was incarcerated at the Department of Correctional Services. Dr. McNeese indicated that he had police reports concerning Brett's assault of Jennifer as well as background information obtained from Brett himself. Dr. McNeese diagnosed Brett as suffering from polysubstance dependence, major depression, impulse control disorder, and mixed personality disorder, which includes antisocial and passive-aggressive behavior. Dr. McNeese specifically testified that these conditions would affect Brett's ability to parent Brettany and Cinnamon and would affect his ability to maintain employment and housing. Dr. McNeese further testified that although Brett verbalized a strong desire to be involved in the lives of his children, without treatment and guidance, it will be difficult for him to do so. Further, Dr. McNeese testified on cross-examination that Brett's personality type would interfere with emotional bonding, closeness, and warmth between Brett and the children, although it is possible that he can provide those things. Finally, Dr. McNeese testified that Brett's personality could lead him to commit similar harms toward the children as he did against Jennifer, although Dr. McNeese acknowledged that there is no evidence that Brett has ever before acted physically toward the children.

Brett asserts that Dr. McNeese's testimony does not provide clear and convincing evidence of best interests because Dr. McNeese acknowledged that he would ideally have liked access to more information when conducting his evaluation and because he never expressly opined regarding the best interests of the children. Nonetheless, Dr. McNeese's testimony is part of what we must consider in determining the best interests of the children.

(b) Caseworkers

The State also presented the testimony of Dyson and Treva Jeffares Haugaard, caseworkers from the Department who have been involved with Brettany and Cinnamon's case. Haugaard was the caseworker for Brettany and Cinnamon between November 1998, when the children first entered the juvenile system, and August 1999. Haugaard testified that she had recommended termination of Brett's parental rights in August 1999 because of his incarceration and the length of his sentence and because of his failure, to that point in time, to address the issues that had led to the children's involvement in the juvenile system. Additionally, she noted the age of the children and indicated that the fact that they were very young and that it would be many years before Brett could be released from incarceration was another factor to consider. Haugaard acknowledged that she was unaware of what Brett might have done to address her concerns after August 1999.

Dyson became the caseworker for Brettany and Cinnamon in May 2000. Dyson specifically opined that Brett's parental rights should be terminated. She testified that her opinion was based on the children's need for permanency, the confusion caused for the children by what Brett did to Jennifer, the fact that Brett will be unavailable to provide for the children during his incarceration, and his mental health and substance abuse problems. Dyson testified that although Brett has been involved in some classes since being imprisoned, the risks associated with his mental health issues have not been alleviated.

Dyson acknowledged that she had not investigated whether visitation would be possible for Brett to further the physical availability of Brett to the children. Dyson also acknowledged that she was not aware of what counseling and therapy options were available for Brett, even though her opinion that his parental rights

should be terminated was based in part on his being unable to receive the services needed to rehabilitate himself. Dyson further testified that she felt that letters that Brett had written to the children were "a little more on an adult level" and that she felt that Brett should have acknowledged what he had done to Jennifer and shown some remorse. However, Brett testified that he was specifically instructed by the Department that he could not write to the children about the assault of Jennifer. Dyson further acknowledged that although she based her opinion in part on a history of violence by Brett, she was not specifically aware of any incidents of violence besides the assault of Jennifer which resulted in Brett's incarceration.

Despite the problems with Dyson's and Haugaard's testimony, both provided valid areas of concern that bear on the best interests of the children. Most significant of these is Brett's mental health and substance abuse problems, the fact that these children were very young when placed into the juvenile system and will not be able to be reunited with Brett for over 9 years because of his incarceration, and the concerns about the quality of relationship that Brett could ever develop with these children because of his incarceration.

(c) Brett's Evidence

Brett presented a deposition of Dr. Joseph Rizzo, who was appointed by the court to perform a psychological and parenting assessment on behalf of Brett. As Brett argues in his brief on appeal, the record indicates that Dr. Rizzo had access to more background information than Dr. McNeese. Dr. Rizzo opined that there was a great sense of bonding and connection between Brett and Brettany because of Brettany's special medical needs and Brett's active role in caring for her prior to his incarceration. Dr. Rizzo determined that Brett suffered from chronic drug and alcohol problems, but that he did not have a history of physically hurting other people, aside from the first degree assault of Jennifer. Dr. Rizzo opined that the likeliness of Brett's acting out anger in violence is limited. Dr. Rizzo diagnosed Brett as suffering from schizo-affective disorder in remission, alcohol and cannabis abuse, and a personality disorder with "[s]chizo-[t]ypo and [a]ntisocial features." Dr. Rizzo opined that the assault of Jennifer was the result of a psychotic incident.

Although Dr. Rizzo testified that his diagnostic impression of Brett would not exclude Brett from being able to parent Brettany and Cinnamon, Dr. Rizzo testified that if Brett was not incarcerated and was in contact with the children, he would need to be under the care of a psychiatrist and psychologist or social worker, he would have a "fairly active" alcohol problem, and he would need an alcohol and drug abuse program, and that such supervision would be "just a given for a person with these diagnoses." Dr. Rizzo acknowledged on cross-examination that Brettany and Cinnamon need permanency and stability and that Brett cannot provide for them while he is incarcerated.

Brett also presented several character witnesses who testified concerning Brett's parenting of Brettany and Cinnamon prior to his incarceration. These witnesses generally established that Brett was the primary caregiver for Brettany and Cinnamon and that he was a loving and involved parent prior to his incarceration. These witnesses also established, however, that between 1996 and 1998, Brett and the children resided, at various times, with Jennifer and with Brett's two sisters in their various households.

Finally, Brett testified on his own behalf. Brett testified about the parenting he did prior to his incarceration and about the legal proceedings he underwent to establish paternity and obtain legal custody of Brettany and Cinnamon. Brett also testified about his relationship with Jennifer. Brett expressed remorse for the assault of Jennifer and testified about various anger management and parenting classes that he has taken in the penitentiary. Brett acknowledged that the first opportunity he will have to get out of prison will be in May 2008. On cross-examination, Brett acknowledged prior convictions for driving under the influence, resisting arrest, and being an accessory to burglary. Further, Brett did not deny that he has a history of drug and alcohol abuse.

### (d) Incarceration

As is apparent from a review of the testimony presented by both the State and Brett that is relevant to the issue of the best interests of the children, one of the most permeating factors in this case is Brett's incarceration. For this reason, Brett argues that the State has failed to meet its burden of proof because his incarceration cannot serve as the sole basis for terminating his parental

rights. Although this proposition of law is true on its face, its application to the facts of this case merits more consideration.

[9,10] The Nebraska appellate courts have held, in numerous past cases, that parental incarceration may not be utilized as the sole ground for termination of parental rights. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999); *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). See *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). However, a parent's incarceration may be considered along with other factors in determining whether parental rights should be terminated. *In re Interest of B.A.G., supra*; *In re Interest of M.L.B., supra*; *In re Interest of Ditter, supra*; *In re Interest of Wagner and Russell, supra*. See *In re Interest of Kalie W., supra*.

[11,12] Incarceration of a parent is not supposed to insulate an inmate from termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. *In re Interest of Azia B., supra*; *In re Interest of Theodore W., supra*. Further, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the crime was perpetrated. *Id.* Such factors are all relevant in assessing parental fitness and child welfare. *Id.*

Brett's argument that his incarceration should not be viewed as a determinative factor in assessing whether the best interests of his children would be served by terminating his parental rights misapplies the proposition of law that incarceration cannot be the sole factor in terminating parental rights. What Brett fails to recognize in the present case is that Brettany and Cinnamon's best interests are not determined by *the sole fact* that he is incarcerated, but by a host of factors that are ancillary to that incarceration.

The record in the present case indicates not just that Brett was incarcerated. The record indicates that Brett was incarcerated for inflicting a violent and extremely damaging assault on Jennifer, Brettany and Cinnamon's mother. The record indicates that this brutal assault occurred when Brettany was 2 years old and Cinnamon was approximately 1 year old. The record indicates that as a result of Brett's assault of Jennifer, he has been sentenced to remain in prison at least until 2008, when Brettany will be 11 years old and Cinnamon will be 10 years old. The record further indicates that as a result of Brett's assault of Jennifer, she has been rendered physically incapable of providing any parental care and nurturing until such time as she makes a recovery, which had progressed minimally in the 6 months following the assault. The record indicates that at the very least, Brett's assault of Jennifer substantially interfered with her ability to be a parent to the children. The record also indicates that because of Brett's incarceration, he is unable to have significant physical conduct and foster bonding with Brettany and Cinnamon during their very young years.

The record further indicates that Brett suffers from a variety of mental health and personality disorders which require ongoing treatment, counseling, and therapy. The record indicates that even when Brett is able to be released from prison, ongoing treatment, counseling, and therapy will be necessary for him to be capable of parenting Brettany and Cinnamon. The record indicates that Brett's mental health and personality disorders will affect his ability to parent and his ability to maintain housing and employment.

[13] Although Brett is viscerally correct in noting that the majority of these factors are related to the fact that he is incarcerated, Brett fails to recognize the difference between these factors being related to incarceration and his parental rights being terminated solely because he is incarcerated. A review of the cases cited above indicates that although termination cannot be based solely on the fact that a parent has been incarcerated, courts may consider the attendant circumstances which are occasioned by incarceration. When the aggregate of these circumstances indicates clearly and convincingly that the children's best interests dictate termination of parental rights, such is proper.

In *In re Interest of Kalie W.*, 258 Neb. 46, 50, 601 N.W.2d 753, 756 (1999), the Supreme Court noted and considered the fact that the father's incarceration "ma[de] it nearly impossible for him to provide for any of Kalie's needs." In *In re Interest of B.A.G.*, 235 Neb. 730, 735, 457 N.W.2d 292, 297 (1990), the Supreme Court noted that the father's actions which resulted in incarceration were "every bit as voluntary as if he had purchased a ticket for a 6-, 7-, or 8-year trek into Siberia" and that the father had just as effectively placed himself in a position where he could not possibly offer his presence, care, love, protection, maintenance, and opportunity for displaying parental affection. In *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985), the Supreme Court held that the mother's law violations and the resulting period of incarceration had substantially contributed to her daughter's spending most of her life in foster care. In *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982), the Supreme Court recognized that other jurisdictions have supported the termination of parental rights in cases where the actions of one parent have resulted in the death of another spouse. In *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001), this court upheld a finding of best interests where the primary factor was that the length of time the father would be incarcerated would prevent him from being able to support his daughter emotionally, psychologically, mentally, and physically and nurture her.

In the present case, Brett's incarceration has similarly made it nearly impossible for him to provide for any of Brettany and Cinnamon's needs. This situation will continue for the first 10 or 11 years of their lives. By severely assaulting Jennifer, Brett has effectively placed himself and Jennifer in a position where they cannot possibly offer their presence, care, love, protection, maintenance, and opportunity for displaying parental affection. As a result of his actions and the resulting period of incarceration, Brett has substantially contributed to Brettany and Cinnamon's spending much of their young lives in foster care. Although Brett's assault fortunately did not result in Jennifer's death, the record indicates that the assault was very severe, that he stomped on her head, and that she has suffered debilitating injuries as a result of the assault.

Brett's conduct which led to his incarceration, the length of incarceration, and the fact that this brutal assault was against Jennifer have seriously impaired any possibility of having these children placed in his care. Much like the appealing father in *In re Interest of Kylie W., supra*, Brett cannot now complain that he does not have the opportunities to provide for the children because of his incarceration when it was his own conduct that placed him in a position where he could not care for Brettany and Cinnamon. Perpetrating a severe assault of Jennifer, Brettany and Cinnamon's mother, is obviously not in Brettany and Cinnamon's best interests.

[14] Beyond the specific nature of Brett's actions and the victim of his actions, the record is undisputed that Brett suffers from mental health and personality disorders which require continuing treatment and which will affect his ability to parent even when he is finally released from prison. Nebraska jurisprudence holds, generally, that it is in a child's best interests that a final disposition be made without delay. *In re Interest of M.L.B., supra*. The courts will not gamble with the child's future and will not make children await uncertain parental maturity. *Id.* The primary consideration is the best interests of the children, and the aggregate of the evidence in this case clearly and convincingly establishes that termination of Brett's parental rights is in the best interests of Brettany and Cinnamon.

## V. CONCLUSION

We find no merit to Brett's appeal. Upon a de novo review of the record, there is clear and convincing evidence that termination of Brett's parental rights is in the best interests of Brettany and Cinnamon. The juvenile court's order terminating Brett's parental rights is affirmed.

AFFIRMED.

# TIM R. EISENHART, PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNETH D. EISENHART, DECEASED, APPELLEE, V. CRAIG LOBB ET AL., APPELLANTS.

647 N.W.2d 96

Filed May 14, 2002. No. A-00-1176.

1. **Contracts: Reformation: Equity: Appeal and Error.** An action to reform a contract is an equity action, and appellate review of an equity action is by trial de novo on the record.
2. **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.
3. **Evidence: Appeal and Error.** Where the credible evidence is in conflict on a material issue of fact, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over the other.
4. **Contracts: Reformation: Proof.** Reformation of a contract may not be granted unless a mistake sufficient to justify reformation is established by clear and convincing evidence.
5. **Limitations of Actions: Fraud.** Under Neb. Rev. Stat. § 25-207 (Reissue 1995), an action for relief from fraud must be brought within 4 years, but the cause of action does not accrue until the discovery of the fraud. Actions for accident or mistake, although not specifically mentioned in the statute, are classed with fraud and have a 4-year statute of limitations.
6. ____: ____. The statute of limitations period begins to run upon discovery of facts constituting fraud or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which should lead to such discovery.
7. ____: ____. If fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute of limitations will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit on his or her cause of action if such failure to discover it is attributable to his or her own neglect.
8. **Limitations of Actions.** The point at which a statute of limitations commences to run must be determined from the facts of each case.
9. **Summary Judgment: Appeal and Error.** The denial of a motion for summary judgment is neither appealable nor reviewable.
10. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law.
11. **Summary Judgment: Appeal and Error.** After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
12. **Limitations of Actions: Pleadings: Proof.** Where a petition does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that

defense. If, however, the petition on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.

13. **Reformation.** Carelessness or negligence in executing a written instrument does not stop a person from seeking reformation where the ground for relief is a mutual mistake of the parties.
14. **Reformation: Notice.** The recording of a document is not of itself, under all circumstances, sufficient to charge all parties with notice of a mistake therein.
15. **Contracts: Intent.** The interpretation given a contract by the parties themselves, while engaged in their performance of it before any controversy has arisen, is one of the best indications of their true intent and should be given great, if not controlling, influence.
16. **Decedents' Estates: Deeds: Reformation: Executors and Administrators: Intent.** In an action to reform a deed so as to name an executor instead of the estate of a person known to be deceased as grantee, evidence as to negotiations between the grantors and the executor leading up to execution of the deed and the conduct of the parties at the time the deed was executed and thereafter are examined to discern the parties' intent.
17. **Deeds: Reformation.** The matter of discovery and whether there was a mutual mistake involves examination of the facts which surround the deed and how the parties conducted themselves thereafter.
18. **Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties which is not in accord with the facts.
19. **Reformation: Intent: Words and Phrases.** A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument, and exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
20. **Contracts: Reformation: Intent: Words and Phrases.** If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
21. **Reformation: Intent: Proof.** To reform a written instrument on the ground of mutual mistake, the burden is on the party alleging the mistake to prove that the written instrument does not fully state the agreement or intention of the parties.
22. **Contracts: Presumptions: Proof.** The precise terms of a contract must be proved. There is always a presumption arising from the instrument itself that it sets forth correctly the agreement of the parties.
23. **Reformation: Proof.** Reformation is never granted on a probability; much stronger and clearer evidence is required than in an ordinary suit for damages. To justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory.
24. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
25. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is harmless error and does not require reversal if such evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
26. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted,

sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

27. **Trial: Evidence: Presumptions: Appeal and Error.** In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and an appellate court will not reverse a case so tried because other evidence was admitted.
28. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Hitchcock County: JOHN J. BATTERSHELL, Judge. Affirmed.

D. Eugene Garner, of Mousel, Garner & Rasmussen, for appellants.

Daylene A. Bennett, of Burger & Bennett, P.C., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

This case involves a deed executed and filed over 15 years ago, which is alleged to contain a mutual mistake and to not reflect the intention of the parties to the deed. At the heart of this case is approximately 415 acres of farm ground in Hitchcock County, Nebraska. While the complete legal descriptions of the land are in the pleadings below, for convenience, we will refer to the land as "section 9" and "section 19," which designations more readily lend themselves to an understandable narrative.

Kenneth D. Eisenhart and Ruth Harrington (Ruth) were brother and sister, and upon the death of their father in 1972, they inherited the "Eisenhart farm," which land included portions of sections 9 and 19. From 1972 forward, Ruth managed the farm for Kenneth and herself, which they held in undivided shares. Kenneth and Lois Lobb were married on July 17, 1984, when both were in their sixties and after previous marriages to others. They lived in Utah. Because Ruth was having some financial problems, Ruth and Kenneth made a deal in 1986 to separate out their interests in the Eisenhart farm. The arrangement was that Ruth would own all land of the farm located in section 19 and that Kenneth would have the farm's land in section 9. At this

time, Kenneth was married to Lois. Ruth received all of section 19 by a quitclaim deed from Kenneth and Lois, after which Ruth sold the ground.

This lawsuit was spawned by Ruth's quitclaim deed of February 18, 1986, in which she conveyed her interest in section 9 naming Kenneth and Lois as grantees, as "[h]usband and [w]ife," which if effective, would give Lois an interest in the portion of the Eisenhart farm located in section 9. It is of some significance that Kenneth and Lois had entered into a prenuptial agreement at the time of their marriage in 1984, which, among other things, provided that their separate property would remain separate. And they prepared mutual wills, reciting that they were making no provision for each other. However, in the fall of 1992, Kenneth and Lois divorced, and the trial court in that divorce divided their property in accordance with the prenuptial agreement. The divorce decree did not mention section 9. Kenneth died on July 23, 1997, and Lois died on February 14, 1998.

In the instant case, Lois' children, Craig Lobb, Richard Lobb, and Carolyn Lobb-Larsen (collectively the Lobbs), claim that Lois, by virtue of Ruth's February 18, 1986, quitclaim deed to Kenneth and Lois, acquired an undivided one-fourth interest to the land in section 9. The opposing view is taken by Tim R. Eisenhart, personal representative of the estate of his father, Kenneth, as he claims that the inclusion of Lois on Ruth's deed to Kenneth was a mutual mistake and did not reflect their intent that the land be conveyed to just Kenneth. Thus, Tim filed suit to reform the deed to reflect that it was a conveyance solely to Kenneth, and as a result, Lois and the Lobbs, claiming through her, have no right, title, or interest in section 9. The Lobbs assert that this action for reformation of the deed and to quiet title is barred by the statute of limitations.

## TRIAL COURT DECISION

Tim also asserted a claim that Kenneth had acquired section 9 by adverse possession. The trial court rejected that claim, which is not assigned as error, and we discuss it no further.

With respect to the claim for mutual mistake and reformation of the deed, the trial court rejected the Lobbs' statute of

limitations defense and found that the deed contained a mutual mistake when it was signed and recorded and that such mistake was contrary to the intention and agreement of the parties. Consequently, the trial court ordered that Ruth's deed be reformed so that Lois and those claiming through her would have no interest in, right to, or title to the real estate in section 9. The trial court found that all ownership and interest in section 9 was vested in Kenneth upon his death. Thus, the Lobbs' claim for partition of the land was dismissed. The Lobbs now appeal.

## ASSIGNMENTS OF ERROR

The Lobbs make numerous specific assignments of error which are best narrowed to two basic issues: (1) whether the statute of limitations bars Tim's action and (2) if the action is not time barred, whether there is clear and convincing admissible evidence of a mutual mistake by Kenneth and Ruth which includes the Lobbs' claim that the trial court erred in admitting hearsay evidence about Kenneth's intentions.

## STANDARD OF REVIEW

[1-4] An action to reform a contract is an equity action, and appellate review of an equity action is by trial de novo on the record. *J.J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). 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. *Village of Exeter v. Kahler*, 9 Neb. App. 1, 606 N.W.2d 862 (2000). However, where the credible evidence is in conflict on a material issue of fact, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over the other. See *id.* In our de novo trial, we must bear in mind that reformation of a contract may not be granted unless a mistake sufficient to justify reformation is established by clear and convincing evidence. *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989); *York Equip., Inc. v. Ashwill*, 2 Neb. App. 374, 510 N.W.2d 79 (1993). The evidence is largely undisputed, remembering that of the people involved in the transaction at issue, only Ruth remains alive.

## ANALYSIS

*Statute of Limitations.*

[5] The applicable statute of limitations here is Neb. Rev. Stat. § 25-207 (Reissue 1995). Under § 25-207, an action for relief from fraud must be brought within 4 years, but the cause of action does not accrue until the discovery of the fraud. In *Ainsfield v. More*, 30 Neb. 385, 403, 46 N.W. 828, 834 (1890), the Nebraska Supreme Court noted that "[a]ctions for relief on the ground of accident or mistake are not specifically mentioned in [§ 25-207], but these three, fraud, accident, and mistake, have been always classed together as the three great fountains of equity jurisprudence." Therefore, actions for accident or mistake, although not specifically mentioned in the statute, are classed with fraud and have a 4-year statute of limitations. *Sweley v. Fox*, 135 Neb. 780, 284 N.W. 318 (1939).

[6-8] In *Wright v. Davis*, 28 Neb. 479, 44 N.W. 490 (1890), the court held that fraud will be deemed to have been discovered when such facts are known as would naturally suggest such inquiries as, if pursued, would lead to such knowledge. In other words, the statute of limitations period begins to run upon discovery of facts constituting fraud or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which should lead to such discovery. *Jameson v. Graham*, 159 Neb. 202, 66 N.W.2d 417 (1954); § 25-207. If fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute of limitations will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit on his or her cause of action if such failure to discover it is attributable to his or her own neglect. *Burchmore v. Byllesby & Co.*, 140 Neb. 603, 1 N.W.2d 327 (1941); *Sweley v. Fox*, 135 Neb. 780, 284 N.W. 318 (1939). The point at which a statute of limitations commences to run must be determined from the facts of each case. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

[9-11] We quickly dispose of the Lobbs' claim that the district court improperly denied their summary judgment motion concerning the statute of limitations. The denial of a motion for summary judgment is neither appealable nor reviewable. *McLain v.*

*Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. *McLain v. Ortmeier, supra*. After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). Thus, we only examine the trial court's decision after trial.

[12] The Lobbs argue that Tim's petition alleges facts which in themselves show that the statute of limitations has run and that he failed to meet his burden of proof to show the case was not time barred. The general rule is that where a petition does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the petition on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts. *DeSciose v. Chiles, Heider & Co.*, 239 Neb. 195, 476 N.W.2d 200 (1991).

Tim's petition alleges facts which would normally cause the reformation action to be barred by the statute of limitations. Specifically, the petition states that the deed was executed on February 18, 1986, and recorded 6 days later, and suit was filed on January 26, 1999. But the amended petition alleges that "[t]he mistake and error in the deed was not discovered until sometime after July 23, 1997." Having alleged facts showing that the statute had run and other facts which, if proved, would toll the statute, Tim had the burden to prove that his case was not time barred. Although at this point we are still discussing the statute of limitations, we observe that analysis of whether this alleged mutual mistake should have been discovered at a particular time necessarily intertwines with the analysis of whether there was actually a mutual mistake. For that reason, our decision on the

statute of limitations issue will largely determine whether a mutual mistake was proved.

The Lobbs argue that there are several dates upon which Ruth, Kenneth, and Lois had within their knowledge facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of the fact that Lois' name had been placed on the deed involving section 9, thereby barring the action.

First, the Lobbs argue that "[Ruth] signed the subject deed on February 18, 1986, and [it] was delivered to [Kenneth] and Lois Lobb . . . and then recorded on February 24, 1986." Brief for appellants at 14. If a mistake was made, according to the Lobbs, it was made on one of those two dates, and an action for reformation was barred 4 years later on February 24, 1990. Finally, at the latest, according to the Lobbs, the mistake should have been discovered in 1992 when Lois and Kenneth divorced. The Lobbs argue that Lois and Kenneth "examined their respective assets very thoroughly at that time." Brief for appellants at 20. But the reality is that the record contains little evidence about the divorce other than the final decree. Thus, as we explain later, the divorce really does not aid the Lobbs' arguments.

The record contains evidence that Ruth read the deed at the time she signed it as she testified that she always read documents before signing them. This fact, the Lobbs claim, precludes Tim's reformation action. Under the Lobbs' argument, the rule of law would be that if a grantor signs and delivers a deed with an error, that error is necessarily, and as a matter of law, discoverable then and there. Here, we have no direct knowledge about what Kenneth read or did at the time the deed was executed because of his death. The Lobbs argue that because Ruth testified she was Kenneth's "agent," her knowledge must be imputed to Kenneth. This argument misconstrues the evidence and is without supporting authority. Ruth testified that she was Kenneth's "agent" for managing the Eisenhart farm after their father's death. She never testified that she acted as Kenneth's agent in the transfer of land, and there was no other evidence upon which to base such a conclusion. Ultimately, the focus on Ruth ignores the real issue, which is whether Kenneth, who seeks reformation, albeit through his personal representative, should have discovered the mistake

at the time the deed was executed and delivered. The legal issue, as we see it, is whether a grantee is bound as a matter of law to read a deed, and appreciate its contents, at the time of delivery.

[13] The Lobbs' view that a mistake must necessarily be discovered at the time a deed is executed is too narrow. If that were the law, there would be no need for the "discovery" rule extending the statute of limitations for actions seeking to correct mutual mistakes. Instead, all mistakes in deeds, and perhaps many other documents, would be "discoverable" upon execution and delivery, and the statute of limitations would never go beyond 4 years. The question of "discoverability" of a mistake is a more complex and multifaceted factual inquiry. And, on the most fundamental level, we must begin with the rule that carelessness or negligence in executing a written instrument does not stop a person from seeking reformation where the ground for relief is a mutual mistake of the parties. *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965) (failure of parties to ascertain that property was incorrectly described not bar to reformation on ground of mutual mistake).

[14] As for the Lobbs' argument that the mistake should have been discovered at the time the deed was recorded, the recording of a document is not of itself, under all circumstances, sufficient to charge all parties with notice of a mistake therein. *Sweley v. Fox*, 135 Neb. 780, 284 N.W. 318 (1939). In any event, the deed was recorded in Nebraska, while Kenneth lived in Utah, and thus the recording process itself seems to be a fact of little consequence, particularly given that the record is largely silent on how delivery and recording were accomplished.

We find that other facts are of more significance here on the interlaced questions of "discoverability" and whether there was a mutual mistake. When Kenneth and Lois divorced in Utah in 1992, their decree did not specifically mention section 9, as one would expect if it were a joint asset, or if either or both had some knowledge or expectation that it was jointly held. They had provided in 1984, in their prenuptial agreement, (1) that all property owned by each would remain separate, (2) that Kenneth owned real property in Nebraska listed on schedule B of the agreement, and (3) that Lois agreed to give up all rights to Kenneth's separate property. Schedule B, dated before Ruth

and Kenneth agreed to separate and divide out sections 9 and 19, specifically listed Kenneth's one-half share in the Nebraska farm as his separate property. In their 1992 divorce decree, Kenneth was awarded all items of property "currently in his own name or possession," which would include the Nebraska land as it had been described and treated in the prenuptial agreement. Plus, there is no evidence that Lois made a claim to the Nebraska land at the time of the Utah divorce decree, which we would expect, if she really thought that she had an interest in that land.

[15] In short, this evidence shows that Kenneth believed his land remained his separate property notwithstanding his marriage to Lois or the contents of the 1986 deed. There is no evidence showing that Lois, Kenneth, or Ruth acted in any which would show that any of them held a belief or acted as if Lois had an interest in the Eisenhart farm. That we may look to the parties' conduct with regard to the land long after the deed itself was executed to decide the issues presented is consistent with the rule that the interpretation given a contract by the parties themselves, while engaged in their performance of it before any controversy has arisen, is one of the best indications of their true intent and should be given great, if not controlling, influence. *Dunn v. Mutual Benefit Health & Accident Ass'n*, 135 Neb. 506, 282 N.W. 487 (1938).

Examination of the parties' postdeed conduct was undertaken in one of the few Nebraska cases we have found in which the mistake at issue was the name of the grantee. See *Fisher v. Standard Investment Co.*, 145 Neb. 80, 15 N.W.2d 355 (1944). In this category of cases, we note *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958), in which a deed was challenged by an heir on the ground that the wife did not intend to grant her husband an interest in the property. The court held:

> The burden of [the wife] was increased by the presumption which arises in any case in which a spouse puts the title to property in the other spouse. The law indulges a presumption in such a situation that the property was a gift. . . . The deed in the circumstances of this case is the best evidence of the intent and purpose of the parties thereto as to the interest conveyed and received.

*Id.* at 184, 92 N.W.2d at 190. The evidence, other than the deed, suggested that the wife was the sole intended owner. But, in the instant case, the conveyance was not spouse to spouse, but, rather, sister to brother.

[16] In an action to reform a deed so as to name an executor instead of the estate of a person known to be deceased as grantee, evidence as to negotiations between the grantors and the executor leading up to execution of the deed and the conduct of the parties at the time the deed was executed and thereafter are examined to discern the parties' intent. *Fisher v. Standard Investment Co., supra.*

In *Jacobson v. Forster*, 138 Neb. 452, 293 N.W. 336 (1940), the plaintiff instituted an action against the children by a former marriage of his deceased wife and their spouses to have her name stricken from a warranty deed naming the plaintiff and his deceased wife as grantees. As here, the plaintiff sought the court's decree that neither the deceased wife nor her children, as her heirs, had any actual interest in the property. The petition alleged that the wife's name had been inserted as a grantee by mistake on the part of the scrivener and that the plaintiff did not discover that fact until 4 years later, when, on the wife's death, her children sought to have a one-half interest in the property administered as part of her estate. The trial court denied the plaintiff's right to reformation on the ground that his proof of the alleged mistake was not sufficiently clear, convincing, and satisfactory to meet the standards required for the reformation of an instrument, which result was affirmed on appeal.

[17] From these cases, we conclude that the absolute rule that the Lobbs advocate is not correct and that the matter of discovery and whether there was a mutual mistake involves examination of the facts which surround the deed and how the parties conducted themselves thereafter. Thus, we continue to focus on the facts, both predeed and postdeed.

After Ruth and Kenneth's father died, Ruth acted as the "agent" for all of the land which she and Kenneth had inherited. John Bauer, who leased the farm for growing crops, kept Ruth informed about the farm's operations, notified her when bills needed to be paid, and notified her when crops were ready for sale. Ruth, who lived in Nebraska, would sell the crops and

would send the necessary tax documents and the year's profits to Kenneth alone, who lived in Utah until his death. This practice continued after Kenneth married Lois. After Kenneth's death, Ruth did not send the farm's earnings to Lois. After Lois' death, Ruth put the money in the account for Kenneth's estate. Lois was not involved in the management of the farm before or after sections 9 and 19 were divided out and received no money from the farm's operation, and there is no evidence whatsoever that she ever considered herself an owner of section 9. Bauer testified that he did not know Lois and never had any contact with her. And as further proof of the tenuous nature of the Lobbs' claim that there was no mutual mistake, the Lobbs asserted no ownership claim until Tim approached them for a quitclaim deed to correct Ruth's deed. In other words, there is no inference permissible from the record that Lois had ever suggested to her children that she owned land in Nebraska.

When Ruth began to have financial difficulty, she contacted Kenneth to request that they arrange ownership of their land so that she could sell section 19. Ruth testified that she had no contact or discussion with Lois regarding this transaction, while it was occurring or thereafter. Ruth testified that she intended to continue to take care of the land for Kenneth after the transfer, that she had intended to transfer section 9 solely to Kenneth, and that it was her family's desire that the land would always be in the Eisenhart family estate. The conduct of the parties from the death of Ruth and Kenneth's father right up to when Tim requested the quitclaim deed from the Lobbs clearly and convincingly shows that no one acted as if Lois had any interest in section 9. All of these facts speak loudly to Kenneth's and Ruth's intent that Lois was not receiving any interest in section 9 when Ruth and Kenneth rearranged the legal ownership of the land they inherited from their father. Given the clear and unequivocal conduct of Ruth, Kenneth, and Lois, expressed in a variety of ways, that Lois had no interest in the Eisenhart farm, we find that there was no occasion until after Kenneth's death when the mistake in the deed should have been discovered under the discovery doctrine which tolls the statute of limitations.

The evidence establishes that the mutual mistake was not "discoverable" until its actual discovery by Tim in 1997. The district

court was therefore correct in finding that the statute of limitations does not bar Tim's reformation action. On this record, any other holding would make a mistaken name, date, or legal description "discoverable" as a matter of law on the date of delivery of a deed and render the "discovery doctrine" completely meaningless. Such a result, remembering that this case is in equity, would fly in the face of fundamental fairness—the hallmark of all equity jurisprudence.

*Mutual Mistake.*

[18-20] A mutual mistake is a belief shared by the parties which is not in accord with the facts. *Resolution Trust Corp. v. Dial Cos.*, 5 Neb. App. 695, 564 N.W.2d 260 (1997). A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument, and exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Id.* If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties. *Id.*

[21-24] To reform a written instrument on the ground of mutual mistake, the burden is on the party alleging the mistake to prove that the written instrument does not fully state the agreement or intention of the parties. *Sweley v. Fox*, 135 Neb. 780, 284 N.W. 318 (1939). The precise terms of the contract must be proved. There is always a presumption arising from the instrument itself that it sets forth correctly the agreement of the parties. *Id.* Reformation is never granted on a probability; much stronger and clearer evidence is required than in an ordinary suit for damages. *Id.* To justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory. *Id.* "Clear and convincing evidence" is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

[25-28] The Lobbs argue that the evidence of Kenneth's intent was hearsay erroneously admitted by the trial court, specifically, what Kenneth told Tim. But the evidence we have relied upon in reaching our decision was admitted without hearsay objections, and it, by itself, is sufficient to support the findings of the district court, findings which we also reach. We do not decide whether the evidence the Lobbs characterize as "hearsay" was properly admitted, because the erroneous admission of evidence is harmless error and does not require reversal if such evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Carter,* 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Chojolan,* 253 Neb. 591, 571 N.W.2d 621 (1997). If the evidence was improperly admitted, this was error without prejudice to the plaintiff and does not change the result. The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Main Street Movies v. Wellman,* 251 Neb. 367, 557 N.W.2d 641 (1997). That is not the case here. Further, it has been said in *Miller v. Banner County*, 127 Neb. 690, 691, 256 N.W. 639, 640 (1934): " 'In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.' " An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it. *Smith v. Goodyear Tire & Rubber Co.*, 10 Neb. App. 666, 636 N.W.2d 884 (2001). This doctrine applies to the objection to hearsay evidence about Tim's conversations with Kenneth about his intent concerning the land at issue which were said to have occurred after the divorce during Kenneth's final illness.

The evidence which clearly and convincingly supports Tim's claim that there was a mutual mistake in placing Lois' name on the deed to section 9 is fully detailed in the "*Statute of Limitations*" section of this opinion, and we need not repeat it here. As said earlier, the evidence shows that the mistake was

not "discoverable" in the eyes of the law until after Kenneth's death. Equally clear and convincing is the evidence that the mistake was a mutual mistake under the law, making reformation and quiet title the appropriate remedies. We affirm the district court's judgment in all respects.

AFFIRMED.

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SAUNDERS COUNTY, APPELLANT, V.
METROPOLITAN UTILITIES DISTRICT-A, APPELLEE.
SAUNDERS COUNTY, APPELLANT, V.
METROPOLITAN UTILITIES DISTRICT-W, APPELLEE.
645 N.W.2d 805

Filed May 14, 2002. Nos. A-01-554, A-01-555.

1. **Judicial Notice: Evidence: Records: Appeal and Error.** Items judicially noticed are to be separately marked, offered, and received as evidence to enable efficient review by an appellate court.
2. **Judicial Notice: Evidence.** Only adjudicative facts are properly the subject of judicial notice.
3. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director.
4. **Constitutional Law: Counties: Political Subdivisions.** Both the U.S. and Nebraska constitutional guarantees of due process apply to any "person" and the county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.
5. **Administrative Law.** A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding.
6. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
7. **Administrative Law: Legislature.** The Legislature specifically barred only prosecutors, investigators, and advocates from participating as hearing officers, or assisting hearing officers, in administrative hearings.
8. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

9. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. **Administrative Law: Rules of Evidence: Witnesses: Presumptions.** When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. An employee with unique knowledge indispensable to the adjudication may be subject to a subpoena.
11. **Standing: Jurisdiction: Parties: Actions.** Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy.
12. **Standing: Parties.** The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
13. **Standing: Jurisdiction: Parties.** 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 issue of standing at any time during the proceeding.
14. **Waters.** A water right applicant has no property right in a mere application for water rights.
15. **Actions.** Causes of action accrue upon the violation of a legal right and when an aggrieved party has the right to institute and maintain a suit.
16. **Waters: Real Estate.** To be riparian, land must have water flowing over it or along its border.

Appeals from the Nebraska Department of Natural Resources. Affirmed.

Thomas S. Jaudzemis, Saunders County Attorney, and Grant A. Porter for appellant.

Daniel G. Crouchley for appellee.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

Saunders County appeals from orders of the Department of Natural Resources (Department) dismissing 18 causes of action. The Department dismissed the 1st cause of action in one order and dismissed the 2d through 18th causes of action in another order; the appeals of each order have been consolidated. On appeal, Saunders County asserts various errors, including the continued involvement of the hearing officer, LeRoy W. Sievers; the denial of subpoenas; and the dismissal of the causes of

action. We find no merit to Saunders County's assertions on appeal, and the orders of the Department are affirmed.

## II. BACKGROUND

### 1. Factual Background

On October 6, 1993, Metropolitan Utilities District (MUD) filed an application with the Department for a permit to appropriate natural flow from the Platte River for induced ground water recharge. The project proposed by this first application is known as the Platte West Wellfield. On March 1, 1994, MUD filed an application with the Department concerning ground water transfer for the Platte West Wellfield. A combined notice was issued for both applications. On or about July 22 and 27 and August 3, the notice was published in the Omaha World-Herald newspaper, and on or about July 20 and 27 and August 3, the notice was published in the Ashland Gazette newspaper. Saunders County apparently did not file any objections or requests for hearing on the applications during the time set forth in the notice. On December 10, 1998, an order from the Department was issued granting the two applications.

On May 11, 1999, Saunders County filed a complaint with the Department. In the complaint, which is approximately 125 pages long including attached exhibits, Saunders County set forth 15 causes of action against MUD, requested registration and decommissioning of various wells, and asserted that the order of the Department granting the two applications was void because of various inadequacies in the applications and the findings granting the applications. Saunders County prayed for a hearing, an order to register or decommission various wells, and a cease and desist order restraining the withdrawal of water from wells until certain permits were issued. On June 9, the Department entered an order requesting briefs on the question of Saunders County's standing to pursue various of the causes of action making allegations concerning the applications. Specifically, the order noted that the time for requesting a rehearing or filing an appeal concerning the applications had passed and that Saunders County was not a party to the initial proceedings which resulted in the applications being granted.

On August 30, 1999, Saunders County filed an amended complaint. In the amended complaint, which is more than 150 pages long including exhibits, Saunders County set forth the same 15 causes of action set forth in the original complaint and added an additional 3 causes of action, for a total of 18 causes of action. Saunders County prayed for relief similar to that prayed for in the original complaint.

On November 24, 1999, the Department issued an order finding that there could be MUD wells that had not been properly registered or needed to be decommissioned. In the order, the Department ordered a field investigation. The order noted that the issue of registration, construction, and decommissioning of wells was raised in the first cause of action in Saunders County's amended complaint. As such, this order dealt with only the first of the causes of action in Saunders County's amended complaint.

On December 22, 1999, the Department issued an order concerning the remaining 17 causes of action. In the order, the Department determined that Saunders County did not have standing to assert the 2d through 18th causes of action in the amended complaint. Accordingly, the Department dismissed the 2d through 18th causes of action. In the order, the Department noted that the order was being issued without a hearing and set forth the procedures for Saunders County to follow to seek a hearing.

On January 5, 2000, Saunders County followed procedures noted in the December 22, 1999, order for seeking a hearing on the findings of the December 22 order. Such a hearing was granted by an order of the Department issued on January 10, 2000.

On June 9, 2000, Saunders County filed a written petition for the disqualification of the Department's appointed hearing officer, Sievers. Saunders County asserted a number of bases for Sievers to be disqualified from continuing to serve as the hearing officer. This issue was raised repeatedly during the pendency of the proceedings before the Department in various motions for continuance and other pleadings. The request was repeatedly denied. Additionally, on August 10, Saunders County filed a motion to reconsider and vacate the December 22, 1999, order.

On August 30, 2000, the Department issued an order concerning the first cause of action. The order concluded that all of the

wells subject to Saunders County's amended complaint had been registered or a notice of abandonment had been filed with the Department. Additionally, the order indicated that unless a request for hearing was filed on the matter, the first cause of action would be dismissed. Saunders County filed such a request for hearing on September 13.

On September 19, 2000, the Department issued an order separating Saunders County's amended complaint into two separate proceedings. The Department designated the proceedings governing the 1st cause of action as " 'Saunders County v. M.U.D. - W' " and the proceedings governing the 2d through 18th causes of action as " 'Saunders County v. M.U.D. - A.' "

An evidentiary hearing was held on October 25 through 27, 2000, concerning the finding that Saunders County lacked standing to pursue the 2d through 18th causes of action. Saunders County presented numerous witnesses and offered numerous exhibits in support of its contention that it had an interest sufficient to confer standing to pursue the 2d through 18th causes of action. The Department characterized Saunders County's contentions of standing to be based on the following five grounds: (1) an application by Saunders County for surface water rights, (2) Saunders County's water well registration, (3) Saunders County's obligations to engage in the administration and enforcement of zoning and flood plain regulations, (4) alleged riparian water rights, and (5) an entitlement to receive water. On April 11, 2001, the Department issued an order ruling that Saunders County lacked standing on any of the asserted grounds to pursue the 2d through 18th causes of action. As such, the Department dismissed Saunders County's 2d through 18th causes of action.

On November 16, 2000, an evidentiary hearing was held concerning Saunders County's first cause of action. Saunders County presented witnesses in support of its first cause of action. The Department characterized Saunders County's first cause of action as an allegation that MUD has failed to register various illegal water wells. On April 11, 2001, the Department issued an order ruling that Saunders County had not presented any evidence of the existence of any wells which are required to be registered that are not properly registered. As such, the Department dismissed Saunders County's first cause of action.

On April 30, 2001, Saunders County filed a petition for rehearing on all 18 causes of action. The Department denied the request by an order issued on May 4. This appeal followed.

## 2. Record on Appeal

At this juncture, we feel it necessary to briefly comment on the record presented in this appeal. We feel it necessary to comment on the difficulties presented by the record and the manner in which the record was created. These difficulties arise because of both the size of the record and the condition of the record.

The first issue with the condition of the record concerns the praecipe for bill of exceptions filed by Saunders County. In the praecipe, Saunders County requests, inter alia:

> (i) a copy of the verbatim record of the evidence offered at all trial(s), hearing(s), conference(s) or other evidentiary proceeding(s) including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties and Saunders County and (ii) a copy of the verbatim record of *anything and everything said or done by anyone in the course of trial(s), hearing(s), conference(s) or any other proceeding(s)* . . . .

(Emphasis supplied.) Blanket requests such as this are specifically discouraged by Neb. Ct. R. Prac. 5(B) (rev. 2000). Because Saunders County has, in essence, requested a record of anything said by anybody during any proceeding, the record before us may or may not include what Saunders County requested and may or may not include other extraneous matters. Unfortunately, this is only the first of several problems with the record and would, by itself, most likely not merit mentioning.

[1,2] On February 4, 2000, a prehearing conference was held before the Department. During the course of the prehearing conference, Saunders County requested the Department "take judicial notice of the pleadings and correspondence within its own files, and Chapter 46, Nebraska Revised Statutes." MUD indicated its willingness "to stipulate to the entry of the full record of the department." The Department accepted the stipulation and indicated that "those items will be considered evidence." Whatever items were included in "the full record of the Department" were never separately marked, offered, and received as evidence. Items

judicially noticed are to be separately marked, offered, and received as evidence to enable efficient review by this court. See *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997). Additionally, it is not clear from the record whether these items constituted adjudicative facts. Only adjudicative facts are properly the subject of judicial notice. See *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

In an order issued on August 17, 2000, the Department delineated approximately 18 items that were specifically being judicially noticed to "'[make] it clear what's being judicially noticed or what isn't or whether it's appropriate at this point or not.'" These items purport to include various applications, correspondence, and surveys.

During the evidentiary hearing on Saunders County's 2d through 18th causes of action, Saunders County sought to establish that the items that had been previously judicially noticed were also being considered for purposes of the evidentiary hearing. The Department indicated in the affirmative. Additionally, although Saunders County requested the judicially noticed files be marked for purposes of appellate review, the Department indicated that "[t]hat's not necessary." Later in the hearing, Saunders County was questioning witnesses concerning certain exhibits that were, allegedly, included in the judicially noticed materials. At one point, the Department indicated the following:

> And again, just as a word of caution to everyone, since it's in the record in the files and anybody that needs to review this will — if you can just identify it by date and so forth [rather than by exhibit number], then they'll be able to make sure they can get to the same item. Because [the numbered exhibit], per se, won't be in the record.

As a result, it is not entirely clear on appeal what information was judicially noticed. There is no copy of "the files" or "the record" of the Department contained in the record we have received on appeal. The various numbered exhibits which were discussed during testimony and which the Department indicated were included in the judicially noticed materials are in the record before us, although most of them were rejected when offered as evidence on the basis of already having been judicially noticed. Nobody has raised an issue concerning the adequacy of the

record pertaining to the judicially noticed materials, and to the extent we have copies of the various exhibits testified about, we will review those exhibits as if they had been marked and received in the proper procedure for judicial notice. The improper procedures, however, have made review of this case more difficult than necessary.

We also note that 2 of the 77 exhibits that were provided in the record on appeal consist of nothing more than empty manila folders. The index to the bill of exceptions indicates that these two exhibits were "[m]iscellaneous documents with cover sheet[s]." The index also purports to indicate where, in the 330 pages of testimony contained in the bill of exceptions, these exhibits were marked, offered, and ruled upon. A review of those pages, however, reveals no mention whatsoever of any exhibits. After a lengthy search through the record, this court was able to discern that the two exhibits were referenced during a hearing held on August 14, 2000, and were to contain the originals and photocopies of various documents provided by the Department to Saunders County. Admission of the proffered exhibits into evidence was "take[n] under advisement" by the Department. In an order issued on September 5, the Department rejected the admission of both exhibits. Inasmuch as neither exhibit was received into evidence and no assertions of error on appeal concern the admission of either exhibit, the absence of these exhibits appears harmless to our review on appeal. Nonetheless, we caution that in the future, the record should actually contain the exhibits requested and purported to be included.

Despite the difficulties caused by the record, we note that the various orders of the Department are particularly detailed and particularly useful in our review. The orders include detailed explanations of the Department's reasoning, as well as detailed chronologies of the proceedings which have enabled this court to more thoroughly assess the proceedings that occurred before the Department.

## III. ASSIGNMENTS OF ERROR

On appeal, Saunders County has assigned 11 errors. Saunders County asserts, consolidated and restated for discussion, (1) that Saunders County was denied due process by the Department;

(2) that the Department erred in allowing the continued involvement of Sievers, a Department hearing officer, and Susan France, a Department unit supervisor; (3) that the Department erred in denying various requests for subpoenas; (4) that the Department erred in failing to make a complete record; and (5) that the Department erred in dismissing Saunders County's 18 causes of action.

## IV. ANALYSIS

### 1. Standard of Review

[3] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). See, also, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); Neb. Rev. Stat. § 61-205 (Cum. Supp. 2000) (authorizing Department of Natural Resources to exercise powers and perform duties assigned to Department of Water Resources prior to July 1, 2000).

### 2. Due Process

[4] We first note that Saunders County has couched a substantial portion of the assignments of error on appeal and the argument on appeal, as well as a substantial portion of the arguments raised before the hearing officer, in terms of Saunders County's "due process" rights being violated. In fact, 9 of the 11 assignments of error set forth in Saunders County's brief specifically assert violations of due process. It appears that Saunders County made similar assertions in the recent case of *City of Lincoln v. Central Platte NRD, supra*. In that case, the Supreme Court noted that "[t]o the extent Saunders County argues that it was denied due process, we do not consider such arguments." *Id.* at 146, 638 N.W.2d at 844. The Supreme Court specifically noted that both the U.S. and Nebraska constitutional guarantees of due process apply to any "person" and that the county, as a

creature and political subdivision of the State, is neither a natural nor an artificial person. *Id.* See, also, *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990); *Dodge Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 10 Neb. App. 927, 639 N.W.2d 683 (2002). Similarly, we disregard Saunders County's arguments to the extent they concern asserted deprivations of due process.

### 3. Involvement of Sievers and France

Saunders County has challenged the continued involvement in this matter of the hearing officer, Sievers, and France. Saunders County asserts that Sievers and France should not have been allowed to continue participating in the proceedings, that they engaged in improper ex parte communications with one another and with the director, that the Department failed to make a proper record of these ex parte communications, and that Sievers should have granted Saunders County's repeated motions and requests that he recuse or disqualify himself from the proceedings. We find no merit to any of these assertions.

Nearly identical issues appear to have been raised in *City of Lincoln v. Central Platte NRD, supra*, wherein Saunders County similarly challenged the involvement of Sievers and France in proceedings before the Department. Sievers was designated as the hearing officer in the present case, and France, the unit supervisor for permits and adjudications and later the division manager, assisted Sievers. In *City of Lincoln v. Central Platte NRD, supra*, just as in the present case, Saunders County relied heavily on Neb. Rev. Stat. § 84-913.04 (Reissue 1999) as the basis for asserting that Sievers and France should have been precluded from continuing to be involved in the hearings on Saunders County's amended complaint.

[5] Section 84-913.04(1) provides: "A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding . . . ." Neb. Rev. Stat. § 84-914(6)(c) (Reissue 1999) provides:

> No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to a hearing officer or agency head or employee who is or may

> reasonably be expected to be involved in the decisionmaking process of the contested case.

See *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). We therefore must consider whether the activities of Sievers and France prevented them from participating in the hearings concerning Saunders County's amended complaint.

In *City of Lincoln v. Central Platte NRD, supra*, the Supreme Court set forth the relative roles played by Sievers and France in the proceedings. The present case is substantially identical concerning the roles of Sievers and France. France has been involved in various functions assisting Sievers, she reviewed the MUD applications for completeness and accuracy, and she sent various documents and e-mails to Sievers concerning the case. Sievers was formerly a full-time employee of the Department, served as a special assistant to the director, and served as legal counsel. In those capacities, he provided legal advice to the Department.

Saunders County made numerous repeated motions for Sievers to be disqualified or to recuse himself. In these motions, Saunders County has asserted that Sievers and France have "served as investigator, prosecutor, or advocate in this contested case or in its prehearing stage," that Sievers has "grossly commingled his duties as a prior investigator for the Department and/or as an advocate for the Department and/or M.U.D. with his duty to be a neutral Hearing Officer," that Sievers' continued involvement violated various disciplinary rules and ethical considerations, and that Sievers' continued involvement violated "fundamental principles of due process." Saunders County sought the disqualification of Sievers through written motions and pleadings on at least 15 different occasions and raised the issue orally on repeated occasions. On each occasion, Saunders County's request was denied.

On August 17, 2000, Sievers issued a written order denying Saunders County's petition for disqualification of Sievers as the hearing officer. In that order, Sievers specifically found that "there is nothing in the record that reflects that [Sievers or] France . . . have been involved in any investigation other than processing the County's complaint and ordering other Department personnel to conduct a formal field investigation and to submit a written

report." Sievers further found that "there is nothing in the record which would support an allegation that any of the Department employees . . . France, or [Sievers] have served as a prosecutor or advocate in this matter." Finally, Sievers noted that "[i]n summary, nothing in the record reflects anything that would constitute investigation, prosecution or advocacy by [Sievers or] France . . . in these matters . . . ."

Similarly to Saunders County's argument set forth in the opinion in *City of Lincoln v. Central Platte NRD, supra*, Saunders County's basis for claiming that Sievers and France were investigators is stated in its brief as follows:

> The Department has no rules or regulations concerning the requirements set forth in Neb. Rev. Stat. §§84-913.04 and 84-914(6) (Reissue 1999). The Department has ignored the requirements of said statutes in this contested case. Neb. Rev. Stat. §84-913.04 was intended to prohibit persons that have served as investigators, prosecutors, or advocates concerning contested cases (i.e. investigating the completeness and correctness of applications for appropriating ground or surface water or complaints) from serving as the hearing officer or assisting the hearing officer. Neb. Rev. Stat. §84-913.04 is intended to provide a "bright line" and prevent the result reached in Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994) wherein Ann Bleed[,] State Hydrologist[,] was allowed to serve as hearing officer concerning an application for an in-stream flow appropriation. . . .
>
> . . . .
>
> Susan France and LeRoy W. Sievers have both served as investigators, prosecutors and/or advocates to determine the correctness and completeness of MUD's [a]pplications and/or the merits of Saunders County's [a]mended [c]omplaint . . . and are prohibited by Neb. Rev. Stat. §84-913.04 from serving as or assisting the hearing officer in this contested case.

(Emphasis omitted.) Brief for appellant at 13-15.

[6] " 'Administrative adjudicators serve with a presumption of honesty and integrity.' " *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 150, 638 N.W.2d 839, 847 (2002), quoting

*Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). There is no factual support for Saunders County's conclusion that Sievers and France were investigators in this matter. There is no factual support to overcome the presumption of honesty and integrity which Sievers is afforded.

[7-9] The Legislature specifically barred only prosecutors, investigators, and advocates from participating as hearing officers, or assisting hearing officers, in administrative hearings. *City of Lincoln v. Central Platte NRD, supra.* See, also, § 84-913.04. 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. *City of Lincoln v. Central Platte NRD, supra.* In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*

In the present case, Sievers found that Saunders County had failed to present evidence that he or France had performed an investigation for the purpose of presenting evidence or that they had participated as an advocate or prosecutor. Under the facts of this case, we conclude that Sievers and France were not prosecutors, investigators, or advocates so as to be prohibited from participation in the proceedings. Saunders County has not shown that either Sievers or France was prohibited by § 84-913.04 from serving as a hearing officer or advising the hearing officer. See *City of Lincoln v. Central Platte NRD, supra.* Saunders County's assignments and assertions of error to the contrary are meritless.

### 4. Denial of Subpoenas

[10] Next, Saunders County asserts that Sievers erred in denying requests for subpoenas for Sievers; France; Ann Bleed, the state hydrologist; and David Vogler, a Department attorney. In *City of Lincoln v. Central Platte NRD*, the Supreme Court iterated:

> "When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. To hold otherwise would enable the parties to remove

> unwanted adjudicators simply by requesting a subpoena. However, there are limits to an agency's power to shield its employees from a subpoena. An employee with unique knowledge indispensable to the adjudication may be subject to a subpoena."

263 Neb. at 151-52, 638 N.W.2d at 848, quoting *Central Platte NRD v. State of Wyoming, supra.*

The burden is on Saunders County to demonstrate that the Departmental employees possessed unique knowledge indispensable to the determination of the issues in this case. Saunders County has failed to demonstrate what unique and indispensable knowledge was possessed by any of the individuals for whom subpoenas were denied. The most that Saunders County does in this regard is to assert on appeal that because Sievers and France had communications with one another concerning the case, they had unique indispensable knowledge. Saunders County has failed to carry its burden, and this assertion of error is meritless.

### 5. Complete Record

Next, Saunders County claims that the Department failed to maintain and make available a complete official record and failed to disclose "proposed or recommended decisions or orders." Brief for appellant at 17. Saunders County attempted to raise a significantly comparable error in *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). The Department's decision is not arbitrary, capricious, or unreasonable simply because the record does not contain drafts of the hearing officer's findings. See *id.* This assigned error is also meritless.

### 6. Dismissal of Causes of Action

Finally, we address Saunders County's assertion that the Department erred in dismissing the 18 causes of action set forth in Saunders County's amended complaint.

#### (a) First Cause of Action

Our review of Saunders County's brief on appeal reveals that Saunders County has not asserted error with the Department's dismissal of the first cause of action. As such, we need not further discuss the first cause of action.

(b) Remaining Causes of Action

Saunders County asserts that the Department erred in finding that Saunders County lacked standing to pursue the 2d through 18th causes of action. The 2d through 18th causes of action all alleged that various MUD wells were "illegal" and that the order granting MUD's two applications was void because of a variety of alleged deficiencies in MUD's application process. The Department determined that Saunders County was, in effect, challenging the applications and the order granting them and determined that Saunders County failed to demonstrate an adequate basis of standing to pursue the causes of action. We agree.

[11-13] Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or interest in the subject matter of the controversy. *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996). The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* 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 issue of standing at any time during the proceeding. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

On appeal, Saunders County argues that the Department, in finding a lack of standing concerning the 2d through 18th causes of action but not the 1st cause of action, "simply do[es] not comprehend that MUD's wells are, per se, the subject of the [s]econd through [e]ighteenth [c]auses of [a]ction." Brief for appellant at 25. Saunders County argues that because it is asserting the MUD wells are "illegal" and must be decommissioned, standing exists. We disagree with Saunders County.

A review of Saunders County's amended complaint indicates that the subject matter of the 2d through 18th causes of action is not the wells, but, rather, the permits granted to MUD because of the approval of the two applications and the water rights granted to MUD as a result. In the 2d through 18th causes of action, Saunders County repeatedly makes such assertions as that "[t]he [v]oid [o]rder [granting the two MUD applications] lacks

jurisdiction and is null and void to approve the [applications] due to a failure of the [a]pplication and [v]oid [o]rder to describe the beneficial uses, beneficial use area and quantity of water to be used for each beneficial use"; "[o]n information and belief, the [v]oid [o]rder fails to make the findings required by [various statutes] and is null and void"; "[t]he D[epartment] failed to give due consideration to all the essential elements required by [Nebraska statutes] while considering MUD's . . . applications"; and "[o]n information and belief, the D[epartment's] [v]oid [o]rder failed to contain a discussion of the required factors for consideration under [Nebraska statutes]." Each of the 2d through 18th causes of action asserts that the MUD wells are illegal "because the . . . [w]ells . . . do not have valid permits that comply with [Nebraska statutes]" or "because the . . . [w]ells . . . do not have a valid order approving an application" or "because the . . . [w]ells . . . do not comply with Nebraska law." A review of the supporting assertions in each cause of action reveals that the alleged deficiencies pertain to the information in the applications or the findings and considerations of the Department in granting the applications. As such, it is apparent that the subject matter of the 2d through 18th causes of actions is not whether the wells are not properly registered or should be decommissioned pursuant to Neb. Rev. Stat. § 46-602 (Cum. Supp. 2000), as is the subject matter of the 1st cause of action.

A review of the 2d through 18th causes of action and the evidence presented before the Department indicates that Saunders County's alleged bases for standing can be summarized as (1) the applications for surface water rights filed by Saunders County, (2) the installation of a water well by Saunders County next to the MUD well field, (3) Saunders County's authority and responsibility to enact and enforce zoning and flood plain regulations, (4) alleged riparian water rights, and (5) alleged entitlement to water rights because of a construction contract between Saunders County and MUD.

*(i) Surface Water Rights Application*

Saunders County presented evidence that the County had filed three applications to appropriate surface water. Saunders County acknowledged that the applications had not been granted

as of October 25, 2000. The Department held that Saunders County's water rights applications did not provide standing to challenge water rights established by a water right holder with an earlier priority date. Because Saunders County's applications had not been granted as of the October 25 hearing, the water rights granted to MUD by the approval of the two applications gave MUD an earlier priority date. As such, the Department held that the fact that Saunders County had filed applications for water rights after the MUD applications were approved did not give Saunders County standing to pursue the 2d through 18th causes of action.

[14] The Nebraska Supreme Court has held that a water right applicant has no property right in a mere application for water rights. See, *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993); *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988). As such, Saunders County's applications, which had not yet been approved as of the Department's hearings in this case, do not provide Saunders County standing to pursue the 2d through 18th causes of action which, in essence, challenge the approval of MUD's prior applications and the water rights granted as a result thereof. The Department's finding in this regard is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

*(ii) MUD's Water Well*

Saunders County presented evidence that the County had constructed a water well adjacent to MUD's well field. The well was, allegedly, constructed to provide water for road construction projects. Saunders County presented evidence that the well had been tested and that a load of water had been removed from the well and used for road construction. Saunders County registered this well in October 2000, approximately 2 years after MUD's applications were approved.

[15] On appeal, Saunders County asserts that the fact that it presented evidence of "a significant drawdown in the area of the [Saunders County] well," there is an adequate basis for Saunders County's standing because of the potential harm caused by MUD's water rights. (Emphasis omitted.) Brief for appellant at 26. As the Department determined, however, Saunders County's

reasoning is faulty in that it fails to recognize that Saunders County's well was constructed and registered nearly 2 years after MUD's applications were granted. Saunders County cannot now construct a well and create water rights that somehow give rise to standing to challenge an earlier grant of rights. See, *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995) (causes of action accrue upon violation of legal right and when aggrieved party has right to institute and maintain suit). As such, the filing of a well registration 2 years after the applications were granted does not provide standing to Saunders County. The Department's finding in this regard is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

*(iii) Zoning and Flood Plain Regulations*

Saunders County presented undisputed evidence that the County has adopted zoning and flood plain regulations. Saunders County argued to the Department that MUD is required to obtain various permits and to comply with various zoning and flood plain regulations enforced by Saunders County. A review of the 2d through 18th causes of action, however, indicates that none of them assert that MUD's water rights granted by the approval of the two applications in any way violates zoning or flood plain regulations. Additionally, Saunders County did not present any evidence of any violation of these regulations.

Our review of the record indicates that Saunders County failed to demonstrate in any way how the County's authority to regulate zoning and flood plains provides standing for the 2d through 18th causes of action challenging the approval of the MUD applications and the water rights granted thereby. There has been no showing how this authority or these regulations give rise to a legal or equitable right, title, or interest in the subject matter of the 2d through 18th causes of action. The Department's finding in this regard is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

*(iv) Riparian Rights*

Saunders County presented evidence in the form of testimony and a series of deeds and patents relating to real estate located in

Saunders County. Saunders County also provided evidence concerning the alleged use of the water associated with the real estate. The Department concluded that Saunders County failed to demonstrate proper use of the alleged riparian rights, failed to demonstrate the extent of alleged harm, failed to demonstrate the social value associated with the uses, failed to demonstrate the time of initiation of the uses, failed to demonstrate the suitability of the uses to the water course, and failed to demonstrate the burden on the county of avoiding the harm. The Department's order ruling on Saunders County's standing goes to great length and detail concerning the alleged riparian rights of Saunders County. On appeal, Saunders County has failed to adduce any argument concerning how the Department's order was unsupported, arbitrary, capricious, or unreasonable in this regard.

[16] To determine whether Saunders County has standing to pursue the 2d through 18th causes of action based on riparian rights associated with the property Saunders County presented evidence about at the hearing, we first determine whether the property is riparian in nature and then to what extent Saunders County demonstrated riparian rights. To be riparian, land must have water flowing over it or along its border. See *Krimlofski v. Matters*, 174 Neb. 774, 119 N.W.2d 501 (1963). We accept the Department's review of the evidence in this regard and the Department's conclusion that Saunders County established that at least some property owned by Saunders County is riparian in nature.

Nonetheless, our review of the record indicates that as the Department concluded, Saunders County has failed to demonstrate how having a riparian right to a parcel of real estate located within Saunders County provides standing for Saunders County to pursue the 2d through 18th causes of action. See *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966). The most Saunders County did was present evidence that on at least two occasions sometime in the past, people have been seen using the water associated with Saunders County's riparian rights for fishing, swimming, or boating. Saunders County failed to adduce any meaningful evidence to establish how its riparian rights would be in any way impacted by the subject matter of the 2d through 18th causes of action. On appeal, Saunders County presents no argument whatsoever concerning the importance of its

riparian rights. The Department's finding concerning riparian rights is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

*(v) Entitlement*

Saunders County presented evidence that Saunders County granted MUD a construction permit. One condition of the permit indicates that MUD would agree to supply water to governmental subdivisions of Saunders County, on a cost basis, as permitted by law. Evidence adduced at the hearings before the Department indicated that the permits issued to MUD by the Department do not authorize MUD to use water in Saunders County and that the permits would need to be amended to allow them to do so. There was evidence that MUD would be willing, at some point, to negotiate selling water to Saunders County.

Saunders County has failed to present any argument or legal authority on appeal for the notion that the condition contained in the construction permit somehow provides Saunders County standing to pursue the 2d through 18th causes of action. Saunders County has failed to demonstrate how the fact that MUD may have agreed to a condition in the permit which requires MUD to provide water to Saunders County somehow gives Saunders County standing to come before the Department alleging the illegality of the various wells because of problems with the application and approval process. We find the Department's decision in this regard to be supported by competent evidence and to not be arbitrary, capricious, or unreasonable.

*(vi) Summary*

In summary, the Department found that Saunders County lacked standing to pursue the 2d through 18th causes of action. The Department found no merit to any of the bases for standing asserted by Saunders County below. On appeal, we find the Department's order concerning standing to be supported by competent evidence and to not be arbitrary, capricious, or unreasonable. As such, we find no merit to Saunders County's assertions on appeal that the Department erred in finding a lack of standing.

## V. CONCLUSION

Saunders County has asserted numerous errors associated with the proceedings before the Department and the Department's final

orders. These include assertions that the hearing officer should have been precluded from participating in the proceedings and that the Department erred in finding that Saunders County lacked standing to pursue its causes of action. As set forth above, we find Saunders County's assertions on appeal to be meritless. The orders of the Department are affirmed.

AFFIRMED.

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RANDOLPH OLDSMOBILE CO., APPELLEE, V.
BONNIE J. NICHOLS, APPELLANT.
645 N.W.2d 566

Filed May 21, 2002. No. A-00-1244.

1. **Attorney Fees: Appeal and Error.** The standard of review on the trial court's determination of a request for sanctions under Neb. Rev. Stat. § 25-824 (Reissue 1995) is whether the trial court abused its discretion.
2. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824 (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous.
3. ____: ____. The definition of "frivolous," as used in Neb. Rev. Stat. § 25-824 (Reissue 1995), has been held to mean without rational argument based on law and evidence to support a litigant's position in a lawsuit.
4. **Actions.** Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
5. ____. The determination of whether a particular claim or defense is frivolous must depend upon the facts of a particular case.
6. **Actions: Appeal and Error.** An appeal that is simply without merit is not by definition frivolous.
7. ____: ____. All doubts as to whether an appeal is frivolous should be resolved in favor of the party filing the allegedly frivolous action. Sanctions should not be imposed except in the clearest cases.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded with directions.

James D. McFarland, of the McFarland Law Office, for appellant.

Thom K. Cope and Ruth A. Laukka, of Polsky, Cope, Shiffermiller, Coe & Monzon, for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Bonnie J. Nichols appeals the decision of the district court for Lancaster County, Nebraska, denying her motion for an award of attorney fees and costs pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) on the basis that the action brought by Randolph Oldsmobile Co. (Randolph) was frivolous. For the reasons set forth herein, we affirm in part, and in part reverse and remand with directions.

## BACKGROUND

This matter stems from an incident related to a former consumer-service relationship between Nichols and Randolph wherein Nichols alleged that after she had taken her vehicle in for repair, Randolph spilled paint on it and refused to wash and wax it. The circumstances surrounding this incident escalated to the level that Nichols was cited by the Lincoln Police Department for trespassing after Nichols refused to leave Randolph's place of business.

Several days after Nichols was cited for trespassing, Randolph filed a verified petition for temporary and permanent injunction on September 9, 1998, to enjoin Nichols from returning to Randolph's business premises. Nichols timely answered the lawsuit, alleging that Randolph had filed a frivolous lawsuit, pursuant to § 25-824, and further alleging that she should be awarded reasonable attorney fees and costs for having to defend against the action.

Initially, in an effort to resolve this matter, Nichols' legal counsel contacted Randolph's legal counsel and requested a voluntary dismissal of the action in consideration for Nichols' agreement that she would no longer patronize Randolph's place of business in the future, but no agreement was reached.

On October 5, 1998, a hearing was held to determine whether the temporary restraining order previously issued by the court on September 10 was to continue. By letter dated October 6, 1998, indicating an entry in the judge's minutes, the district court vacated the temporary restraining order and denied Randolph's request for a preliminary injunction pending trial.

After some time had passed, Nichols again requested a voluntary dismissal of the lawsuit from Randolph. Hence, on April 5, 1999, Randolph served a dismissal without prejudice on Nichols' legal counsel. A short time later, Nichols filed a motion for an award of attorney fees and costs. In response to the motion, Randolph's legal counsel alleged that he was " 'sandbagged' " into the dismissal because nothing was said about Nichols' seeking attorney fees and costs when the dismissal was negotiated. Subsequently, on April 22, Nichols stipulated to Randolph's withdrawal of the dismissal, and on May 11, the district court overruled Nichols' motion for attorney fees and costs, indicating that the motion was premature.

The parties, through their counsel, continued to negotiate, with the primary point of contention being Nichols' refusal to forgo her pursuit of attorney fees and costs. From the record, the only discovery evident was the service of a request for admissions on Randolph by Nichols, the allegations of which were answered by Randolph. As the trial date approached, a pretrial conference was held on May 30, 2000, which resulted in the case's being dismissed upon the oral motion of Randolph. On the following day, Nichols again filed a motion for an award of attorney fees and costs. The district court denied Nichols' motion on November 1 and stated in its ruling that the evidence failed to show that Randolph's case was brought in bad faith, was frivolous, or was brought for purposes of harassment or other improper conduct. From that order, Nichols has filed this appeal.

## ASSIGNMENTS OF ERROR

Nichols claims, restated, that the district court erred in (1) failing to find that Randolph's petition for a temporary and permanent injunction was frivolous and brought in bad faith under § 25-824(2), (2) failing to find that Randolph unnecessarily expanded the proceedings for purposes of harassment and other misconduct under § 25-824(4), and (3) failing to award her attorney fees and costs as provided for under § 25-824.

## STANDARD OF REVIEW

[1] The standard of review on the trial court's determination of a request for sanctions under § 25-824 is whether the trial court abused its discretion. *Detmer v. Bixler*, 10 Neb. App. 899,

642 N.W.2d 170 (2002). See *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

## ANALYSIS

*Frivolous Lawsuit.*

Nichols asserts on appeal that Randolph's action was frivolous and brought in bad faith, and she thus seeks attorney fees and costs under § 25-824(2).

Section 25-824(2) states:

> Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

[2-5] The term "frivolous," as used in § 25-824, connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The definition of "frivolous" as set forth above has also been held to mean without rational argument based on law and evidence to support a litigant's position in the lawsuit. *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001). Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998). The determination of whether a particular claim or defense is frivolous must depend upon the facts of a particular case. *Id.* See *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987).

Although there is conflicting testimony as to the circumstances surrounding the events that led to Randolph's filing this action, Nichols argues that the lawsuit was frivolous and that Randolph filed its petition for an injunction in bad faith instead of allowing the trespassing citation issued to Nichols to deter her from any future contact with Randolph or its employees. Nichols further argues that the petition was brought in bad faith in that the trespassing citation was dismissed on November 23,

1998, thus demonstrating a lack of evidence for the trespassing charge. Finally, Nichols contends that the district court's denial of the temporary injunction for the reason that the evidence failed to show the likelihood that Randolph would prevail on the merits of its petition, in addition to the fact that Randolph's petition failed to show that Randolph would suffer irreparable injury if the temporary injunction were not granted, further evidenced the lack of merit and the frivolousness of the lawsuit.

Randolph, on the other hand, argues that it initially sought the injunctive relief to permanently restrain Nichols from entering upon its premises because of numerous problems with Nichols. Randolph claims that it thereafter refrained from voluntarily dismissing the lawsuit until the court ruled on Randolph's motion for a temporary injunction. Randolph asserts that it was attempting to obtain the protection available in the form of an injunction as opposed to accepting a written agreement with Nichols that would be negotiated outside of the judicial system.

[6,7] As emphasized by the Nebraska Supreme Court in *Shanks*, 225 Neb. at 656, 407 N.W.2d at 747, "'"[a]n appeal that is simply without merit is not by definition frivolous."'" (Emphasis omitted.) Furthermore, "'"all doubts as to whether an appeal is frivolous should be resolved in favor of the [party filing the allegedly frivolous action]."'" *Id.* Sanctions should not be imposed except in the "'"clearest cases."'" *Id.* In bringing the injunction action, Randolph was attempting to seek relief available to it through the judicial process for apparently disruptive behavior by Nichols at Randolph's place of business. Based upon our review of the record, we find that the district court did not abuse its discretion in ruling that Randolph's action was not frivolous or brought in bad faith.

*Continuation of Lawsuit.*

Nichols further argues that she is entitled to an award of attorney fees and costs under § 25-824(4), based on Randolph's unnecessary delay of this matter for purposes of harassment and other improper conduct.

Section § 25-824(4) sets forth the following:

> The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an

> attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or *harassment*. If the court finds that an attorney or party unnecessarily expanded the proceedings by other *improper conduct*, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs.

(Emphasis supplied.)

A review of the district court's order reflects that although the court stated that the evidence failed to show that this case was brought for purposes of *harassment* or other *improper conduct*, the court does not make a specific reference to § 25-824(4); nor does it make any reference to either party's unnecessarily expanding the proceedings. However, the court's use of the terms "harassment" and "improper conduct," together with its denial of Nichols' motion for attorney fees and costs, which motion referenced both subsections of § 25-824 at issue here, leads us to conclude that the district court considered both subsections (2) and (4) of § 25-824 in its ruling.

The question to be resolved under § 25-824(4) in this case is whether Randolph continued to prosecute the injunction action solely for harassment or unnecessarily expanded the proceedings by other improper conduct. In analyzing this issue, we believe the critical timeframe to be the activity following Randolph's initial voluntary dismissal without prejudice on April 5, 1999. The activity in the case prior to this dismissal is attributed to the bringing of the lawsuit, which we have found was not frivolous or in bad faith under § 25-824(2).

After receiving Nichols' first motion for attorney fees and costs, which was filed on April 13, 1999, Randolph's counsel wrote a letter to Nichols' counsel, dated April 14, 1999, in which Randolph's counsel stated:

> Now, here's the plan. If your client continues to seek fees and costs, we will revoke our dismissal and proceed to trial. Therefore, your client will incur more costs and expenses because I can tell you that if you persist in this attempt to collect fees, your client will see the inside of a courtroom.

Thereafter, Randolph withdrew the dismissal, and the litigation continued with the primary activity being the negotiation of

another dismissal of the suit. Randolph refused to dismiss the case without an agreement by Nichols to sign a mutual release and thereby forgo her claim for attorney fees and costs. At this juncture, the only party who had the ability to end the litigation and stop both parties from incurring additional fees was Randolph, as Nichols could not file another motion for fees until the conclusion of the litigation.

It is clear that after April 14, 1999, Randolph's only purpose in continuing the litigation was to attempt to convince Nichols to give up her claim for attorney fees and costs by requiring Nichols to incur additional fees and expenses to prepare for trial. There was no evidence presented in the record that Randolph continued the litigation for the purpose of obtaining a permanent injunction, particularly where the evidence revealed that Nichols had not returned to the Randolph premises since the initial trespassing citation was issued upon her. Under these circumstances, we find that Randolph unnecessarily expanded the action after April 14, solely for harassment and by improper conduct. Therefore, the district court abused its discretion in failing to award fees and costs to Nichols under § 25-824(4).

*Award of Attorney Fees and Costs.*

Based upon the determinations made in the foregoing discussion of Nichols' assignments of error, we further conclude that the district court did not err in denying Nichols' motion for an award of attorney fees and costs under § 25-824(2), but did err in denying the motion under § 25-824(4). We therefore reverse in part, and remand the matter to the district court for a determination of the fees and costs to be awarded to Nichols after April 14, 1999, from the record previously made.

## CONCLUSION

We conclude that Randolph's petition for an injunction against Nichols was not frivolous or brought in bad faith; however, we conclude that Randolph did unnecessarily expand the proceedings for the purpose of harassment and by improper conduct. We also conclude that the district court did not err in denying Nichols' motion for an award of attorney fees and costs under § 25-824(2), but did err in denying the motion under § 25-824(4).

Therefore, the judgment of the district court is affirmed in part and in part reversed, and the cause is remanded with directions to award Nichols fees and costs incurred in the district court after April 14, 1999.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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BLANCA DELGADO, APPELLANT, V.
IBP, INC., APPELLEE.
645 N.W.2d 831

Filed May 28, 2002. No. A-01-532.

1. **Workers' Compensation: Final Orders: Appeal and Error.** A review panel's order affirming in part and in part reversing and remanding has previously been found to be appealable.
2. **Jurisdiction: Appeal and Error.** It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Workers' Compensation: Final Orders: Appeal and Error.** Even though workers' compensation cases are special proceedings, an order of the Workers' Compensation Court that does not determine all issues submitted to that court is not a final order and remains interlocutory until all issues are decided.
4. **Judgments: Jurisdiction: Appeal and Error.** A necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a tribunal lacking jurisdiction is the power to vacate that order and, if appropriate, to remand the cause for further proceedings.

Appeal from the Nebraska Workers' Compensation Court. Order vacated, appeal dismissed, and cause remanded with directions to dismiss.

Lee S. Loudon, of the Law Office of Lee S. Loudon, for appellant.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

Blanca Delgado instituted this action in the Nebraska Workers' Compensation Court against IBP, inc., alleging that she had been

injured while an employee of IBP and that the matters in dispute were temporary and permanent disability benefits, medical expenses, vocational rehabilitation benefits, attorney fees, interest, and penalties. After a trial, the trial court made an award for temporary and permanent disability benefits and medical expenses but made no findings or order concerning her right to rehabilitation benefits, penalties, interest, or attorney fees. Delgado appealed to the review panel, alleging that the trial court erred in failing to make certain findings, failing to correctly determine her loss of earning power, and failing to provide reasoned decisions on these issues. The review panel found that the trial court's failure to mention interest, penalties, or attorney fees in its decision indicated that the trial court found no merit in Delgado's claim for these items; that there was evidence to support such finding; and that the trial court's determination in that respect was justified. The review panel found that the evidence would have supported a finding by the trial court that a reasonable controversy existed as to these items, and it affirmed that aspect of the order. The review panel also found that the trial court's order failed to provide a reasoned decision on Delgado's loss of earning power, and the case was remanded to the trial court for a reasoned decision on that issue. Delgado appealed to this court, alleging that the trial court erred in neither awarding interest, attorney fees, and penalties nor rendering reasoned decisions on those items and that the review panel erred by failing to reverse on such grounds.

We conclude that since the trial court did not decide all of the issues submitted to it, its order is not final and appealable, and thus, we dismiss this appeal for lack of jurisdiction and direct the review panel to vacate its order and to dismiss the appeal from the trial court.

## BACKGROUND

In her amended petition, Delgado alleges that she suffered two accidents in the course of her employment with IBP that caused physical injury to her. She alleges that the matters in dispute are temporary and permanent disability benefits, medical expenses, vocational rehabilitation benefits, attorney fees, interest, and penalties, and she prays that her rights be determined and that she be awarded the benefits she is entitled to under the Nebraska Workers' Compensation Act.

IBP's answer admitted Delgado's employment and denied the remainder of the amended petition. At the hearing on June 27, 2000, the parties stipulated (1) to Delgado's average weekly wage on the dates of the accidents, (2) that she sustained injuries to the right upper extremity in an accident arising out of her employment with IBP on March 25, 1999, (3) that she sustained a cervical injury from a work-related accident on April 6, 2000, and (4) that IBP agreed to pay the medical bills shown in exhibit 13. Because we are remanding the cause, we will not summarize the entire stipulation or the evidence.

The trial court's award was four pages long, single spaced. It discussed the stipulations and evidence and found that Delgado was entitled to temporary total disability benefits for the March 25, 1999, accident, the dates of which entitlement are not germane to our decision, as well as benefits for permanent impairment of her right upper extremity and the second and third fingers on her right hand and for a 6-percent loss of earning capacity. The trial court also found that IBP was entitled to credit for medical expenses paid pursuant to stipulation and ordered IBP to pay medical bills totaling $510 for treatment of the injury resulting from the April 6, 2000, occurrence. The trial court made no findings or order on Delgado's right to rehabilitation benefits, penalties, interest, or attorney fees.

Delgado applied for review of the award, alleging that the trial court erred in failing to find that she was entitled to attorney fees and interest for IBP's failure to timely pay her medical bills without providing a reasoned decision, in failing to enforce the parties' stipulation that she had not reached maximum medical improvement for her injury of April 6, 2000, without providing a reasoned decision, in assessing her loss of earning power based on her loss of physical function instead of her industrial disability, in failing to consider certain factors in determining her loss of earning power, and in finding that her loss of earning power was only 6 percent without providing a reasoned decision.

The review panel decided that the trial court's failure to award attorney fees, interest, and penalties for IBP's failure to pay medical bills and other benefits in a timely manner and its failure to provide a reasoned decision pursuant to Workers' Comp. Ct. R.

of Proc. 11 (2000) as to such items were not error because the absence of a specific finding indicated that the court found a lack of merit to Delgado's claim for these items. Further, the review panel stated that there was evidence to support a finding that a reasonable controversy existed, to refute Delgado's claim to the unawarded penalties, interest, and attorney fees. The review panel decided, however, that the trial court had failed to provide a reasoned decision about its finding of Delgado's loss of earning capacity. Therefore, the review panel remanded the matter for the trial judge to provide a reasoned decision concerning Delgado's loss of earning capacity.

## ASSIGNMENTS OF ERROR

Upon appeal to this court, Delgado alleges that the trial court erred in failing to find that she was entitled to penalties, interest, and attorney fees for IBP's failure to timely pay her indemnity benefits and in failing to provide a reasoned decision with respect to that conclusion.

## ANALYSIS

[1] We find the procedure followed in this case as outlined above to be troublesome. A review panel's order affirming in part and in part reversing and remanding has previously been found to be appealable. See *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W.2d 878 (1998). It is the fact that the trial court did not decide all of the issues submitted to it which we find troublesome about the procedure. We cannot accept the review panel's conclusion that the trial court made an implied ruling denying interest, penalties, and attorney fees by not discussing or ruling upon such matters. It is impossible for us to know whether the trial judge actually intended an implied denial or whether he simply forgot to rule upon those issues. At first blush, we were inclined to simply remand the cause to the trial court with directions for the trial court to make the necessary findings and enter an order which decides the undecided issues. However, upon further consideration, we decided that analysis was wrong even though the ultimate result will be the same by the order we make here.

## JURISDICTIONAL QUESTION

[2,3] It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999); *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999). In a case we are issuing simultaneously with this case, *Hamm v. Champion Manuf. Homes, post* p. 183, 645 N.W.2d 571 (2002), we have concluded that *Thompson, supra*, teaches that an appeal may not be taken from an order of the Workers' Compensation Court if that order is not a final order as that concept has been interpreted by the Nebraska Supreme Court. In *Hamm*, we also concluded that *Thompson* is authority for the proposition that we can look to non-workers' compensation cases to determine whether a given order from the Workers' Compensation Court is a final order. We further concluded in *Hamm* that even though workers' compensation cases are special proceedings, an order of the Workers' Compensation Court that does not determine all issues submitted to that court is not a final order and remains interlocutory until all issues are decided. *Thompson* is clear authority for the proposition that a review panel does not have jurisdiction of an appeal from a nonfinal order, and hence, we do not have jurisdiction to consider an appeal from a decision of a review panel which purports to review such a nonfinal order. We therefore must decide whether the trial court's order in this case is a final order.

The trial court, as evidenced by its award, did not directly rule upon the claims for rehabilitation benefits, interest, penalties, or attorney fees. Only the amended petition and the answer to it inform the trial court, and this court, of the issues submitted to the trial court for decision. That is the function of such pleadings. We find nothing in the bill of exceptions which amends or changes the relief sought in the amended petition. While Delgado does not complain that the trial court failed to grant rehabilitation benefits, this requested relief was neither granted nor denied. Clearly, not all of the issues were decided, and therefore, the order is not final. The petition stated that vocational rehabilitation benefits were in dispute. The trial court also did not rule upon that issue. We find no evidence or discussion in the bill of

exceptions on this subject. The issue was probably not presented, but the rule requiring the trial court to decide all issues before its order becomes final still applies. Frequently, a bill of exceptions contains statements which show certain issues have been abandoned. The best procedure on issues pled but not litigated would be for the trial court to ascertain on the record whether unproved issues have been abandoned, or to simply find against the plaintiff on such issues and deny relief on them. In *School Dist. No. 54 v. Howell*, 172 Neb. 404, 110 N.W.2d 52 (1961), for example, the district court found that one issue that was pled was not presented and therefore was not being decided.

## CONCLUSION

[4] The court in *Thompson, supra*, merely dismissed the appeal in that case when it held that the review panel of the Workers' Compensation Court did not have jurisdiction to enter the order appealed from. In that case, the review panel had affirmed the trial court's decision, and a dismissal was all that was necessary. In this case, the review panel modified the trial court's order. That modification cannot stand, because it was entered in a case where the review panel had no jurisdiction. A necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a tribunal lacking jurisdiction is the power to vacate that order and, if appropriate, to remand the cause for further proceedings. *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999). In this case, we must vacate the order of the review panel. We do so, and we dismiss this appeal and direct the review panel to dismiss the appeal from the trial court.

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

# OMAHA COUNTRY CLUB, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

645 N.W.2d 821

Filed May 28, 2002. Nos. A-01-679 through A-01-684.

1. **Taxation: Judgments: Appeal and Error.** Appellate review of a Tax Equalization and Review Commission decision shall be conducted for error on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented.
5. **Taxation: Valuation: Proof.** The burden of proof is on the taxpayer to establish the taxpayer's contention that the value of the taxpayer's property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment.
6. ____: ____: ____. The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the taxpayer's property, when compared with valuations placed on other similar properties, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.
7. **Sales: Valuation.** A single sale may in some instances provide evidence of market value.
8. **Taxation: Valuation.** The actual value of real property for tax purposes shall be the value which a willing buyer would be willing to pay for the fee simple interest.

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

Danene J. Tushar and Aimee A. Demulling, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

James S. Jansen, Douglas County Attorney, and James R. Thibodeau for appellee Douglas County Board of Equalization.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

## I. INTRODUCTION

Omaha Country Club (OCC) appeals from the May 18, 2001, order of the Tax Equalization and Review Commission (Commission) affirming the decision of the Douglas County Board of Equalization (Board) and denying OCC's request for a decrease in the assessed values of the six parcels of land which are the subject of this appeal.

## II. STATEMENT OF FACTS

OCC is the owner or lessee of seven adjoining parcels of land which make up its 18-hole golf course, clubhouse and other structures, parking lot, green space, and some farmland. The farmland is not part of this appeal. Prior to 1997, the six properties subject to this appeal were leased under noncancelable, long-term leases effective until 2071. In 1997, subject property 4020-0000-01, consisting of 26.2 acres, was sold to OCC in fee simple for $45,064 or $1,720 per acre, and the lease for the property was terminated. OCC is the taxpayer for the parcel of land which it now owns, and under the terms of the leases, OCC is responsible for paying the real property taxes on the five parcels of leased property.

For the 2000 tax year, the Board assessed the value of the properties at $2,062,900, which is approximately $8,550 per acre. OCC filed protests with the Board, alleging that the owned and leased properties were overvalued, and requested a reduction of the assessed values. The Board denied OCC's request. OCC appealed to the Commission on August 17, 2000. The issue before the Commission was whether the subject properties should be assessed as if they were fee simple or whether the effect of long-term leases affecting the privileges pertaining to the properties should have been considered by the Board. In other words, how do the leased fee estate and leasehold estate affect the actual or fair market value of the real property at issue. The leased fee estate is an ownership interest held by the landlord who is

transferring specified rights, such as right to use and occupancy, to the lessee. *The Appraisal of Real Estate*, Appraisal Inst. (11th ed. 1996). The leasehold estate is the interest held by the lessee through a lease which transfers specified rights, such as the right to use and occupancy, to the lessee. *Id.*

A telephonic hearing was held on February 26, 2001, and the Commission issued its order on May 18 upholding the Board's decision and denying OCC's request for a reduction in the assessed values of the properties. The Commission determined that the "actual or fair market value of the real property can only be ascertained by determining the value of the fee simple estate, including the Leasehold Estate, the Leased Fee Estate, and any severed estates." The Commission also determined that the evidence presented by OCC, namely the appraisal by Patrick Morrissey and letter from John Elliott, were not credible evidence because both failed to adhere to the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP) and valued only the leased fee estate. Thus, the Commission concluded that although OCC presented evidence that the rents due under the lease are below market and constitute evidence by which the leased fee estate value can be determined, OCC did not present any evidence of the value of the leasehold estate. Therefore, the actual or fair market value of the subject properties could not be determined. As a result, the Commission found that OCC, by failing to produce clear and convincing evidence, did not overcome the presumption in favor of the Board. OCC has timely appealed to this court.

## III. ASSIGNMENTS OF ERROR

OCC assigns and argues that the Commission erred in affirming the Board's decision and denying OCC's request for a reduction in the assessed values of the properties. More specifically, OCC contends that the Commission erred because it (1) found that OCC did not overcome the statutory presumption of the validity of the Board's assessment, (2) disregarded the existence of a recent comparable sale for less than the current assessed value, (3) disregarded the effect of long-term leases for below-market rents on the subject properties, (4) found that OCC's proposed valuations separated the leasehold estates and leased fee

estates, and (5) failed to give proper consideration to the appraisal and letter submitted by OCC as evidence.

## IV. STANDARD OF REVIEW

[1-3] Neb. Rev. Stat. § 77-5019(5) (Supp. 2001) provides that appellate review of a Commission decision shall be conducted for error on the record. When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). However, in instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001).

## V. ANALYSIS

OCC contends that the Commission erred in upholding the Board's decision and denying OCC's request for a reduction in the assessed values of the subject properties.

### 1. Statutory Presumption

[4] There is a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001).

[5,6] The burden of proof is on the taxpayer to establish the taxpayer's contention that the value of the taxpayer's property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust,

and unfair assessment. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959). Such a burden is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon the taxpayer's property, when compared with valuations placed on other similar properties, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment. *Id.*

In the present case, the only evidence regarding the valuation of the subject properties was the 1997 sale of subject property 4020-0000-01; the letter of Elliott, a certified public accountant; the appraisal report of Morrissey, a certified general appraiser; and the affidavit of Len Buckwalter, Douglas County chief deputy assessor. We will proceed to discuss each in turn.

(a) Comparable Sale

OCC offered the 1997 sale of subject property 4020-0000-01, consisting of 26.2 acres, to OCC in fee simple for $45,064 or $1,720 per acre as evidence of a comparable sale in order to establish the actual value of the subject properties.

[7] The term "sales comparison approach" or "market approach" means "a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised." 350 Neb. Admin. Code, ch. 50, § 001.16 (2000). A single sale may in some instances provide evidence of market value. *Firethorn Invest. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001).

The Commission disregarded OCC's contention that the sale price of parcel 4020-0000-01 represented the actual or fair market value of the real property, since the sale price only represented the value of the leased fee estate because that was all the seller had to sell. As a result, the Commission held that the 1997 sale could not be used as a comparable sale to determine the actual value of the entire property, including the entire bundle of rights associated with fee simple ownership. Based upon our review of the record, we cannot say that the Commission erred in making the determination that the 1997 sale only reflected the value of the leased fee estate and therefore could not be used to determine the actual value of the entire property.

(b) Elliott's Letter

OCC submitted the letter from Elliott to support its proposition that the subject properties were overvalued because the effect of long-term leases upon the properties should have been taken into account by the assessor.

Elliott stated in his letter:

> For the purpose of monetary valuation, property has no value unless there is a prospect that it can be exploited by human beings. Since the property is under a non-cancelable lease, there is no opportunity for exploitation or to accrue more value to the property than the income from the lease payments.

In order to determine the value of the real estate, Elliott calculated the present value of the stream of lease payments that would be acquired by the buyer. Under this analysis, Elliott opined that reasonable fair market values for the properties are as follows:

| Key Number | Value |
|---|---|
| 4019-0000-01 | $233,469 |
| 4018-0006-01 | $158,351 |
| 4018-0010-01 | $124,419 |
| 4021-0002-01 | $142,678 |
| 4021-0004-01 | $ 42,618 |

We note that Elliott offered no opinion of value for parcel 4020-0000-01.

The Commission determined that Elliott considered only the income stream to the owner of the leased fee interest and thus valued only the leased fee estate. As a result, the Commission found that the letter had valued only the leased fee estate and was not credible evidence of the actual or fair market value of the subject properties, including all the estates. The Commission also found Elliott's letter to be noncredible because it was not made under oath in compliance with the provisions of 442 Neb. Admin. Code, ch. 4, § 010 (1999), which states that the testimony of witnesses may be taken by (1) affidavit, (2) deposition, (3) oral testimony, and (4) videotape of an examination conducted prior to the time of the hearing for use at the hearing. We agree with the Commission's determination that because Elliott's letter was not in compliance with the Nebraska Administrative

Code, it was not credible. Further, we also agree that Elliott's letter estimated only the value of the income stream to the owner of the leased fee estate and never estimated the value of the leasehold estate. Therefore, we cannot say that it was error for the Commission to determine that Elliott's letter was not credible evidence of the actual value of the subject properties.

(c) Morrissey's Appraisal Report

OCC submitted the appraisal report as support for its contention that the effect of the long-term leases on the subject properties should have been taken into consideration when making an assessment for tax purposes.

Morrissey specifically states in his report that it should be considered a "'Restricted Appraisal Report'"; is restricted to use by the party to whom it is addressed, OCC's attorney; and could not be fully understood without additional information contained in Morrissey's work file.

From the report, it appears that Morrissey calculated the value of the reversion and the value of income stream, which he then added together in order to obtain the total value. In Morrissey's opinion, the market value of the subject properties is $5,000 per acre. Morrissey then used a mathematical calculation to reduce the value of each subject property to its present worth. According to Morrissey, the present values of the subject properties are as follows:

| Key Number | Value |
|---|---|
| 4018-0006-01 and 4018-0010-01 | $37,106 |
| 4019-0000-01 | $34,970 |
| 4020-0000-01 | $10,001 |
| 4021-0002-01 and 4021-0004-01 | $25,449 |

The Commission first determined that it would not be proper to review the appraisal report in the proceedings because it was a restricted appraisal report which was intended to be used only by the client for whom it was prepared. The comment to Standards Rule 2-2 of the USPAP, Appraisal Standards Board of the Appraisal Foundation (1999), which governs real property appraisal reports, states: "When the intended users include parties other than the client, either a Self-Contained Appraisal Report or a Summary Appraisal Report must be provided. When

the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided." The USPAP defines client as "the party or parties who engage an appraiser (by employment or contract) in a specific assignment." Because the Commission was not the client, the Commission determined that the restricted appraisal report was not appropriate for use in these proceedings. However, the Commission did determine that the restricted appraisal report separated the leased fee estate and leasehold estate and thus was not credible evidence of the actual or fair market value of the subject properties.

It appears from Morrissey's report that he determined the value of the leased fee estate and the value of the leasehold estate and that by adding the two values together, he arrived at the value of each of the subject properties. However, we note that Morrissey stated that the report could not be fully understood without additional information contained in his work file. This additional information was not included in the evidence before the Commission, which means that his report cannot be fully understood. Upon our review of the record, we cannot say that the Commission erred in determining that Morrissey's report was not credible evidence.

(d) Affidavit of Buckwalter

Buckwalter stated that he was responsible for the values assigned to the subject properties involved in this dispute. According to Buckwalter, the parcels in question were last reappraised in 1998 as part of a simultaneous reappraisal of 18 golf courses for the 1999 tax year. Buckwalter stated that the values of the subject properties were originally not changed for the 2000 tax year, but were subsequently increased 7 percent by the order of the Commission.

According to Buckwalter, the values for the subject properties, as assigned by the county assessor, are as follows:

| Key Number | 2000 Value |
|---|---|
| 4018-0006-01-43 | $340,700 |
| 4018-0010-01-43 | $283,600 |
| 4019-0000-01-43 | $736,200 |
| 4020-0000-01-43 | $224,000 |

| | |
|---|---|
| 4021-0002-01-43 | $ 87,000 |
| 4021-0004-01-43 | $391,400 |

The assessed values equate to approximately $8,550 per acre.

The Commission found that OCC had not overcome the presumption that the Board had faithfully performed its official duties in making an assessment and had acted upon sufficient competent evidence to justify its action. Therefore, the Commission affirmed the Board's decision to deny a reduction in the assessed values and ordered OCC to pay the assessed amounts listed above.

OCC has the burden to prove that the value of the subject properties was arbitrarily or unlawfully fixed by the Board at an amount greater than the actual value. This burden is not met by showing a mere difference of opinion. No evidence was presented which established clearly and convincingly that the valuations placed upon the subject properties, when compared with valuations placed on other similar properties, was grossly excessive and was the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment. Because the evidence presented simply showed that Elliott, Morrissey, and Buckwalter differed in opinion as to the value of the subject properties, we find that OCC did not meet its burden of proving that the value of the subject properties was arbitrarily or unlawfully fixed by the Board at an amount greater than the actual value. Therefore, based upon our review of the record, we cannot say that the Commission erred in determining that OCC failed to overcome the presumption that the Board had faithfully performed its official duties in making an assessment and had acted upon sufficient competent evidence to justify its action.

### 2. Effect of Long-Term Lease

Under Nebraska law, real property "shall mean all land, . . . improvements, . . . and all privileges pertaining to real property." 350 Neb. Admin. Code, ch. 10, § 001.01 (2000). Privileges related to real property is defined as "the right to sell, lease, use, give away, or enter and the right to refuse to do any of these. All rights may or may not be vested in one owner or interest holder." 350 Neb. Admin. Code, ch. 10, § 001.01F (2000).

Nebraska law also provides that all real property not exempt from taxation is to be valued at its actual value. Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 2000). Further, 350 Neb. Admin Code, ch. 10, § 002.01A (2000), requires real property, except agricultural or horticultural land, to be valued at 100 percent of its actual value. For the purpose of taxing real property, actual value means the real property's market value in the ordinary course of business. Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998). Additionally, 350 Neb. Admin. Code, ch. 10, § 001.15 (2000), defines actual value as

> the market value or fair market value of real property in the ordinary course of trade. It is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market or in an arm's-length transaction between a willing seller and willing buyer, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which it is capable of being used.

Actual value, market value, and fair market value mean exactly the same thing. *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984).

This same issue was considered by the Supreme Court of Florida in *Schultz v. TM Florida-Ohio Realty LTD.*, 577 So. 2d 573 (Fla. 1991). In *Schultz*, the subject property was encumbered by a 22-year lease for below-market rent which commenced in 1970. The court stated that " 'the assessed value of the land must represent all the interests in the land. This means that despite the mortgage, lease, or sublease of the property, the landowner will still be taxed as though he possessed the property in fee simple.' " (Emphasis omitted.) *Id.* at 575 (quoting *Dept. of Revenue v. Morganwoods Greentree, Inc.*, 341 So. 2d 756 (Fla. 1976)). Thus, the court held that the valuation of property must represent the value of all interests in the property, i.e., the fair market value of the unencumbered fee.

A similar result was reached in *Caldwell v. Dept. of Revenue*, 122 Ariz. 519, 521, 596 P.2d 45, 47 (Ariz. App. 1979), where the court stated: "The fact that an unfavorable lease may make the property less desirable to prospective buyers does not affect its full cash value for tax valuation." The court held that the

combined value of the lessee's and lessor's interests under a long-term lease are subject to taxation.

In *Matter of County Dollar Corp. v. City of Yonkers*, 97 A.D.2d 469, 467 N.Y.S.2d 666 (1983), the taxpayer contended that the actual income was not reflective of the rental market, that it was in fact submarket, and that a capitalization process using the actual income did not reflect the true value of the property. The Special Term of the Supreme Court of Westchester County upheld the tax commission's determination, stating: " 'It is elementary that "if contract rent is to be ignored, it must be demonstrated by clear, convincing evidence that the contract rent is below the true market." ' " *Id.* at 472, 467 N.Y.S.2d at 669 (quoting *Caroldee Realty Corp. v. Board of Assessors*, 73 Misc. 2d 41, 340 N.Y.S.2d 774 (1972)). On appeal, the Appellate Division of the New York Supreme Court stated:

> "[T]he existence of an outstanding lease at an unrealistically low rental for a long term, not representing the fair rental value of the property, is not to be used as a basis for calculating actual value. Thus, the true value of the property for assessment purposes is to be ascertained as if unincumbered [sic] by such a lease."

*Matter of County Dollar Corp. v. City of Yonkers*, 97 A.D.2d at 472, 467 N.Y.S.2d at 670 (quoting *People ex rel. Gale v. Tax Comm.*, 17 A.D.2d 225, 233 N.Y.S.2d 501 (1962)).

In *Nance v. State Tax Com'n, of Missouri*, 18 S.W.3d 611 (Mo. App. 2000), the taxpayer entered into a 99-year lease agreement of the subject property, with the option to buy. In 1962, the taxpayer subleased the property to a development company. The taxpayer exercised the option to buy the subject property in 1970. Upon review, the commission determined that the lease created two property interests: the leasehold, owned by the development company, and the leased fee, owned by the taxpayer. The commission held that the fair market value of the property is the sum of the separately valued interests and that the difference between the fair market value of the unencumbered fee simple and the value of the leased fee estate and the leasehold estate equals the impact of the lease on the subject property. On appeal, the Missouri Court of Appeals stated:

> Appellant may be correct in asserting that nobody would purchase the leased fee at its present terms considering the tax burden. However, assessing the value of the leased fee interest in this case as zero would go against public policy. As Respondent points out, if a property owner could unilaterally alienate his property by lease or by other actions that make the property have no value to him, the taxing authority could not collect appropriate property tax because of the taxpayer's unilateral action. If the property were not valued and assessed as unencumbered by the lease, the taxpayer appears to be afforded a tax cut because of the poor judgment of his predecessors.

*Id.* at 619.

These cases require that the income attributed to the leased fee estate under a long-term lease be considered as one of the factors used to determine the actual or fair market value of the real property. However, as these cases demonstrate, the actual or fair market value of the real property can only be ascertained by first determining the fee simple value, including the value of the leasehold estate, the leased fee estate, and any other severed estate.

[8] Therefore, based upon our examination of Nebraska law and jurisprudence from other states, we hold that the actual value of real property for tax purposes shall be the value which a willing buyer would be willing to pay for the fee simple interest.

## VI. CONCLUSION

For the reasons discussed above, we find that the Commission did not err in finding that OCC failed to overcome the presumption that the Board had faithfully performed its duties and had acted upon sufficient evidence to justify its action. We also hold that for tax purposes, the actual value of real property shall be the value which a willing buyer would be willing to pay for the fee simple interest. Therefore, the decision of the Commission is affirmed.

AFFIRMED.

# CARL R. HAMM, APPELLEE, V. CHAMPION MANUFACTURED HOMES, APPELLANT.

645 N.W.2d 571

Filed May 28, 2002. No. A-01-808.

1. **Jurisdiction: Appeal and Error.** It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.
3. **Workers' Compensation: Final Orders.** It is well settled that a workers' compensation case is a special proceeding.
4. **Jurisdiction: Final Orders: Appeal and Error.** If a party's substantial rights are not determined by a court's order and the cause is retained for further action, the order is not final for the purpose of appeal. An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Workers' Compensation: Final Orders: Appeal and Error.** An appeal may not be taken from an order of the Nebraska Workers' Compensation Court if that order is not a final order as defined by statute, as interpreted by the Nebraska Supreme Court.
6. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
7. **Final Orders.** When not all of the issues are decided, the order is not a final order, but an interlocutory order, and when the unresolved issues are resolved, the whole order, including the interlocutory portion, becomes final.
8. **Judgments: Jurisdiction: Appeal and Error.** A necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a tribunal lacking jurisdiction is power to vacate that order and, if appropriate, to remand the cause for further proceedings.

Appeal from the Nebraska Workers' Compensation Court. Order vacated, appeal dismissed, and cause remanded with directions to dismiss.

Mark Kadi, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

Roger D. Moore, of Rehm Bennett Law Firm, P.C., L.L.O., for appellee.

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

## INTRODUCTION

Champion Manufactured Homes (Champion) has appealed from the order of the three-judge review panel of the Nebraska Workers' Compensation Court which affirmed in part and in part remanded the award entered by the trial court in favor of Carl R. Hamm. We conclude that Champion's appeal from the trial court to the review panel was an appeal from a nonfinal, and therefore nonappealable, order because the trial court did not determine all the issues before it, but set an issue for further hearing. Thus, the review panel was without authority to hear the appeal from the trial court, and this court is likewise without jurisdiction to hear the appeal. Accordingly, we dismiss this appeal, vacate the order of the review panel, and order that the review panel dismiss the appeal from the trial court.

## BACKGROUND

The record reveals that Hamm sustained an injury to his right knee while working at Champion in October 1993. He had surgery in March 1994 to remove the prepatellar bursa from his right knee. His physician found that he reached maximum medical recovery on December 15, 1994, and further found that he had a 5-percent permanent physical impairment and loss of use of the right lower extremity. Hamm had been paid all temporary and permanent benefits for that accident.

On June 3, 1997, during the course of employment with Champion, Hamm injured his left knee. He had surgery on his left knee in July 1997 and again in January 1998.

On March 28, 1998, Hamm informed his supervisor at Champion that he was unable to continue as a roofer for Champion because of his knee problems. The testimony is in dispute, but Hamm testified that he was told there were no positions open for him if he could not perform his job and that his employment was then terminated.

Hamm testified that in June 1998, he injured his right knee at home while playing with his children. He was unemployed at the time of the June injury. In July, Hamm began employment with Nutrition Services. Hamm injured his right knee while

working for Nutrition Services and saw a doctor in October 1999 in response to that injury.

Hamm filed a petition seeking workers' compensation benefits. In the operative petition, Hamm prayed for temporary disability benefits, permanent disability benefits, vocational rehabilitation benefits, and payment of medical expenses, waiting-time penalties, attorney fees, and interest.

On December 22, 2000, the trial court issued an award which found that Hamm was entitled to temporary total disability benefits during the period from March 29 through May 5, 1998, and that since Hamm would require future medical care of both knees, Champion was liable for that expense as well. The trial court awarded temporary total disability and permanent partial disability benefits for a finding of a 5-percent loss of use of Hamm's left leg. The trial court found that it could not determine medical expenses and mileage due and owing without a further hearing because the evidence was unclear, and it set a hearing for January 17, 2001, "to sort out the bills and mileage." It also ordered Champion to "pay [Hamm's] future medical care required by [Neb. Rev. Stat. §] 48-120 [(Reissue 1998)]," but denied rehabilitation services and allowed Champion credit for payments already made.

On January 4, 2001, Champion filed an application for review, and after a hearing, the review panel found that there was evidence in the record to support the trial court's finding that Hamm sustained a compensable accident and injury to his left knee and that it was not error for the trial court to order Champion to provide future medical care as it relates to Hamm's left knee injury from June 3, 1997. However, the review panel found it was error for the trial court to find that Hamm had sustained a right knee injury arising out of and in the course of his employment with Champion, as there was no evidence to support such a finding.

In regard to the trial court's order for a hearing to determine medical expenses and mileage, the review panel remanded the matter to the trial court for a determination of Champion's liability for the medical expenses and mileage based on the evidence submitted to the trial court. Champion appealed.

## ASSIGNMENTS OF ERROR

Champion alleges that the review panel erred in (1) affirming the trial court's order requiring Champion to pay future and ongoing medical expenses regarding the injury to Hamm's left knee, when the injury arose after Hamm left Champion's employment; (2) substituting its own finding of fact for that of the trial court and then remanding the cause back to the trial court to determine medical expenses and mileage when the trial court found that it could not determine such expenses without further information; and (3) remanding the cause back to the trial court to determine claimed medical expenses and mileage, when Hamm did not assign error to the trial court's finding thereon or seek such relief during review by the review panel.

## JURISDICTIONAL QUESTION

[1] On our own motion, this court noticed a possible jurisdictional question. It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999); *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

[2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent of that of the trial court. *Thompson, supra*; *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

## ANALYSIS

Appeals from a workers' compensation trial court to a review panel are controlled by statutory provisions found in the Nebraska Workers' Compensation Act. See, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1998 & Cum. Supp. 2000); *Thompson, supra.* The *Thompson* court addressed the jurisdictional question relating to the Workers' Compensation Court and stated, "[Section] 48-179 provides for appeals from findings, orders, awards, or judgments whereas § 48-182 provides for appeals from final orders." 258 Neb. at 327, 603 N.W.2d at 371. It further stated:

> Neither § 48-179 nor § 48-182 defines a "final order" for purposes of a workers' compensation appeal from a trial court to a review panel. Accordingly, we refer to § 25-1902,

> which defines three types of final orders which may be reviewed on appeal, to wit: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.

*Thompson*, 258 Neb. at 328, 603 N.W.2d at 372.

[3,4] It is well settled that a workers' compensation case is a " 'special proceeding.' " *Id.* at 329, 603 N.W.2d at 372. We are therefore only considering an issue involving a final order in a special proceeding. Hamm sought recovery for medical expenses and mileage as well as the other relief prayed for in the petition, and the liability of Champion for medical expenses and mileage was not determined by the trial court, but reserved for another hearing. " 'If a party's substantial rights are not determined by a court's order and the cause is retained for further action, the order is not final for purposes of appeal. . . . An appellate court is without jurisdiction to entertain appeals from nonfinal orders.' " *Id.* at 329, 603 N.W.2d at 373, quoting *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996). The *Thompson* case differs from this case in that the issue appealed from in *Thompson* was the only issue before the trial court when its order was made and in that the appeal therein was dismissed because the *Thompson* court determined that the trial court's order did not affect a substantial right, whereas the order appealed from in the case at hand clearly affects a substantial right.

[5] We conclude that the *Thompson* case is not authority for the proposition that the order in this case is not a final order. It is authority for the proposition that an appeal may not be taken from an order of the Workers' Compensation Court if that order is not a final order as defined by statute, as interpreted by the Nebraska Supreme Court. We conclude that it is also authority for the proposition that we can look to non-workers' compensation cases to determine whether a given order is a final order.

We recently decided a case wherein we stated, "The problem presented in this case stems from the jurisdictional implications of an order in a special proceeding which fails to decide all of the issues submitted to the court in that proceeding, and specifically

reserves ruling on one of such issues." *Paulsen v. Paulsen*, 10 Neb. App. 269, 272, 634 N.W.2d 12, 15 (2001). We have the same situation in the instant case, the only difference being that the special proceeding is a workers' compensation case and not a modification of a divorce decree.

*Paulsen* addressed an appeal from a nonfinal order in a modification of a divorce decree. In *Paulsen*, we determined that there was a lack of jurisdiction because the trial court's order modified child custody but did not determine the amount of child support and reserved that for a later hearing. After an analysis of Nebraska case law, we determined that the order was not a final, appealable order because it determined less than all the issues submitted to the court in the special proceeding. In making that decision, we relied on the following cases, all of which involve an attempt to appeal from an order made in a special proceeding: *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992) (appeal from probate court where trial court decided some issues while reserving some for later determination); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990) (where parent sought change in custody or change in visitation and order was held not final when court reserved issues of visitation and attorney fees for later determination); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984) (where appeal from order dissolving marriage but reserving other issues was dismissed because order was not final); *Goldenstein v. Goldenstein*, 110 Neb. 788, 195 N.W. 110 (1923) (where order setting aside previous allowance for alimony and child support but reserving question of new amount was held not final until new amount was set). The *Goldenstein* court said, in finding the order at issue therein to be a nonfinal order, "[The order] expressly reserves the very thing which was the point of contention for the future consideration and judgment of the court." 110 Neb. at 791-92, 195 N.W. at 112.

[6] In considering the same question, the *Huffman* court reviewed cases from Nebraska and other jurisdictions and stated:

> Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's

> determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.

236 Neb. at 105, 459 N.W.2d at 219.

This rule applies in the instant case. Because the trial court did not resolve the amounts of medical expenses due and owing as well as any amounts of mileage, but reserved them for later determination, the order from the trial court was a nonfinal order.

In resisting a possible dismissal for lack of jurisdiction, Champion's counsel raises two points. One is that the trial court erred in setting, and even lacked jurisdiction to set, the issues of medical expenses and mileage for further hearing and that therefore, the order of December 22, 2000, was a final order even with the erroneous order for further hearing. We point out that we are holding that the order from December 22 is not a final order because the court neither granted nor denied certain relief which was requested, not because the court set the issue for further hearing. We are not deciding whether the trial court erred or even had jurisdiction to set a further hearing. This court has no jurisdiction to decide the correctness of the trial court's action. That will be decided only when and if the matter is properly assigned in a case in which this court does have jurisdiction.

[7] Champion also argues that if it cannot appeal from the order within the statutorily allowed time after the order was entered, then it will lose its right to appeal from the significant part of the order which it maintains was erroneous. This argument is based upon a fallacious understanding of the cases holding that orders which do not decide all of the issues are not final. The above-cited cases that hold that when not all of the issues are decided, the order is not a final order, but an interlocutory order, also hold that when the unresolved issues are resolved, the whole order, including the interlocutory portion, becomes final. This is expressly what was held in *Huffman, supra*, and *Goldenstein, supra*. The discussion in *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000), demonstrates this principle more fully. On further review of that case from this court, the Nebraska Supreme Court noticed that a motion for attorney fees had not been ruled upon by the trial court, and it dismissed the appeal for lack of jurisdiction for that reason. The case was returned to the trial court, and after attorney fees were awarded

by the trial court, the case was appealed anew. The *Gagne* court then considered the validity of all issues appealed, including the sufficiency of the evidence to support the verdict (the same issue this court had determined in the previous appeal).

## CONCLUSION

[8] The court in *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999), merely dismissed the appeal in that case when it held that the review panel of the Workers' Compensation Court did not have jurisdiction to enter the order appealed from. In that case, the review panel had affirmed the trial court's decision, and a dismissal was all that was necessary. In this case, the review panel modified the trial court's order. That modification cannot stand. A necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a tribunal lacking jurisdiction is power to vacate that order and, if appropriate, to remand the cause for further proceedings. *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999). In this case, we must vacate the order of the review panel. We do so, and we dismiss this appeal and direct the review panel to dismiss the appeal from the trial court.

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

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## STATE OF NEBRASKA, APPELLEE, V. TATANKA SAPANAJIN, ALSO KNOWN AS JESSE T. ROUSE, APPELLANT.

646 N.W.2d 668

Filed June 4, 2002. No. A-01-902.

1. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
2. **Trial: Words and Phrases.** A trial court abuses its discretion when its rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result.
3. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct

waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.

4. **Prosecuting Attorneys: Miranda Rights: Due Process.** A prosecutor's remarks referring to postarrest, pre-*Miranda* silence do not necessarily violate a defendant's due process rights.
5. **Miranda Rights: Due Process.** In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, it does not violate due process of law for a state to permit cross-examination as to a defendant's postarrest silence when that defendant chooses to take the stand.
6. **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.
7. **Criminal Law: Intent: Intoxication.** Ordinarily, voluntary intoxication does not justify or excuse a crime unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.
8. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
9. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, 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.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Amie C. Martinez and Jonathan M. Braaten, of Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

CARLSON, Judge.

## INTRODUCTION

Tatanka SapaNajin appeals after a jury trial in the district court for Lancaster County. After trial, the jury found SapaNajin guilty of possession of methamphetamine. The trial court found SapaNajin to be a habitual criminal and sentenced him to 10 years in prison. For the reasons set forth below, we affirm.

## BACKGROUND

In an information filed September 20, 1996, the State charged SapaNajin with possession of a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1995) and alleged that SapaNajin was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995).

Trial was held in April 1999. At trial, SapaNajin chose to represent himself up until closing arguments, when SapaNajin requested that the public defender represent him. During his opening statement, SapaNajin acknowledged that the officers found a controlled substance, methamphetamine, in his coat on October 24, 1995. SapaNajin argued that the coat he was wearing was not his, but had been borrowed from a friend. SapaNajin also stated that none of the officers asked him if the coat or the drugs inside the coat were his.

Officer Jeffrey Van Nortwick of the Lincoln Police Department testified that on October 24, 1995, he was working the second shift, from 3:30 to 11:30 p.m. Nortwick testified that he came into contact with SapaNajin on October 24 after being dispatched to a vandalism in progress. Nortwick testified that he and three other officers arrested SapaNajin that evening. Nortwick testified that after the arrest, a search of SapaNajin revealed a shot glass in the inside pocket of his coat, which shot glass later tested positive for methamphetamine. At trial, the prosecutor asked Nortwick if he recalled SapaNajin stating, " '[t]hat's not my shot glass, I don't know where that came from,' " or anything to that effect. SapaNajin objected, stating that the State was trying to draw conclusions as to his silence. The State argued that it could ask those questions because SapaNajin opened the door in his opening statement. The trial court sustained SapaNajin's objection and stated:

> Opening statement is not evidence. I see this as a peremptory strike. We have to wait [to see] if Mr. Sapa[N]ajin is going to testify, then he can testify, then you can ask him on cross-examination and if he says something different, you can call your officer back again.

Besides the shot glass, the officers found two syringes, extra needles, and some alcohol wipes in the left outer front pocket of SapaNajin's coat. The officers also found a marijuana pipe

with marijuana residue and two small marijuana joints on SapaNajin's person.

Officer Kevin Hinton transported SapaNajin to jail. At the jail, Officers Joseph Anderson and Kim Sneddeker conducted a search of SapaNajin. Anderson testified that SapaNajin was resistant and that it was Anderson's belief that SapaNajin was highly intoxicated. Anderson testified that while the officers were searching SapaNajin, they found a pack of cigarettes and a small folded piece of paper in the cigarette package. Anderson testified that upon opening the paper, the officers found a white powdery substance. The record shows that one of the paper packets found in the cigarette pack subsequently tested positive for methamphetamine. Sneddeker testified that she retrieved the above items out of the left front pocket of either SapaNajin's shirt or his coat.

At trial, SapaNajin testified in his own defense. SapaNajin testified that on October 24, 1995, he was in a bar with some friends. SapaNajin testified that he was at the bar longer than he anticipated and that as it got toward evening, he realized that he should move his car if he was going to stay any longer. SapaNajin testified that when he left the bar, it was chilly out so he grabbed the coat of his friend Richard Maher. SapaNajin testified that he remembers Maher telling him, " 'Don't lose my shot glass.' " Maher testified at trial, corroborating SapaNajin's story and stating that the coat and the items inside were Maher's.

SapaNajin testified that when he left the bar, he had a "good buzz" going. SapaNajin testified that before he had walked three or four blocks, he got arrested. SapaNajin testified that he generally smokes pot in a pipe and that the pipe found on him was his. SapaNajin testified that he does not use methamphetamine and that the items found on him containing methamphetamine were found in Maher's coat and belonged to Maher, not him. Regarding any statements SapaNajin may have given to the police after his arrest, but before any *Miranda* warnings were given, he stated:

> I remember people once asking me if I had anything to say. I think it was Officer Van Nortwick, but, you know, what have I got to say? No, he said, you got drugs on you,

> you know, nobody said that. They said, have you got anything to say?
>
> I remember them being more excited about a knife in my pocket than anything else. I get down to the jail, nobody waves something in front of me saying, uh-oh, look what we found? You got anything to say? Nobody did that, so I didn't say anything.

In the prosecutor's closing argument, he commented on SapaNajin's testimony as follows:

> Well, now, what if they pulled that off of my jacket and when they were doing so I said, geez, I don't know whose that is. This isn't my jacket. When I'm being booked into jail and having items pulled off of this jean jacket and just say, this isn't mine. Make sure you keep straight what you're taking out of which place because this isn't mine. This is somebody else's that I just borrowed right before I got arrested. But he doesn't.

After trial, the jury found SapaNajin guilty of one count of possession of methamphetamine. On April 29, 1999, SapaNajin filed a motion for new trial, which the district court denied on August 16. On August 23, the trial court sentenced SapaNajin to 10 years in prison. On September 23, SapaNajin appealed. On December 23, this court dismissed SapaNajin's notice of appeal for lack of jurisdiction. See *State v. Sapanajin*, 8 Neb. App. lxvii (No. A-99-1122, Dec. 23, 1999).

On January 3, 2000, SapaNajin filed a motion for rehearing, which this court overruled on April 5. On June 28, 2001, SapaNajin filed a motion for hearing on a petition for postconviction relief, seeking reinstatement of his direct appeal. On July 25, the trial court granted SapaNajin's request for postconviction relief and reinstated SapaNajin's direct appeal. SapaNajin appeals.

## ASSIGNMENTS OF ERROR

On appeal, SapaNajin argues that (1) the trial court abused its discretion in overruling his motion for a new trial based on prosecutorial misconduct during closing arguments, (2) the trial court erred in refusing to give a jury instruction on the defense of intoxication, (3) the evidence at trial was insufficient to convict

him of the charge of possession of methamphetamine, and (4) he was denied effective assistance of counsel at the trial level in violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

## ANALYSIS

*Prosecutorial Misconduct.*

On appeal, SapaNajin argues that the trial court abused it discretion in overruling his motion for new trial based on prosecutorial misconduct during closing arguments. SapaNajin points to the following remarks made by the State in closing arguments:

> Well, now, what if they pulled that off of my jacket and when they were doing so I said, geez, I don't know whose that is. This isn't my jacket. When I'm being booked into jail and having items pulled off of this jean jacket and just say, this isn't mine. Make sure you keep straight what you're taking out of which place because this isn't mine. This is somebody else's that I just borrowed right before I got arrested. But he doesn't.

SapaNajin argues that the State committed prosecutorial misconduct by suggesting to the jury that they were allowed to infer SapaNajin's ownership of the coat and its contents based on SapaNajin's silence at the time of his arrest.

[1,2] An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Thompson*, 246 Neb. 752, 523 N.W.2d 246 (1994). A trial court abuses its discretion when its rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result. *Id.*

[3] Initially, we note that SapaNajin did not request a mistrial or move to have the court admonish the jury when the prosecutor made these remarks. A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

Even so, we conclude that the prosecutor's remarks in closing argument did not constitute prosecutorial misconduct. In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976),

the U.S. Supreme Court held that it is fundamentally unfair and a violation of due process to allow the silence of an arrested person to be used to impeach that person.

[4,5] In *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the Supreme Court limited this rule to postarrest, post-*Miranda* silence. Specifically, the Supreme Court held that a prosecutor's remarks referring to postarrest, pre-*Miranda* silence do not necessarily violate a defendant's due process rights. The Court stated that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." 455 U.S. at 607.

In its order denying SapaNajin's motion for new trial based on prosecutorial misconduct, the trial court stated:

> A review of the court's trial notes reveals there was no testimony concerning the defendant ever being advised of the *Miranda* rights or being given similar affirmative assurances. That being the case, all questioning of the defendant . . . relating to his not revealing certain information to law enforcement was questioning relating to pre-*Miranda* silence and was, therefore, properly used to impeach the defendant.

After reviewing the record, we conclude that the trial court did not abuse its discretion in overruling SapaNajin's motion for new trial on the basis of prosecutorial misconduct. On this record, the prosecutor's statements during closing argument regarding SapaNajin's postarrest, pre-*Miranda* silence did not constitute misconduct in light of SapaNajin's trial testimony. This assignment of error is without merit.

*Intoxication Defense.*

On appeal, SapaNajin argues that the trial court erred in refusing to give the following jury instruction on the defense of intoxication:

> There has been evidence that the Defendant was under the influence of drugs at the time that the crime with which he is charged was committed. Intoxication is a defense only when a person's mental abilities were so far overcome by

> the use of alcohol that he could not have had the required intent. You may consider evidence of alcohol use along with all other evidence in deciding whether the Defendant had the required intent.

Brief for appellant at 12.

[6] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). Initially, we note that SapaNajin failed to request the above instruction at trial. Therefore, we review for plain error.

[7,8] First, we note that SapaNajin's tendered instruction is a correct statement of the law. Ordinarily, voluntary intoxication does not justify or excuse a crime unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged. *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999). Whether jury instructions given by a trial court are correct is a question of law. *State v. Bao, supra.*

The next question is whether SapaNajin's tendered instruction is warranted by the evidence. On this record, SapaNajin did not raise the defense of intoxication at any time prior to this appeal. Rather, SapaNajin alleged that the coat he was wearing belonged to Maher and that all of the methamphetamine found on him by police on October 24, 1995, was Maher's.

Even if SapaNajin had raised intoxication as a defense at trial, the record does not support an instruction on that defense. Although the record shows that SapaNajin was intoxicated on October 24, 1995, SapaNajin presented no evidence to support the requirement that he was intoxicated to such an extent that he was incapable of forming the requisite intent to intentionally or knowingly possess a controlled substance. Therefore, the trial court did not err in failing to instruct the jury on the defense of intoxication.

*Insufficiency of Evidence.*

On appeal, SapaNajin argues that the evidence at trial was wholly insufficient to warrant a rational fact finder's determining

that SapaNajin intentionally and knowingly possessed a controlled substance.

Section 28-416(3) provides:

> A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by the act, shall be guilty of a Class IV felony.

[9] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, 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. Utter*, 263 Neb. 632, 641 N.W.2d 624 (2002).

SapaNajin contends that he did not intentionally or knowingly possess methamphetamine because the drugs were found in a coat he had just borrowed from Maher. SapaNajin further argues that it was uncontradicted that Maher owned both the coat and its contents.

While it is true that SapaNajin and Maher testified that the coat SapaNajin was wearing at the time of his arrest belonged to Maher, the jury was entitled to reject both SapaNajin's and Maher's testimonies to that effect. Additionally, as noted above, the State properly brought out the fact that SapaNajin first stated at trial that the coat was not his. SapaNajin testified that he did not tell the officers after his arrest that the coat and its contents did not belong to him. The jury was entitled to consider this evidence in reaching its verdict. We conclude that the evidence taken most favorably to the State is sufficient to support SapaNajin's conviction for possession of methamphetamine.

*Ineffective Assistance.*

On appeal, SapaNajin contends that he was denied effective assistance of counsel at the trial level in violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the

Nebraska Constitution. First, SapaNajin argues that he was denied effective assistance of counsel by his trial counsel's failure to object to the improper remarks pertaining to SapaNajin's silence after arrest made by the prosecutor during closing argument. Given our conclusion that the prosecutor's remarks were not improper, we dismiss SapaNajin's claim in that regard.

Second, SapaNajin argues that he was denied effective assistance of counsel "by trial counsel's failure to request a jury instruction on the defense of intoxication." Brief for appellant at 18. Because we concluded above that SapaNajin's requested instruction on intoxication was not warranted by the evidence, SapaNajin's ineffective assistance of counsel argument is without merit.

## CONCLUSION

After reviewing the record, we conclude that the trial court did not err in overruling SapaNajin's motion for new trial based on prosecutorial misconduct during closing arguments or in refusing to give a jury instruction on the defense of intoxication. We also conclude that the evidence at trial was sufficient to convict SapaNajin of the charge of possession of methamphetamine and that SapaNajin was not denied effective assistance of counsel at the trial level.

AFFIRMED.

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LAWRENCE PRIBIL, APPELLANT, V. BARTON AND SANDRA KOINZAN, HUSBAND AND WIFE, ET AL., APPELLEES.

647 N.W.2d 110

Filed June 11, 2002. No. A-01-251.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility.
2. ____. If a statement violates Neb. Evid. R. 408, Neb. Rev. Stat. § 27-408 (Reissue 1995), a trial court does not have discretion to admit the statement.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an

appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.

4. **Trial: Appeal and Error.** If an issue was actually considered by the trial court, it may be considered on appeal.
5. **Trial: Evidence: Appeal and Error.** An objection that successfully excludes evidence must be timely in the sense that it must be made so that the other party has an opportunity to make a proper offer of proof or otherwise to preserve the issue for appeal.
6. **Compromise and Settlement.** A compromise and settlement of litigation need not embrace all the matters in issue; adjustment of single issues, although not necessarily determinative of the outcome, should be encouraged.
7. **Rules of Evidence: Compromise and Settlement.** Neb. Evid. R. 408, Neb. Rev. Stat. § 27-408 (Reissue 1995), excludes not only offers to compromise or offers made in attempting to compromise a claim which is disputed, but also excludes evidence of conduct or statements made in compromise negotiations.
8. ____: ____. In complex settlement negotiations, in the absence of an express provision that preliminary agreements are contingent upon full settlement of the issues being negotiated, such preliminary agreements on one or more of the disputed points should be treated like an offer of compromise or admission under Neb. Evid. R. 408, Neb. Rev. Stat. § 27-408 (Reissue 1995).
9. **Damages: Evidence: Proof: Words and Phrases.** "Reasonable certainty" and "reasonable probability" mean the same thing, and it is not error for a trial court to instruct that damages must be proved by the plaintiff with reasonable certainty, notwithstanding that the plaintiff's burden of proof is by the greater weight of evidence.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

David J. Partsch and Thomas H. DeLay, of Jewell, Collins, DeLay & Gray, for appellees Koinzans.

Kathleen Koenig Rockey, of Copple & Rockey, P.C., for appellees Held and Shaw.

IRWIN, Chief Judge, and HANNON and INBODY, Judges.

HANNON, Judge.

## INTRODUCTION

Lawrence Pribil sued Barton and Sandra Koinzan, Terry Held, and Genevieve Shaw (collectively the defendants) for damages that the Koinzans' cattle did to Pribil's mature corn and soybean crops on several quarters of irrigated land. The Koinzans' cattle escaped from Shaw's land and went onto Pribil's neighboring

fields. A summary judgment on the issue of liability was granted, and liability is not disputed in this appeal. In Pribil's operative petition, he sought $164,079.42 in damages, but the jury returned a verdict for only $34,920.60. Pribil alleges that the trial court erred in sustaining the defendants' objection to the admission of evidence of an alleged agreement made by a representative of the Koinzans during settlement negotiations with Pribil on the corn and soybean yields he would have had without damage from the cattle, as well as the price of corn per bushel. Pribil also alleges error by the court in instructing the jury that Pribil must prove the damages to his crops to a "reasonable certainty." We conclude that the alleged partial settlement was inadmissible under Neb. Evid. R. 408, Neb. Rev. Stat. § 27-408 (Reissue 1995), and that the complained about jury instruction has been specifically approved by the Nebraska Supreme Court. Accordingly, we affirm.

## SUMMARY OF EVIDENCE AND ISSUES

Pribil is a 70-year-old farmer with many years' experience growing corn and soybeans on irrigated land southwest of O'Neill, Nebraska. The land is irrigated by center-pivot irrigation systems. These systems work by pivoting a suspended pipe with sprinklers on it around the center of a quarter, which is usually 160 acres. Thus each system irrigates only about 130 acres of each quarter section. The irrigated portion of each quarter section is often called a "circle." In 1996, Pribil raised corn and soybeans on 13 circles. The cattle trespassed upon only five circles that were adjacent to Shaw's land and to each other. It is undisputed that between September 23 or 25 and the end of October, cattle for which the defendants were legally responsible escaped and got into and damaged the corn and soybeans on these five circles.

The evidence contains a thorough history of the dates and times the cattle got into Pribil's crops as well as the damage to these crops by the cattle or by those trying to get the cattle out of the fields. The trial court determined the defendants were liable as a matter of law for the damage those cattle did to Pribil's crop. The issues litigated concerned the physical damages the cattle did, the effect of that damage upon the yield of these circles, and the market value of that lost crop.

Pribil testified to the history of his farming of these circles, the yield history of each circle, and the details of his farming on each of the circles in 1996. The testimony included such things as the type of crop planted, when and how fertilizer and herbicide were applied, the farming practices used, and the appearance of the crop. This evidence appeared to show every imaginable variable that might affect the yield and quality of the corn and soybeans that year, as well as the market value. Similarly, he testified in detail about the physical damage the cattle did to his corn and soybean fields by their trespassing. Obviously, he did this in order to establish a basis for his opinion and the opinions of other qualified farmers in the area of what would have been harvested from these circles had they not been damaged by the trespassing cattle. Pribil then testified to the yield he did in fact receive. Since Pribil and other farmers did testify about such matters, and there is no error assigned by any party concerning the foundation for such evidence or the sufficiency of that evidence to support the verdict, we see no point in summarizing this voluminous evidence. We do so only to the extent necessary to give a setting to the issues appealed. This is not to say that the defendants did not dispute Pribil's case on damages on almost every issue.

The cattle belonged to the Koinzans. Shaw owned the land from which the cattle escaped. She rented it to the Koinzans from May to October 1996, and Held managed the Shaw property. Prior to trial, the court granted Pribil a partial summary judgment determining that all defendants were liable for the damage done by the Koinzans' cattle, and that determination is not disputed in this appeal.

Tom Chambers was an adjuster representing an insurance carrier that was in some way liable for the damages Pribil suffered as a result of the trespassing cattle. In order to avoid raising issues concerning the existence of liability insurance, the parties stipulated that Chambers would be described as a "representative" of the Koinzans. Pribil and Chambers had conversations during the fall of 1996 concerning the loss Pribil suffered from the trespass. Some statements made by Chambers during those conversations were admitted, but some of his statements were excluded upon the defendants' objections. The exclusion of this

evidence is one of the issues in this appeal. The background and details will be set forth when we consider that issue.

While the evidence on the amount of damages is not directly relevant to the issues of the appeal, a summary might be helpful to understand the issues. Pribil's evidence, if accepted, would have shown he lost 26,311 bushels of corn and 2,153 bushels of soybeans from the cattle's trespass. The value of the loss of yield is another variable, but the evidence would support a market value of approximately $2.75 per bushel for the corn and more than $5 for the soybeans. Thus, the evidence would have supported a verdict of approximately $83,000. The jury returned a verdict for Pribil in the amount of $34,920.60, and Pribil appealed.

## ASSIGNMENTS OF ERROR

Pribil assigns as error the trial court's (1) refusing to allow the hearsay testimony of Tom Chambers, a representative of the Koinzans; (2) including jury instruction No. 8C; and (3) overruling Pribil's motion for new trial.

## STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). We find that in *First Nat. Bank in Mitchell v. Kurtz*, 232 Neb. 254, 440 N.W.2d 432 (1989), the Nebraska Supreme Court reviewed, under the abuse of discretion standard, a ruling excluding evidence under rule 408. That case, however, was decided before *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991), when the Nebraska Supreme Court clearly stated that the abuse of discretion standard applies only when discretion is a factor of admissibility. We find no suggestion in the Nebraska Evidence Rules that discretion is an element of admissibility under rule 408. " '[I]f a statement violates the rule, a trial court does not have discretion to admit the statement.' " David P. Leonard, The New Wigmore: Selected Rules of Limited Admissibility § 3.2.3 at 295 (2002), quoting *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519 (Minn. App. 1999). Upon the basis

of that authority and our own reasoning, we conclude that rule 408 is an exclusionary rule and not a rule of discretion.

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

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. *Snyder, supra.*

## ANALYSIS

*Exclusion of Tom Chambers' Statements.*

After the Koinzans' cattle were removed from the area near Pribil's land, Chambers and Pribil talked on the telephone and then met by agreement at a restaurant in O'Neill. The parties stipulated that Chambers was a representative of the Koinzans, but not of Shaw or Held. The court therefore allowed some of the testimony of what Chambers said to Pribil into evidence as an admission against the Koinzans, but not as against Held and Shaw, and the jury was so instructed during some of Pribil's earlier testimony of Chambers' statements.

Pribil testified that at that meeting he gave Chambers the weights that showed how much corn he had harvested from the southeast quarter of section 15, which had been picked. Chambers wanted to know if there was any way the corn could be harvested and taken to town and weighed. Pribil told him that all his corn goes into his bins. Pribil testified that Chambers asked for sample weights and that Pribil "said that I'd agree to go ahead and pick the North Half of the South Quarter that was so heavily damaged, and I would weigh that, but it would also go to the bins, and that's what I did." Pribil then testified that he "wasn't about to weigh it all," and he explained that by using bin measurements with the test weight of the corn and the moisture of the corn, he could come close to a correct determination of the amount of corn in a bin.

The court ultimately instructed the jury that Pribil was entitled to recover "the market value the crop would have had at maturity, if it had not been injured . . . minus any market value

of the injured crop, and . . . minus any savings to the plaintiff in the cost of production and transportation to market." Under the evidence in this case, the market value would necessarily be determined by the per bushel market value of corn and soybeans at the applicable time. The other element of damage would be the difference between what Pribil would have raised on this land minus the amount he did raise. In summarizing the evidence and argument, we are going to use the term "projected yield" to mean the amount of corn or soybeans per acre that the land would have produced in 1996 if the Koinzans' cattle had not trespassed on Pribil's fields and the term "actual yield" to be corn and soybean amounts that were actually harvested from the land in 1996. Except for a possible agreement between Pribil and Chambers in their meeting in O'Neill, both the projected yields and the actual yields were disputed. The evidence shows that the corn did not all mature on a given day and that the price of corn in late 1996 and early 1997 was not static.

Pribil testified that in the meeting in O'Neill, he and Chambers discussed the projected yields of the damaged fields. Pribil's attorney then asked, "And what did you say, and what did he say?" Counsel for Shaw and Held objected on the ground of hearsay. The court sustained the objection as to Chambers' statements, but not as to Pribil's statements. Pribil's counsel asked to make an offer of proof, and the judge stated that he could do so at the next break. The examination of Chambers continued. Pribil testified that he told Chambers what he had harvested and that Chambers asked if he could inspect the fields. Chambers also asked for a photocopy of the page of a calendar upon which Pribil had written his projected yields and the yield he had lost. This document does not have the actual yield, and indeed the evidence is that some of the corn had not been harvested at the time of the meeting. The page was finally marked exhibit 45 and admitted into evidence. The several figures on that exhibit show Pribil computed his lost yield to be 26,311 bushels of corn and 2,153 bushels of soybeans. These are the figures for lost yield which we used to compute the value of the loss that we concluded in our summary above the evidence would support.

Pribil's counsel then referred to the words "Average 135 bushels" written near the top of exhibit 45. The exhibit actually

contains a handwritten notation that is illegible, but probably is the abbreviation for average, followed by "135 bu." Pribil was then asked to explain those words. He testified, "The figure 135 is what we agreed on that it should have yielded, or that is an estimated yield of what it would have done, had there not been cattle in the corn." An objection was made and sustained. Pribil was allowed to testify that 135 is the bushel amount that the corn would have yielded, without using the word "agreed." In essence, Pribil was allowed to testify that "we estimated that it would do [yield] 155 [bushels]." Chambers wanted to deduct for moisture which would bring the estimated yield down to 135 bushels per acre. Pribil also testified that he and Chambers discussed a price of $2.75 per bushel for corn and that Pribil agreed to that price. Pribil testified that he next talked to Chambers over the telephone in February 1997 about whether the parties were going to "settle this." Pribil was asked what he had said and what Chambers had said, and an objection was made and sustained.

Later at the next break, Pribil's counsel was given an opportunity to make an offer of proof based on an earlier objection. Pribil's counsel did so by a statement. It does not appear that there was any dispute on what the offer of proof contained. We therefore summarize it as follows: Pribil offered to prove that during Pribil and Chambers' meeting in the restaurant in O'Neill, Chambers requested that Pribil's projected yield be reduced for moisture. Pribil said he would reduce it to 135 bushels per acre, and Chamber agreed that the defendants would pay on the basis of 135 bushels per acre for lost corn. It was also stated that Chambers told Pribil that Chambers would pay $2.75 per bushel for the corn. The defendants objected to the offer of proof upon the basis of hearsay and settlement negotiations.

Pribil's counsel then argued that if the defendants are jointly and severally liable, the statements are not hearsay to any of the defendants, and that Pribil was testifying about a conversation that goes beyond settlement negotiations and is an agreement. He argued that Pribil and Chambers had agreed on the yield that Pribil would have received if the crop had not been damaged by the cattle, apparently 135 bushels per acre, and that they had agreed the price he would have received for that corn was $2.75 per bushel. Counsel admitted that Pribil and Chambers still had

not agreed upon the amount of the loss, but only on the projected yield and the price.

The trial judge stated that he had concluded that the testimony was hearsay as to Held and Shaw, but not as to the Koinzans, but since the defendants were jointly and severally liable, there was no way to separate the interests of the defendants for the jury. The judge stated that consequently, the issue becomes one of unfair prejudice as to "the Koinzans" even if the issue was not expressly raised on the offer of proof. He stated that he considered the issue under rule 408 and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). He ruled that the statements made in the offer of proof were inadmissible under rule 408 and that rule 403 would also apply.

We have some difficulty determining what evidence of an agreement the offer of proof contained that was not already before the jury in a different form. If the substance of disputed testimony has been placed before the jury, the exclusion of it does not affect a substantial right. See *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). We do not rest our decision on that point, because it was not argued by the defendants in either this court or the trial court and because Pribil seems to be resting his position upon the refusal of the court to allow proof of an agreement, not just statements which Pribil testified that Chambers had made.

Neither party argues any issue concerning whether the evidence was excludable as hearsay, and in view of the court's ruling, we need not consider whether the offer excluded was hearsay. The court also referred to rule 403, which allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It may well be that the judge thought, as we are inclined to believe, that substantially all of the information contained in the offer was already before the jury, but he did not say so. The defendants did not object upon the basis of rule 403, and the parties do not argue this issue. Therefore, we do not consider it and limit our consideration to the admissibility of the evidence under rule 408.

[4,5] Pribil argues in his brief that by initially objecting on the basis of only hearsay, the defendants waived the right to object on the basis of rule 408. In support of that position, Pribil cites 12 Fed. Proc. L. Ed. § 33-228 (1988). That authority does make that statement, but the case it cites as authority, *Esco Corp. v. United States*, 750 F.2d 1466 (9th Cir. 1985), involved a situation where the hearsay objection was made at trial and the rule 408 objection was first made upon appeal. Naturally, the rule 408 objection was held to be untimely under Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1995). Rule 103 requires that for error to be predicated upon a ruling 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." Interestingly, rule 103 requires a "timely objection" only to predicate error on the admission of evidence. In considering the need for a timely objection, one authority states: "If an issue was actually considered by the trial court, it may be considered on appeal." 4 C.J.S. *Appeal and Error* § 213 at 293 (1993). We are inclined to believe that an objection that successfully excludes evidence must be timely in the sense that it must be made so that the other party has an opportunity to make a proper offer of proof or otherwise to preserve the issue for appeal, but we find no discussion of the issue in the cases. The record shows that Pribil's counsel had a full and complete opportunity to make an offer of proof at the next break, he did make an offer, and the court ruled upon the offer upon the basis of rule 408. We do not believe a waiver arose in that situation.

Rule 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered

> for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In Pribil's brief, he recognizes that rule 408 requires the exclusion of conduct or statements made in a compromise negotiation, that public policy favors settlements, and that rule 408 encourages this by making it unnecessary for parties to avoid making admissions during compromise negotiations by making offers hypothetical. Nevertheless, Pribil cites to *O'Hare v. Peterson*, 150 Neb. 151, 33 N.W.2d 566 (1948), which allowed into evidence as an admission a check and a statement tendered with it during negotiations, even though it was tendered as a basis for settlement. This case is inapplicable because it was decided before the adoption of the Nebraska Evidence Rules in 1975. Before that date, the Nebraska rule was that admissions of fact made during settlement negotiations were admissible even if they were made during settlement negotiations if they were not made in hypothetical form. See *Brown v. Hyslop*, 153 Neb. 669, 45 N.W.2d 743 (1951).

Pribil also argues that the offer would establish that Pribil and Chambers actually agreed on the projected corn yield and the applicable price of corn. Pribil cites and quotes 2 McCormick on Evidence § 266 at 187 (John W. Strong 5th ed. 1999):

> If an offer of compromise is accepted and a contract is thus created, the party aggrieved may sue on the contract and obviously may prove the offer and acceptance. Moreover, if after such a contract is made and the offering party repudiates it, the other may elect to sue on the original cause of action and here again the repudiating party may not claim privilege against proof of the compromise. The shield of privilege does not extend to the protection of those who repudiate the agreements, which the privilege is designed to encourage.

In this case, Pribil did not sue on what he claimed to be the compromise agreement, but, rather, on the original cause of action. We note McCormick does not purport to deal with a settlement or compromise of elements of a controversy, but simply refers to a compromise that results in a contract, after an offer and acceptance. McCormick refers to a suit on the original cause

of action when the other party repudiates the compromise reached. This language necessarily assumes McCormick was considering a compromise of the entire controversy because it settles the original cause of action, not to merely some element of it. We have succeeded in finding only two of the three cases cited by McCormick in support of the above-quoted material. See, *Union Trust Co. v. Resisto Mfg. Co.*, 169 Md. 381, 181 A. 726 (1935) (involved agreement on one issue of controversy, but court rested its decision in part on no longer recognized rule that admission of facts during compromise negotiation were admissible); *Reese v. McVittie*, 119 Colo. 29, 200 P.2d 390 (1948) (involved complete settlement of controversy, not agreement on particular element). These cases were decided long before rule 408 was adopted, and therefore are not helpful. After considerable research, we have been unable to find any case decided under rule 408 which considers the admissibility of an agreement by the parties during a settlement negotiation where less than all of the disputed elements were agreed upon.

[6] We find authority that recognizes that "[p]arties may settle any part of a controversy and leave the rest for litigation. Thus, a compromise and settlement of litigation need not embrace all the matters in issue; adjustment of single issues, although not necessarily determinative of the outcome, should be encouraged." 15A C.J.S. *Compromise and Settlement* § 3 at 177 (1967).

[7,8] However, rule 408 excludes not only offers to compromise or offers made in attempting to compromise a claim which is disputed, but also excludes "[e]vidence of conduct or statements made in compromise negotiations." By its nature, negotiations are usually conducted by the negotiators discussing separate elements of a controversy that involves several disputed elements. It seems difficult to conceive how intelligent negotiation could be conducted otherwise. Usually, tentative agreements have to be made on certain elements as the discussion progresses. To the extent possible in such negotiations, when the parties can agree on one or more element, they do so. They are not likely to expressly state that agreements on the various elements are conditioned upon their being able to agree on other elements which they are about to discuss. Such preliminary agreements are not essentially different from statements made during negotiations, and in fact,

they are frequently made by way of an admission or a statement during the course of the negotiations. We think that generally, the notion that such agreements are conditioned upon being able to agree on all other points is understood but not spoken. In complex settlement negotiations, in the absence of an express provision that preliminary agreements are contingent upon full settlement of the issues being negotiated, such preliminary agreements on one or more of the disputed points should be treated like an offer of compromise or admission under rule 408.

In the case at hand, Pribil alleged in his operative petition that he had a projected yield of 84,360 bushels of corn but an actual yield of only 29,956 bushels and that corn had a market value of $2.70 per bushel, not the $2.75 that he claims Chambers agreed to. In a sense, if there was an agreement, Pribil abandoned it by not pleading it. Even though Pribil's counsel states in the offer of proof that Chambers and Pribil "agreed" upon these things, the only offered evidence of such an agreement was Pribil's conclusion. It would seem that if Pribil wanted to base his damages in part upon an agreement that was reached, he should have alleged the agreement in his petition; otherwise, his claim of such an agreement amounts to nothing but an attempt to avoid rule 408. We agree with the trial court that the offered evidence was not admissible.

*Jury Instructions.*

Pribil argues that the trial court erred in giving jury instruction No. 8C. This part of instruction No. 8 deals with Pribil's burden to prove the damages he claimed. The instructions on the issues of the burden of proof and damages necessary to understand this issue are as follows:

Instruction No. 6 sets forth Pribil's claim, and since the court established liability as a matter of law, it deals with damages. Subpart A(3) of that instruction states: "BURDEN OF PROOF: Before the plaintiff can recover against the defendants on the plaintiff's claim, the plaintiff must prove, by the greater weight of the evidence, the nature and extent of the damage to the corn and soybean crops." Instruction No. 6 also tells the jury the effect of its findings in the event it finds Pribil has met his burden, as well as if he has not.

Instruction No. 7 states the burden of proof as follows:

> A. Any party who has the burden of proving a claim must do so by the greater weight of the evidence.
>
> (1) The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. It does not necessarily mean the greater number of witnesses or exhibits.
>
> (2) Any party is entitled to the benefit of any evidence tending to establish a claim, even though such evidence was introduced by another.
>
> (3) If the evidence upon a claim is evenly balanced, or if it weighs in favor of the other party, then the burden of proof has not been met.

Instruction No. 8A tells the jury how it should determine damages. It essentially instructs the jury to award damages based on the market value of the crops Pribil lost. Instruction No. 8B tells the jury several things it can consider in determining that market value. There is no claim that parts A and B of instruction No. 8 are incorrect. Instruction No. 8C is the part Pribil claims is incorrect, and it states: "The evidence must establish the amount of any item of damage with reasonable certainty or that item of damage cannot be recovered."

At the jury instruction conference, Pribil objected to the court's use of the words "reasonable certainty" in instruction No. 8C, and that issue was clearly preserved for consideration as part of this appeal. On appeal, Pribil bases his argument on several cases, none of which directly consider the correctness of a jury instruction similar to the "reasonable certainty" standard contained in instruction No. 8C. Pribil relies upon and quotes a statement in *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 137 N.W.2d 701 (1965). In that case, a previous decision of that court denying the plaintiff recovery after obtaining a jury verdict was reversed on rehearing because that court concluded that a jury verdict for the plaintiff was supported by sufficient evidence of causation and damages. Pribil quotes a statement from that case as follows:

> If we were to follow defendants' argument to its ultimate conclusion, we would require a much higher degree of certainty for damages than for other elements in the

> action. Juries are allowed to act upon inferential and probable as well as direct and positive proof. . . .
>
> In many types of tort actions it may be said to be impossible to determine damages with exactitude and precision. Here, good will was not susceptible of exact pecuniary measurement. All that was required was that it be proved that damage resulted, and that sufficient evidence be adduced to enable the jury to make the most intelligible and accurate estimate which the nature of the case will permit.

*Id.* at 186, 137 N.W.2d at 711-12.

We think Pribil left out of the above quote a very significant part that was contained where the ellipsis appears. The excluded part was: "In Tarry v. Johnston, 114 Neb. 496, 208 N.W. 615 [(1926)], we said: 'In an action at law for the loss of good will, the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to *estimate* the actual damages.' (Emphasis supplied.)" *Frank H. Gibson, Inc.*, 179 Neb. at 186, 137 N.W.2d at 711-12. The *Frank H. Gibson, Inc.* case does not support Pribil's position.

Pribil also cites the introduction to NJI2d Civ. ch. 4 to the effect that the "reasonable certainty" standard is applied only by the trier of law, that is the court, and not by the trier of fact, the jury. He also argues that instruction No. 8C changed the burden of the plaintiff's proof and rendered the instructions internally contradictory. In effect, he argues that the reasonable certainty standard contradicts the burden of proof instruction. Pribil also cites various cases to be support for his argument, such as *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996) (bench trial where amount of damages for crops was at issue), and *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985) (bench trial where it was held one seeking recovery in contract action has burden of proving damages with as much certainty as case permits). The cases did not involve jury trials and thus are not very helpful to a resolution of this issue.

We believe that *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989), is the case which controls the issue presented by instruction No. 8C. *Worth* was a suit for personal injuries sustained in an automobile accident. The plaintiff sought special and general damages, including future damages, as well as damages

for loss to his wife of his services and consortium. The court instructed the jury that future damages must be " 'reasonably certain.' " *Id.* at 630, 447 N.W.2d at 482. The plaintiff appealed, arguing that the trial court erred in so instructing the jury " 'when the standard which has been recognized in this state since 1981 is "reasonably probable".' " *Id.* at 630, 447 N.W.2d at 483. The plaintiff in *Worth* argued essentially the same point as Pribil argues in this case.

[9] In addition, in holding that an instruction almost identical to the one given by the trial court in this case in instruction No. 8C was not error, the *Worth* court stated: "This court has said that 'reasonable certainty' and 'reasonable probability' are one and the same thing." 233 Neb. at 633, 447 N.W.2d at 484, citing *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). With this statement and holding by the Nebraska Supreme Court, we conclude there is nothing further to discuss. We believe the *Worth* court clearly held that "reasonable certainty" and "reasonable probability" mean the same thing and that it is not error for a trial court to instruct that damages must be proved by the plaintiff with reasonable certainty, notwithstanding that the plaintiff's burden of proof is by the greater weight of evidence.

*Motion for New Trial.*

The issues raised by the motion for new trial were the same as those discussed above and therefore will not be reconsidered. There was no abuse of discretion in overruling Pribil's motion for new trial.

## CONCLUSION

Because Chambers' statements related to offers to negotiate or compromise and are therefore inadmissible under rule 408, we find that issue to be without merit. Likewise, because the Nebraska Supreme Court has decided that giving a jury instruction asking the jury to determine "reasonable certainty" is not error, we find Pribil's assignment of error on that issue to be without merit. We therefore affirm.

AFFIRMED.

# RANDY REEDER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

Filed May 13, 2002. No. A-00-1121.
This opinion has been ordered permanently published by order of the Court of Appeals dated June 19, 2002.
649 N.W.2d 504

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
2. **Employer and Employee: Independent Contractor.** Ordinarily, a person's status as an employee or an independent contractor is a question of fact, because there is rarely a definitive contract on the matter.
3. ____: ____. A worker's status is determined by considering the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
4. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
5. **Employer and Employee: Independent Contractor: Contracts.** Even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to ensure performance of the contract in accordance with its terms.
6. **Employer and Employee: Wages.** The payment of wages, specifically limited wages, argues for an employment relationship.
7. **Employer and Employee: Taxes.** Withholding of taxes tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication.
8. **Health Care Providers: Public Health and Welfare.** The Nebraska Department of Health and Human Services is not in the business of providing the services of a chore provider or nurse, but, rather, it is in the business of paying for the services pursuant to welfare programs.
9. **Negligence: Liability: Employer and Employee: Independent Contractor.** One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety

the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

10. ____: ____: ____: ____. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
11. **Negligence: Liability: Independent Contractor: Words and Phrases.** 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 negligently performed.
12. **Negligence: Liability: Health Care Providers: Public Health and Welfare.** Natural human concern by employees of the Nebraska Department of Health and Human Services for their already ill clients does not make the department vicariously liable for the negligence of care providers with whom it contracts.

Appeal from the District Court for Hall County: JOHN P. ICENOGLE, Judge. Affirmed.

Vince Powers, of Vince Powers & Associates, and, on brief, Denzel Rex Busick, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Randy Reeder, a disabled individual, appeals the Hall County District Court's finding that a provider of nursing services who is paid by Medicaid funds distributed by Nebraska's Department of Health and Human Services (DHHS) is an independent contractor rather than a DHHS employee. Reeder, who suffered a recurrence of decubitus ulcers on his heels while the nurse provider cared for him argues that DHHS is vicariously liable for the alleged negligence of the nurse in treating the ulcers.

## I. FACTUAL BACKGROUND

Reeder was paralyzed from the neck down and left with only limited use of his arms as a result of a car accident on May 5, 1990. He was released from the hospital on March 4, 1991, but due to his disability, Reeder required home health care. He qualified for the Aged and Disabled Medical Waiver program, a state and federally funded program administered by Nebraska's Department of Social Services, now known as DHHS. Individuals

qualifying for this assistance program are referred to as "clients" of DHHS but choose their own service providers. A service provider may be a chore provider, an untrained or trained personal care aide (PCA), a licensed practical nurse (LPN), or a registered nurse (RN). A PCA helps the client complete the daily tasks of living, such as bathing, grooming, and dressing; cleans the client's immediate living space; and transports the client to doctor appointments. If DHHS receives an order from the client's primary physician, an LPN or RN may function as a service provider. 471 Neb. Admin. Code, ch. 13, § 002.02 (1998). Beyond obtaining the physician's order for private-duty nursing services, DHHS must authorize the number of hours to be worked based on the physician's order and the client's medical need. 471 Neb. Admin. Code, ch. 13, § 003.01 (1998). The regulations also specify billing and payment procedures.

One of Reeder's physicians, a Dr. McCammond, submitted an order stating that Reeder required the services of an LPN 1 to 2 hours daily and a PCA 4 to 5 hours daily. Reeder's home health nurse from Saint Francis Medical Center in Grand Island told him that Shari Perales had contacted DHHS for employment and that she was an LPN. Reeder met with Perales and notified DHHS in March 1991 that he had selected her to provide the LPN and PCA services he required. Dorelle Wilson, a DHHS caseworker, checked Perales' credentials, obtained references, and ran a background check. Perales signed two "Medical Assistance Provider Agreements," one allowing her to function as a trained PCA—due to her LPN licensing—and another to serve as an LPN. Both forms required her to follow DHHS policies and procedures in order to receive pay for approved services. The forms also required Perales to swear that she would keep accurate records of the services she provided and that she would provide all services to Reeder that she reported to DHHS for payment. Perales was given a DHHS manual describing the services covered by the program and a care plan—created by Wilson, Reeder, and Perales—that listed the types and frequency of PCA and LPN services Reeder needed.

Perales was reimbursed for her services to Reeder by DHHS on an hourly basis, earning a higher rate of pay for her LPN tasks than for her trained PCA tasks. DHHS never withheld income

taxes from her paychecks, but Perales' 1994 W-2 form shows that her Social Security taxes were paid by DHHS, at least in that year of Perales' service to Reeder. The W-2 form lists DHHS in the box where Perales' employer is identified, but that box also includes "EMPL REEDER RANDY H." Beyond following the care plan, Reeder and Perales decided the details of their work relationship, including the scheduling of Perales' performance of her duties, and Reeder verified the hours Perales worked before she submitted her timesheets to DHHS. If Perales needed to work more hours than authorized, she obtained Wilson's approval, but neither Wilson nor DHHS directed Perales' performance of her duties nor suggested medical treatment.

Perales' nursing duties encompassed Reeder's catheter care, suprapubic care, and bowel program. In May 1991, Reeder redeveloped decubitus ulcers on his heels which he first suffered and recovered from in 1990 after his accident. Although the DHHS manual directs providers to notify the primary or prescribing physician if medical problems arise, Reeder and Perales jointly decided to take Reeder to a podiatrist Perales had once seen for treatment, rather than to one of the physicians that Reeder had previously seen or his attending physician, identified on his initial care plan as Dr. McCammond. Perales notified Wilson that Reeder had been seen by a podiatrist and that she followed the podiatrist's orders in caring for Reeder. The severity and deterioration of Reeder's condition was not known until Perales asked the home health care nurse from St. Francis to look at his heels. As a result, Reeder immediately returned to the care of the doctor in Omaha who had previously treated his heels. Reeder had skin grafting and a long period of recuperation, but the ulcers never healed properly. He suffered a further loss of independence and mobility because the 2-hour daily treatment of his ulcers required the assistance of a nurse. Reeder's emotional health was adversely affected, he attempted suicide in June 1998, and he may need to have his feet amputated if infection reappears. Despite Reeder's filing of suit against DHHS in December 1993, Perales continued to work for him until May 1999.

## II. PROCEDURAL BACKGROUND

Reeder filed suit in the Hall County District Court against DHHS, pursuant to the State Tort Claims Act, alleging that DHHS

was negligent in failing to give appropriate instructions and training to the nurse whom DHHS approved for his care and that DHHS failed to exercise reasonable care in supplying and providing nursing services to him.

DHHS moved for summary judgment, and the district court held as a matter of law that no employment relationship existed between DHHS and Perales. Reeder appealed, and the Supreme Court found that the district court erred by holding as a matter of law that Perales was not a DHHS employee. It reversed and remanded the matter to the district court for trial to determine whether the evidence showed Perales to be a DHHS employee or an independent contractor. *Reeder v. State*, 254 Neb. 707, 578 N.W.2d 435 (1998) (*Reeder I*).

On October 27 and 28, 1999, the district court held another hearing on this matter. Depositions taken several years earlier from Wilson and Paula Greenfield, Wilson's supervisor, were admitted into evidence. Wilson testified that she was not required as a DHHS caseworker to possess medical training. She further testified that she viewed DHHS as the "payment vessel" and the client as the provider's employer. Greenfield concurred with Wilson, characterizing DHHS' role as "an agent for monitoring and payment." She also testified that she specifically informs providers they are not DHHS employees, pointing out that they are not eligible for employment benefits such as overtime, holiday, or sick pay. Greenfield said that DHHS does not monitor the care a provider gives a client but investigates if it becomes aware that the provider is placing the health or safety of a client in jeopardy. She added that the client makes the decision whether to fire a provider, but DHHS may overrule a client's decision to retain a provider if the provider is abusing or stealing from the client. Greenfield testified that DHHS is not directly involved with the medical care provided clients and that if any medical problems arise, the providers are instructed to contact the client's primary care physician.

Nancy Olson, unit manager for long-term-care services in the Medicaid program, testified at trial that LPNs perform their duties under the direct supervision of a doctor or RN. She explained that LPNs receive a year of training before they sit for "boards" and become licensed by the State. Olson described

LPNs as "independent providers the same as physicians, dentists, hospitals." Perales testified that she considered Wilson to be her supervisor, that she and Wilson regularly spoke about Reeder's condition, and that Wilson visited Reeder a couple of times. But Perales also stated that DHHS never provided her with the necessary tools or workplace to care for Reeder, that Wilson never directed Perales' medical treatment of him, that she received no medical training or employment benefits from DHHS, and that DHHS viewed Perales as an independent contractor.

The district court concluded that Perales' relationship to DHHS was such that there could be no vicarious liability and that it need not address the issues of negligence and causation presented by the evidence. From that finding, Reeder appealed to this court.

## III. ASSIGNMENTS OF ERROR

Reeder assigns error to the trial court's (1) ruling that the nurse provider caring for him was an independent contractor rather than a DHHS employee; (2) failing to find DHHS vicariously liable by virtue of the control it exercised over the nurse provider, regardless of her employment status; and (3) not addressing the issues of negligence and proximate cause.

## IV. 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. *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 610 N.W.2d 723 (2000). 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.*

## V. ANALYSIS

### 1. Perales' Status: Question of Fact or Question of Law

Reeder argues that the district court erred, as a matter of law, by concluding that Perales was an independent contractor when the documentary evidence from DHHS on its right to control Perales' activities was "essentially uncontradicted at trial." He

contends that DHHS exercised such control over Perales' performance of services for Reeder that a master-servant relationship between DHHS and Perales was formed. Reeder alleges that where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Reeder v. State*, 254 Neb. 707, 578 N.W.2d 435 (1998); *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[2] Reeder's argument appears to be that this court should review the district court's decision by treating the issue of Perales' status as a question of law requiring us to reach a conclusion independent of the district court's ruling. See *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995) (contractual agreement placed right of control over taxicab in Happy Cab and company in fact exercised extensive control over cab and its driver, making, as matter of law, driver Happy Cab employee). But ordinarily, a person's status as an employee or an independent contractor is a question of fact, *Reeder v. State, supra*, and *Kime v. Hobbs, supra*, because there is rarely a definitive contract on the matter as there was in *Hemmerling*. Here, unlike in *Hemmerling*, there is an issue as to the extent of control DHHS exercised over Perales and there is no contract which clearly establishes DHHS' control over Perales' nursing services to Reeder. Thus, *Hemmerling* is distinguishable, and Perales' status is a question of fact, not a question of law. Under our standard of review, we do not reweigh the evidence but consider the trial court's decision in the light most favorable to DHHS and resolve evidentiary conflicts in favor of DHHS. See *Phipps v. Skyview Farms, Inc., supra*.

### 2. Perales' Status: Independent Contractor or DHHS Employee

[3] The law governing analysis of the nature of Perales' and DHHS' legal relationship is well established and is set forth in a number of recent cases considering 10 factors:

> "(1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference

> to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business."

*Hemmerling v. Happy Cab Co.*, 247 Neb. at 929, 530 N.W.2d at 922.

After considering all 10 factors, the district court concluded that there was no "vicarious relationship" between Perales and DHHS, which is simply another way of saying that no employer-employee relationship existed. Reeder argues that the 10 factors applied to the facts show that Perales' nursing activities on Reeder's behalf made her a DHHS employee rather than an independent contractor. We observe that although Perales also functioned as a PCA for Reeder, signed separate Medical Assistance Provider Agreements, and was paid at different rates depending on whether she completed tasks as an LPN or as a PCA, the trial court did not separately analyze her status as a PCA. Nonetheless, Reeder's allegations of negligence, as well as his assignments of error and arguments, focus exclusively on the tasks that Perales completed for Reeder in her capacity as an LPN rather than as a PCA. Accordingly, it is proper to confine our analysis and review of her status to her work as an LPN.

[4] An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Id.*; *Reeder v. State*, 254 Neb. 707, 578 N.W.2d 435 (1998). There is no single test for determining whether one performs services as an employee or an independent contractor. *Id.* We now turn to the 10 factors to determine if the district court's determination that Perales was not a DHHS employee is clearly wrong.

(a) Control

Generally, the right of control is the chief factor distinguishing an employee from an independent contractor. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). Reeder asserts that DHHS had the right and power under its agreement with Perales to control virtually all the details of her work if it so chose, and Perales was not given contractual discretion to deviate from DHHS policies or procedures set forth in the manual given to her. Reeder notes that the Supreme Court gave great weight to a cab company's contractual right to control an alleged employee through its policies and procedures in *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). But in *Hemmerling*, the cab company exerted control over the means and methods Hemmerling used in operating a taxicab as evidenced by the contents of a written equipment lease agreement which controlled the cab's use.

Here, the Medical Assistance Provider Agreements Perales signed did not dictate how she would provide medical care to Reeder. For example, they do not spell out how an LPN shall do a bowel program with a paralyzed person—that is within Perales' expertise and discretion. Even though Perales kept Wilson apprised of Reeder's condition and received advice from Wilson as to how to deal with Reeder's "moodiness," that does not equate to the contractual control found in *Hemmerling*. Indeed, DHHS' manual instructed Perales to contact the client's attending physician should medical problems arise, not DHHS.

[5] Reeder notes that the Supreme Court has found that a "training manual" from an employer may provide evidence of such control over a hired individual to suggest the creation of an employment relationship. See *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995). Compare *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997) (lack of comprehensive handbooks, policies, or guidelines defining manner in which distributor was to perform specific tasks suggests newspaper did not control distributor). The DHHS manual detailed services which are covered by the Aged and Disabled Medicaid Waiver Program and instructed a provider as to how to submit claims for reimbursement. The manual did not direct the provider as to how to provide medical

services to a client. The manual is largely designed to ensure proper payment only for covered services. "'"[E]ven the employer of an independent contractor may, without changing the status, exercise such control as is necessary to [en]sure performance of the contract in accordance with its terms."'" *Id.* at 223, 570 N.W.2d at 514, quoting *Larson, supra.*

The district court correctly noted that DHHS does not oversee or direct the services a provider performs for a client because the physician's order determines the nature and extent of services. The court noted that documents that were taken from the DHHS manual referencing nursing services establish the types of services and allowable fees reimbursed through DHHS but do not direct the manner in which medical services are provided to clients. Further, the court noted that the Medical Assistance Provider Agreements Perales signed as a trained PCA and LPN, requiring her to promise to follow DHHS policies and procedures, reference billing procedures rather than direct treatment decisions, save for instructing providers to contact a client's primary physician should medical problems arise. The district court found that DHHS acts as a steward of federal moneys by predetermining the reasonable length of services, serves as a conduit to pay providers, and is responsible for ensuring that services are appropriately provided to clients. Thus, the court concluded that by agreement, DHHS' control over Perales' work was limited to administrative duties and "the collateral effects of that administration on the professional services." By this finding, the district court concluded that DHHS did not control Perales' work to the extent that an employment relationship was clearly created. The evidence supports the district court's conclusion, and its finding on what is often the crucial factor in the analysis was not clearly wrong.

(b) Distinct Occupation

Reeder argues that Perales had to have been supervised by someone, be it a physician or an employer such as DHHS, and that her frequent contact with Wilson and her need for Wilson's approval to work more hours for Reeder show that she was a DHHS employee. But this argument misses the point of this factor. "Distinct" refers to whether Perales offered a service similar

to that she offered to DHHS or to other people or entities. See, *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996); *Larson v. Hometown Communications, Inc., supra.* Although it acknowledged that Perales was hired to provide part-time professional nursing services for Reeder and that she was not prohibited from pursuing other employment, the district court found that the evidence does not suggest whether LPNs are customarily hired as independent contractors or full-time employees. The court's conclusion on this factor was that it was "problematic"—which we interpret to mean that the evidence on this point does not point to one status rather than the other. Our review of the evidence reveals that the district court's conclusion was not clearly wrong.

(c) Whether Work Done Under Employer's Supervision or by Specialist Without Supervision in That Locality

Reeder argues that it is reasonable for a nurse provider to assume that because DHHS submits a doctor's order to the nurse and approves the number of hours necessary to complete tasks for the client that DHHS is supervising the nurse's performance. As in *Pettit v. State, supra*, Perales' completion of her duties was not directly supervised by DHHS but was actually supervised by her client, Reeder. The district court found that although DHHS provided "nonprofessional supervision" of Perales, "professional supervision" was the responsibility of other medical professionals. We agree, as the evidence clearly shows that nurse providers are under the medical supervision of the attending or prescribing physician, not DHHS, in caring for a client's medical needs. With respect to this factor, the evidence supports the court's conclusion that Perales was not an employee.

(d) Skill Required in Particular Occupation

Reeder concedes that nursing is a skilled occupation. See *Pettit v. State, supra* (DHHS chore provider with specialized training and respite care certificate was a skilled provider). A logical extension of *Pettit* is that an LPN would also be a skilled provider. But Reeder argues that DHHS' control of a nursing provider's payment, evident from its scrutinizing of the nurse's timesheets to ensure that the provider does not offer services unauthorized by a physician's order, limits the discretion and

autonomy of the nurse provider. Thus, Reeder concludes, a master-servant relationship between DHHS and Perales was created. We think that Reeder misconstrues the import of that evidence. The district court found that the manner in which Perales completed her nursing duties was not controlled by DHHS. Because DHHS ensures that payment is not made for services which are outside a doctor's orders does not change the fact that Perales is working as a skilled provider, and that fact tends to suggest that she is an independent contractor.

(e) Who Supplies Instrumentalities, Tools, and Workplace

Reeder asserts that Perales was not required to buy medical supplies from her own funds and that they were presumably paid for by Medicaid funds. He further asserts that by virtue of "assigning" Perales to work for Reeder, DHHS provided Perales the place to work. The district court made no specific finding concerning this factor, but merely recited the evidence. Therefore, our task is to look at the evidence, which the trial court correctly recounted on this factor, from the standpoint of whether it shows that the district court's final conclusion was clearly wrong, even if the trial court's reasoning was incorrect. See *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 610 N.W.2d 723 (2000).

As the district court noted, Reeder provided the medical supplies, although they may have been purchased using Medicaid funds, and Perales performed her work in Reeder's home, but that is simply a fact inherent in home nursing care. Working in Reeder's home did not create an employment relationship between DHHS and Perales because Reeder's injury and the nature of the work required Perales to perform her duties there. As for the medical supplies, in *Pettit v. State, supra*, it was noted that the DHHS manual made it the chore provider's responsibility to supply necessary tools if not provided by a client, which implies that the chore provider was an independent contractor. Here, the nature of the medical supplies are such that generally they would be provided by Reeder, rather than by DHHS or his nurse provider. We find that although the district court did not reach any conclusion as to the impact the evidence of this factor

had on determining Perales' status, our review of the record on this factor leads us to the conclusion that the court's recitation of the evidence was accurate, and nothing in such evidence makes the court's ultimate conclusion that Perales was an independent contractor clear error.

(f) Length of Time for Which One Employed Is Engaged

Reeder argues the indefinite length of his working relationship with Perales—spanning 8 years—together with other factors show an employment relationship between DHHS and Perales. The district court found that although Perales worked with Reeder over a considerable period of time, the permanency of her service was not initially contemplated and was subject to periodic evaluation by DHHS. Although once again the court reached no conclusion as to what its factual findings meant, we proceed in the same fashion as we did with the previous factor.

Given the evidence, we think this factor is equivocal. But, because it is equivocal, it is clear that the evidence on this factor is not such that it makes the district court's ultimate conclusion clearly wrong. In saying this, we note that the record shows that a paralyzed individual's physical condition is not expected to change markedly and the nursing services that Perales provided were services that Reeder would likely always need. An ongoing relationship not limited to a specific duration or task is suggestive of an employment relationship. See *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). But here, Perales had the singular task of providing the in-home care that Reeder needed in the past and would likely require over his lifetime. She was not doing whatever an employer told her to do, she was providing a specific service that Reeder will likely need the rest of his life. These facts are hardly strongly suggestive of an employer-employee relationship between DHHS and Perales.

(g) Method of Payment: by Time or by Job

Reeder contends that Perales was paid by the hour and that this method of payment, along with DHHS' monitoring of her timesheets, suggests she is a DHHS employee. The district court found that although payment of Perales on an hourly basis suggested an employment relationship between her and DHHS, the

per hour wage was part of a formula by which maximum compensation for a particular task was established. As a result, Perales' payment for any given task could be reduced if DHHS determined that fewer hours than she reported were necessary to complete the task.

[6,7] The payment of wages, specifically limited wages, argues for an employment relationship. See, *Pettit v. State,* 249 Neb. 666, 544 N.W.2d 855 (1996); *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995) (ceiling placed on income of taxicab driver by public service commission rules limiting hours driven in day shows that employment relationship between driver and cab company may exist). Against this precedent, we think we must balance the fact that DHHS did not withhold money from Perales' paycheck to pay federal income taxes or Social Security taxes from at least 1991 to 1994. Withholding of taxes "tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication." *Id.* at 930, 530 N.W.2d at 923. Again the district court made no finding about this factor, and we proceed as before. The evidence is suggestive of an independent contractor relationship because DHHS did not withhold income taxes from Perales' paycheck and because the limitation on Perales' hours is imposed merely to facilitate DHHS' management of public funds. Nothing concerning this factor allows us to say that the district court was clearly wrong in its final decision.

### (h) Whether Work Is Part of Employer's Regular Business

[8] Reeder argues that DHHS' responsibility for screening providers, obtaining physician's orders, authorizing the number of hours worked by providers, and paying those providers—combined with its interest in ensuring that providers provide appropriate care to clients—constitutes the regular work done by DHHS. But the district court found that the purpose of DHHS is to administer services provided and financed by public funds and that "the work of a licensed practical nurse is not the regular business of the defendant, [DHHS]." This finding is fully supported by the record. The provision of medical services by physicians on staff at a hospital has been found to be part of the regular business

of the hospital. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). We contrast this holding with the fact that the Supreme Court has said that DHHS is not in the business of providing the services of a chore provider or nurse, "but, rather, it is in the business of paying for the services pursuant to welfare programs." *Pettit v. State*, 249 Neb. at 676, 544 N.W.2d at 855. We think this same analysis applies to the provision of nursing services reimbursed by DHHS. The record and case law supports the trial court's assessment that DHHS is not engaged in the business of providing health care, which finding weighs against Perales' being an employee of DHHS.

(i) Intent of Parties Regarding Nature of Relationship

Reeder contends that Perales viewed DHHS as her employer and Wilson as her supervisor and that he believed that Perales and DHHS worked out the details of their relationship. The district court acknowledged that Perales testified she regarded Wilson as her supervisor and DHHS as her employer. However, the court observed, Perales also testified that DHHS provided her with no training or employment benefits, did not withhold income tax or social security, at least from 1991-94, and told her that she was being hired as an independent contractor. The district court noted that DHHS employees considered Perales to be an independent contractor and that they told her of that relationship. Further, the court noted that Perales and Reeder scheduled the hours she would work.

Once again, the district judge did not make any finding as to what such evidence meant to him in reaching his final conclusion. If one person in a relationship says "I am an employee" and the other side says "You are an independent contractor," what becomes important in our review are the supporting facts for a particular view; for example, the fact that Perales and Reeder set her hours and no income taxes were withheld tends to support DHHS' view of the relationship. But we make no finding on the disputed views of Perales and DHHS as to the nature of their relationship. Instead, we simply find that the evidence on this point is such that we cannot say the district court clearly erred by ultimately finding that Perales was not a DHHS employee.

(j) Whether Employer Is "In Business"

Reeder asserts that although DHHS is a governmental agency and not a private business, it regularly employs people, and "does conduct regular and ongoing activities pursuant to standard customs, practices and procedures." Brief for appellant at 33. He further asserts that DHHS has more in common with a private business than it does a private person. The district court found that DHHS is not "engaged in business." It is noteworthy that in the chore provider case, the Supreme Court said: "[DHHS] is in the business of distributing funds, part of which come from the federal government and part of which are matching funds provided by the State, in order to permit welfare recipients to obtain needed services for which they could not otherwise pay." *Pettit v. State*, 249 Neb. at 676, 544 N.W.2d at 862. As the Supreme Court found in *Pettit*, DHHS is not in the regular business of providing chore services to elderly clients. Neither does the evidence show that DHHS is in the business of providing nursing services to disabled individuals, at least certainly not to the degree necessary to find that the district court's ultimate conclusion was clearly wrong.

(k) Conclusion

In summary, the district court found the absence of a relationship between DHHS and Perales that would result in DHHS' having vicarious liability for any negligence Reeder alleged against Perales. In other words, the court determined that Perales was not a DHHS employee while she provided nursing care to Reeder. After our examination of the 10 factors which determine Perales' status, we cannot say that the district court was clearly wrong in its conclusion. Therefore, we affirm the court's conclusion that Perales was an independent contractor.

3. DHHS' Vicarious Liability for Perales' Actions or Failure to Act

[9] Reeder alternatively argues that even if we agree with the district court's determination that Perales was an independent contractor, DHHS is still vicariously liable for his injuries allegedly caused by Perales' negligence because DHHS retained sufficient control over the methods and means of Perales' care of him. He cites *Haag v. Bongers*, 256 Neb. 170, 191, 589 N.W.2d 318, 333 (1999), for this proposition:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." See, *Kime v. Hobbs*[, 252 Neb. 407, 562 N.W.2d 705 (1997)]; *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

[10] These cases acknowledge the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Haag v. Bongers, supra*; *Kime v. Hobbs, supra*; *Parrish v. Omaha Pub. Power Dist., supra*. Exceptions to this general rule are recognized in these cases. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Haag v. Bongers, supra*; *Kime v. Hobbs, supra*; *Parrish v. Omaha Pub. Power Dist., supra*.

(a) Defining Control in Context of Employer-Independent Contractor Relationship

In *Haag*, the Supreme Court found that the employer of an independent contractor exercised sufficient control over the premises where third parties were injured due to an independent contractor's negligence that the negligence could be imputed to the employer. The Supreme Court found sufficient evidence of an employer's control of the premises in *Parrish* to create an issue of material fact making summary judgment inappropriate. The "control over the premises" doctrine typically is attempted in cases where a worker is injured at a construction site as in *Parrish*. See, *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000); *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981); *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 611 N.W.2d 132 (2000). But in the instant case, DHHS clearly did not exercise control over Reeder's home. Moreover, the negligence is not alleged to be

inadequate maintenance of the worksite, but, rather, inappropriate medical treatment, a completely different factual setting, making the "control over premises" cases inapplicable.

In *Kime*, a vehicle passenger who was injured in a collision with a tractor-livestock trailer driven by the tractor owner sued the rancher who owned the trailer and the livestock therein. The district court entered summary judgment for the rancher. The Supreme Court held that the tractor driver/owner was an independent contractor rather than an employee of the rancher because the rancher did not retain sufficient control over activities of the tractor driver/owner, which led to the accident, to subject the rancher to liability for the passenger's injuries. In *Kime*, the Supreme Court held that the transportation of cattle in a tractor-trailer under normal conditions is not an inherently dangerous activity such that it imposes a nondelegable duty on an employer of an independent contractor to ensure that cattle are transported in a nonnegligent manner. It requires no discussion to support the conclusion that Perales' provision of medical care to Reeder, particularly at the level of an LPN, does not constitute an inherently dangerous activity. This is not to suggest that poor or negligent care would not be dangerous to Reeder—but the provision of such care is not inherently dangerous.

We have exhaustively reviewed the control DHHS exercised over Perales and have concluded that the district court did not err by characterizing such control as administrative in nature, without influence over the means and methods Perales used to provide authorized medical services to Reeder. Thus, we cannot say that the district court clearly erred by finding no vicarious relationship between DHHS and Perales on the basis of DHHS' alleged control over Perales' provision of nursing services to Reeder.

### (b) Whether DHHS Owed Reeder Nondelegable Duty to Ensure His Safety

[11] Our analysis of whether DHHS owed Reeder a nondelegable duty should begin with a comprehensive definition of this doctrine found in *McKinstry v. Cass County*, 228 Neb. 733, 743-44, 424 N.W.2d 322, 329 (1988):

> "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 negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. [Citation omitted.] One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that nondelegable duty. [Citations omitted.]"

Reeder's brief does not assign as error the district court's failure to find DHHS liable for Perales' alleged negligence on the basis that DHHS owed him a nondelegable duty. But Reeder weaves into his control argument the contention that DHHS had a duty to ensure his safety, and thus we deal with the theory to some extent by reference to the Supreme Court's opinion in *Reeder I*. The Supreme Court analyzed Reeder's claim that DHHS owed him an independent, nondelegable duty to supply a "care provider fully capable of meeting all of his daily nursing needs" under Neb. Rev. Stat. §§ 68-1513 and 68-1519 (1996). The Supreme Court wrote:

> [T]he statutory requirement that [DHHS] review needs of aid recipients and develop standards and procedures for determining qualified programs and services is related to a statutory duty to provide compensation for health services, not a duty to provide the actual services. [DHHS] caseworkers who serve clients receiving public assistance are not licensed health care professionals and are not authorized to make medical decisions or judgments.

*Reeder I*, 254 Neb. at 716, 578 N.W.2d at 442.

As for Reeder's contention, which he repeats before this court, that DHHS had an independent duty to protect him from injury, the Supreme Court wrote:

> In this case, there is no evidence that [DHHS] ever had knowledge that home nursing services provided by Perales posed any risk of injury to Reeder. Reeder's physician determined that Reeder required home nursing care at the level provided by an LPN, and [DHHS] verified Perales' licensure by the state before compensating her for services

> she provided to Reeder. There is no evidence that Reeder or anyone else complained to [DHHS] about any services provided by Perales, or that [DHHS] was ever advised that Reeder's medical and nursing needs were not being met during the time period when his injuries allegedly occurred. Although there is evidence that Perales advised [Wilson] in May 1991 that Reeder had developed decubitus ulcers on his feet for which he sought treatment by a podiatrist, there is no evidence that Reeder, Perales, the podiatrist, or anyone else advised [DHHS] that Reeder required a different or higher level of home nursing care. Under these circumstances, we conclude that [DHHS] had no independent duty to take any affirmative action with respect to the nature or scope of health care services provided to Reeder in the absence of an employment relationship between [DHHS] and Perales, the existence of which we do not decide.

*Id.* at 717, 578 N.W.2d at 442.

However, Reeder argues that after the Supreme Court's remand in *Reeder I*, the district court hearing included evidence showing, "At a minimum, [that Wilson] had sufficient notice of an ongoing and unresolved problem to raise a duty to make further inquiry for the client's safety." Brief for appellant at 37. But, irrespective of what Wilson should have done when she learned from Perales the serious condition of Reeder's feet, Wilson's duty does not determine the nature of the relationship between Perales and DHHS. The lawsuit is not premised on a negligent failure to act on the part of Wilson which is then imputed to DHHS. In any event, the law of the case from *Reeder I* is that DHHS caseworkers are unauthorized to make medical decisions or judgments, and do not have a duty to provide the actual care as distinguished from arranging and paying for it. This, it seems to us, answers Reeder's argument.

[12] As the Supreme Court discussed in *Reeder I*, Wilson was not required to possess medical training and the function of DHHS is primarily to ensure that the Medicaid funds allocated for the care of clients are appropriately expended. Although testimony from DHHS employees established that DHHS is concerned for the safety of its clients, that testimony primarily

addressed the issues of physical and financial abuse of vulnerable clients. And natural human concern by DHHS employees for their already ill clients does not make DHHS vicariously liable for the negligence of care providers with whom it contracts. On this record, we cannot say that DHHS or its employee, Wilson, had a nondelegable duty to ensure the safety of Reeder. This decision makes it unnecessary for us to consider Reeder's final argument that the district court erred by failing to address the issues of negligence and causation. See *Wagner v. Union Pacific RR. Co., ante* p. 1, 642 N.W.2d 821 (2002) (appellate courts are not obligated to engage in analyses not needed to adjudicate the cases and controversies before them).

## VI. CONCLUSION

The district court did not clearly err by determining that DHHS and Perales' relationship was not such as would result in vicarious liability. Further, on this record and given the Supreme Court's holding in *Reeder I*, DHHS did not owe Reeder a nondelegable duty to ensure his safety such that the alleged negligence of Perales could be imputed to DHHS. We affirm.

AFFIRMED.

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MARIA ZAVALA, APPELLANT, V.
CONAGRA BEEF COMPANY, APPELLEE.
647 N.W.2d 656

Filed June 25, 2002. No. A-01-1083.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that the court acted without or in excess of its powers; the judgment, order, or award was procured by fraud; there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or the findings of fact by the compensation court do not support the order or award as it exists.
2. ____: ____. As to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
3. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

4. **Workers' Compensation.** When an employee suffers a scheduled injury, the presence or absence of industrial disability is immaterial.
5. ____. A whole body impairment, or unscheduled disability, is compensated in terms of loss of employability, and scheduled injuries are compensated on the basis of loss of physical function.
6. ____. In cases of industrial disability, functional disability is only one factor, and that other factors such as age, education, experience, and the ability to engage in employment for which the employee is fitted are all measures used to determine the impairment of the ability to earn wages.
7. **Workers' Compensation: Words and Phrases.** Total disability means disablement to earn wages in the same kind of work, or similar work, that a worker was trained for or accustomed to perform, or any other kind of work which a person of his or her attainments and mentality could do.
8. **Workers' Compensation: Statutes.** The policy of liberal construction of the Nebraska Workers' Compensation Act is for the benefit of the claimant, which policy favors taking a view of Neb. Rev. Stat. § 48-121 (Cum. Supp. 2000) that allows what is not directly prohibited.
9. **Workers' Compensation.** The Nebraska Workers' Compensation Act's broad purpose is that when a personal injury is sustained by an employee, by accident or occupational disease, in the scope and course of employment, the employee shall receive compensation therefor from his or her employer.
10. ____. Nebraska law does not prohibit consideration of the effect of a member injury when loss of earning capacity is assessed for a worker who also has sustained a whole body injury.
11. **Workers' Compensation: Words and Phrases.** If a member impairment adversely affects a worker such that loss of earning capacity from an unscheduled injury cannot be fairly and accurately assessed without considering the impact of the scheduled injury on the worker's employability, then "stacking" of member and nonmember impairments is permissible.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Lee S. Loudon, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellant.

Shirley K. Williams and Joseph A. Wilkins, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Maria Zavala petitioned for workers' compensation benefits for an on-the-job injury she sustained while working for ConAgra Beef Company (ConAgra). The Nebraska Workers' Compensa-

tion Court trial judge found that Zavala had sustained a 50-percent loss of earning capacity and awarded her a 2-percent permanent partial impairment status for her right upper extremity as well as vocational rehabilitation benefits. After Zavala's appeal to a review panel of the Workers' Compensation Court, the trial judge's award was affirmed in all respects except that the award of vocational rehabilitation was eliminated. Zavala appeals.

## FACTUAL BACKGROUND

Zavala came to the United States in 1984 and worked for several months doing assembly line work. She was then employed for 6 years in a factory putting together parts for airplanes. She first became employed by ConAgra at its Monfort plant in Grand Island, Nebraska, in November 1995, when she worked for 6 months in the deboning department. She subsequently left her employment at ConAgra and worked for a turkey company in Gibbon, Nebraska, and then returned to ConAgra's Monfort plant in July 1997. On October 18, 1999, Zavala reported that while working in her position as a head trimmer, she picked up a heavy cow's head to throw it in a basket. At that time, she felt pain in her neck and right shoulder.

Zavala's physician was Dr. Frank Lesiak, an orthopedic surgeon in Grand Island, who saw her for the first time on October 20, 1999. Zavala presented a chief complaint at that time of right shoulder and neck pain. After examination and a diagnostic workup, Dr. Lesiak diagnosed Zavala with narrowing of the C4-5 cervical disk area with encroachment of the neuroforamina and found that she had similar disease at the C3-4 level. He also diagnosed subscapular bursitis and myositis of the right shoulder.

Summarizing her medical treatment, we observe in the record that Zavala continued to see Dr. Lesiak, who imposed work restrictions on her and prescribed medication—first Vioxx and then Celebrex—and specialized physical therapy. By December 15, 1999, Dr. Lesiak felt that Zavala was at the point where a "Key Functional Assessment" should be done and that she should go back to a job that she could do given her diagnosis and limitations. The functional assessment was done, but it was considered to be "invalid" and not representative of her current physical capabilities because of "demonstrated inconsistencies,"

meaning, according to the examiner, that Zavala had attempted to manipulate the results. While there are extensive medical records in the evidence, it does not appear that the nature or extent of Zavala's medical treatment is in controversy, and therefore, we will not further detail that evidence.

By January 2000, Zavala had returned to work for ConAgra and initially was working at a job called "steam-vac," which involved vacuuming beef carcasses in an attempt to eliminate foreign objects such as hair or dust. Zavala had complained about her ability to do this job, saying that she was reaching too much, which caused problems in her shoulders and around her neck area. As a result, her job was changed after consultation with plant supervisory personnel. She was moved to a job that involved 4 hours of hanging tails and hearts and 4 hours of scraping tongues. The evidence revealed that part of the purpose of switching tasks within her workday was for her to use different muscles for different parts of her shift. Zavala was working a full 8-hour day in this task-switching position, which was a permanent job.

Dr. Lesiak ultimately rendered an opinion that Zavala had sustained permanent impairment of 5 percent to the cervical spine and 2 percent to the right upper extremity, but he concluded that these were not the results of separate injuries and were both caused by the incident of October 18, 1999.

Zavala's job with ConAgra ended as a result of an altercation with a coworker. In this incident, the coworker rubbed Zavala's posterior with a cow's tongue. Zavala threatened to report the coworker to the supervisor if he did not stop, but Zavala said he only laughed at her. While she claims she intended merely to hit him with her meathook, Zavala swung at him with the hand holding her knife. In any event, the coworker sustained a significant injury to his arm: A piece of flesh approximately 2½ by 2 inches was cut from his forearm, resulting in profuse bleeding. As a result of the incident, both Zavala and the coworker were fired.

During the approximately 4 months when Zavala was doing the job alternating between hanging tails and hearts and scraping tongues, she never missed work due to any injury, never saw a doctor, and never made ConAgra's management personnel, including the safety manager, aware that she was having any

trouble doing her job. After Zavala's termination of employment, she told a vocational rehabilitation counselor that she liked her job, and she did not indicate that she was unable to perform it at the time of her termination, although her trial testimony was to the contrary. Cory Mollak, a supervisor, testified that he spent a considerable amount of time on the plant floor and that whenever he saw Zavala, she seemed cheerful, never reported discomfort or had complaints, and, as far as he knew, could physically perform the job. Mollak also testified that between January 2000 and Zavala's termination of employment because of the altercation with the coworker, Zavala seemed happy working every time he observed her on the floor and was doing the work well without difficulty.

A vocational rehabilitation counselor, Gayle Hope, was appointed by the Workers' Compensation Court to make an assessment of Zavala's loss of earning capacity. Hope's extensive report is in evidence. ConAgra used Deborah Determan as its vocational rehabilitation counselor, and her extensive report is likewise in evidence. We shall detail the evidence concerning vocational rehabilitation and loss of earning capacity in the analysis section of our opinion.

## TRIAL COURT DECISION

The trial court found that on October 18, 1999, while engaged in her employment, Zavala injured her right shoulder and neck as a result of lifting a cow's head. As a consequence, the court found that she had sustained a 50-percent loss of earning capacity and a 2-percent permanent partial disability to her right arm. The trial judge made a specific finding that Zavala was unable to perform work for which she had previous training or experience and that therefore, she was entitled to vocational rehabilitation services. The trial judge recounted in some detail the medical evidence, including that dealing with causation. The trial judge also found that Zavala's employment was terminated following the incident of horseplay and the injury to a coworker. The court stated:

> It is the court's opinion [that] but for her termination, [Zavala] could have continued to perform the work of the position in which she was placed. Corey [sic] Mollak

> testified to the demands of the job and they are well within the most conservative reading of [Zavala's] restrictions.

The trial judge rejected the contention that Zavala was permanently and totally disabled, citing the basic opinions of both Hope and Determan and finding that Hope's opinion that Zavala was limited to being an odd-lot worker had been rebutted. At least by implication, the trial judge was critical of the fact that Hope had "considered both [Zavala's] restrictions to the body as a whole and right upper extremity in formulating her opinion that [Zavala] is an odd-lot worker." For convenience, we shall refer to the combining of member and nonmember impairments to determine loss of earning capacity as "stacking."

The trial judge does not specifically opine whether stacking of injuries is legally permissible. However, the implication, including the reliance upon Determan's report criticizing Hope's methodology, suggests that the trial judge's position is that such stacking is improper. Nonetheless, the trial judge specifically found, in determining whether Hope's opinion had been rebutted, that the fact that Zavala "successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker." The trial judge concluded that Zavala had sustained a 50-percent loss of earning capacity, but she ordered vocational rehabilitation, specifically an "English as a Second Language" program. Zavala filed an application for review.

## REVIEW PANEL DECISION

Zavala's first assignment of error before the review panel of the Workers' Compensation Court was that the trial court erred in failing to combine the scheduled member impairment and the whole body injury so as to find her permanently and totally disabled. Indicating that any "philosophical inclination" on the review panel's part that the scheduled and unscheduled injuries could be combined would not supersede the Workers' Compensation Court's purely statutory authority, the review panel found that it could not deviate from the dictates of Neb. Rev. Stat. § 48-121(3) (Cum. Supp. 2000) because such statute was silent on the matter. The review panel concluded that without specific statutory authority from the Nebraska Unicameral, the Workers'

Compensation Court could not combine such injuries to determine permanent and total disability. The review panel rejected all of Zavala's assignments of error.

With respect to ConAgra's cross-appeal regarding vocational rehabilitation, the review panel noted that Zavala's employment was terminated because of the incident with the coworker rather than her inability to perform her assigned work. The review panel then noted the absence of any finding by the trial judge that vocational rehabilitation services were reasonably necessary to restore Zavala to suitable employment, such absence making it error as a matter of law to award vocational rehabilitation. Thus, that portion of the trial judge's decision was reversed.

Zavala timely perfected her appeal to this court.

## ASSIGNMENTS OF ERROR

Zavala assigns error to the reversal by the review panel of the award of vocational rehabilitation. Additionally, Zavala contends that the review panel committed error in failing to reverse the following four findings or decisions of the trial judge: (1) The scheduled member injury and the whole body injury could not be combined to determine loss of earning capacity; (2) the opinion of Hope, the court-appointed vocational rehabilitation counselor, had been rebutted; (3) Zavala was capable, within her restrictions, of performing the job at which she was working when her employment was terminated; and (4) Zavala was not an odd-lot worker. Lastly, Zavala asserts that the review panel erred in failing to reverse in light of the trial judge's failure to provide a reasoned decision for the finding that Zavala was working at a job within her restrictions at the time of her termination of employment.

## STANDARD OF REVIEW

[1,2] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that the court acted without or in excess of its powers; the judgment, order, or award was procured by fraud; there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or the findings of fact by the compensation court do not support the order or award as

it exists. Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000). As to questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Smart v. Scrivner/Food 4 Less*, 254 Neb. 111, 574 N.W.2d 505 (1998).

As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. *Hale v. Vickers, Inc.*, 10 Neb. App. 627, 635 N.W.2d 458 (2001).

[3] In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

## ANALYSIS

The court-appointed vocational rehabilitation counselor, Hope, concluded that Zavala had experienced "close to a 100% loss of access to the labor market in Nebraska." Hope also opined that if Zavala were to engage in training for English and job skills, she would experience an approximately 29-percent loss of wages, and it was Hope's opinion that after obtaining minimal skills in English and vocational services, Zavala would experience a loss of earning capacity of approximately 60 percent. Hope felt that without such vocational services and without learning to speak minimal English, Zavala, with her physical limitations, would be unable to find any employment in Grand Island and would therefore be an "odd lot worker in her present location [Grand Island] with her inability to speak English, being at the unskilled to semi-skilled level and being at the light work level."

Determan, ConAgra's rebuttal counselor, disagreed with Hope's conclusion on three specific grounds. The first was that Hope had failed to consider that Zavala's loss of her job at ConAgra was solely because she injured her coworker. Second, Determan said that Hope's analysis used the wrong average wage of $12.12 per hour when Zavala's actual base pay at the time of the injury was $9.25 per hour. Third, Determan said that

Hope's analysis "is inaccurate to the extent that the loss in earning capacity opinion is based on the combination of a scheduled and [an] unscheduled injury" and that as a result, the loss appeared greater than it actually was, as "only restrictions related to an unscheduled injury are considered in a loss in earning capacity analysis."

In Hope's report concluding that Zavala was an odd-lot worker, Hope recites, "**Impairment rating:** 4/18/00, 7%, whole body impairment by Dr. Lesiak." This is the medical predicate for Hope's opinion, but we are unable to find a report under such date from Dr. Lesiak. However, we do find a report from him dated May 11, 2000, assigning Zavala a "7% whole person impairment which is broken down as follows: 5% impairment to the cervical spine and 2% for the right upper extremity." We think that it is a fair assumption that it is this report Hope relied upon in formulating her opinions.

Zavala claims that the trial court erred in finding that scheduled member injuries could not be combined with whole body injuries for the purpose of determining loss of earning capacity. The trial judge said that she agreed "with [ConAgra] that [Hope's] opinion is rebutted. It appears that [Hope] considered both [Zavala's] restrictions to the body as a whole and right upper extremity in formulating her opinion that [Zavala] is an odd-lot worker." The trial court's decision could be read as a rejection of stacking. However, the trial judge's reasoning in the above-quoted paragraph continued: "Further, the court believes the fact that [Zavala] successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker." The trial judge's comment about stacking could be in the nature of dicta. But, the decision is not consistent with Workers' Comp. Ct. R. of Proc. 11 (2000), which requires clear and concise explanations of a trial judge's rationale. It is not clear whether the finding that Hope's opinion had been rebutted rests on a rejection of stacking, on a factual finding that Zavala is not an odd-lot worker, or on both.

[4] The review panel clearly is of the view that stacking is presently impermissible. But, this court has held to the contrary in *Payzant v. Coufal Lumber Co.*, No. A-00-083, 2000 WL 1790027 (Neb. App. Dec. 5, 2000) (not designated for permanent

publication), *petition for further review overruled* 261 Neb. xxv (Feb. 22, 2001). We should have published that opinion which comprehensively discussed the stacking issue and found that stacking was permissible under Nebraska law. Thus, we repeat much of that discussion in this published opinion. In *Payzant*, the facts were on point with the instant case, as the defendant argued that an arm impairment and whole body impairment could not be combined or considered together to make up a case of total disability. ConAgra advances this same position, but no published authority from Nebraska is cited, other than the rule that when an employee suffers a scheduled injury the presence or absence of industrial disability is immaterial. See, *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990); *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983). The defendant in *Payzant* cited *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991), for the proposition that loss of earning capacity is relevant only to impairment of the body as a whole and placed heavy reliance upon *Providence Washington Ins. Co. v. Grant*, 693 P.2d 872 (Alaska 1985), which held that an employee must be compensated separately for foot, knee, and back injuries. The Alaska court stated:

> [A] double recovery [could result] if the loss of earning capacity resulting from the scheduled injuries were used to determine the employee's compensation for an unscheduled disability. To avoid this, when awarding the claimant for an unscheduled injury, the board must attempt to separate the loss of earning capacity resulting from scheduled disabilities from the loss of earning capacity resulting from the unscheduled injury.

*Id.* at 876.

[5-7] Nebraska's workers' compensation scheme is that a whole body impairment, or unscheduled disability, is compensated in terms of loss of employability and that scheduled injuries are compensated on the basis of loss of physical function. See, § 48-121; *Nordby, supra*. Often, to some extent, impairment of a member is also impairment of the whole body. However, § 48-121 draws what could be said to be an arbitrary classification by making the industrial impact of a scheduled injury immaterial. This same concept was well articulated by the

Supreme Court of Iowa in *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12 (Iowa 1993). The *Mortimer* court recognized, as is true in Nebraska, that functional disability is arrived at by determining the impairment of the employee's bodily function, thereby limiting disability to the loss of physiological capacity of the body part. In contrast, the *Mortimer* court pointed out that in cases of industrial disability, functional disability is only one factor, and that other factors such as age, education, experience, and the ability to engage in employment for which the employee is fitted are all measures used to determine the impairment of the ability to earn wages. In Nebraska, our approach is the same. See *White v. Christian Homes, Inc.*, 2 Neb. App. 213, 508 N.W.2d 309 (1993) (total disability means disablement to earn wages in same kind of work, or similar work, that worker was trained for or accustomed to perform, or any other kind of work which person of his or her attainments and mentality could do). The *Mortimer* court acknowledged that a person may suffer "a permanent total disability as a result of some scheduled injury. This may happen because of age, lack of training, or other condition peculiar to the person. Yet such an injury is *arbitrarily* compensable according to the schedule." 502 N.W.2d at 15.

*Mortimer* involved an injury requiring amputation of four toes of the employee's foot, which incident aggravated a preexisting depressive condition. The employer sought to limit compensation to that provided in the schedule for the loss of the toes. The court concluded that a psychological condition caused or aggravated by a scheduled injury should be compensated as an unscheduled injury. Its rationale included citation to the Iowa statute, equivalent to Nebraska's § 48-121, delineating payment for scheduled and unscheduled injuries:

> [The Iowa statute] sets no limitation as to the physical location of the injury causing the disability.
>
> The only limitation regarding location of the injury concerns permanent partial disabilities arising from scheduled injuries. And although such injuries may cause permanent total disability because of the claimant's lack of education or experience or physical strength or ability, the injuries are *arbitrarily* compensable according to the schedule. This is so because the legislature in its wisdom has seen fit to give

> the commission no discretion with regard to scheduled injuries. The legislature did this in order to make certain the amount of compensation in cases of specific injuries and to avoid controversies. But where there is injury to a scheduled member *and also to parts of the body not included in this schedule*, there is no logical reason for such arbitrariness.

*Mortimer*, 502 N.W.2d at 17. These observations would seem equally applicable to § 48-121. Accordingly, the *Mortimer* court held that where there is injury to some scheduled member and also to parts of the body not included in the schedule, the resulting disability is compensated on the basis of an unscheduled injury. See, also, *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417 (Iowa 1994); *Evans v. Industrial Commission*, 19 Ariz. App. 90, 505 P.2d 258 (1973) (injuries to right knee and hip along with injury to lower back producing disabling pain moved employee's compensation from scheduled category to unscheduled category); *Boggs v. D & L Construction Company*, 71 N.M. 502, 379 P.2d 788 (1963) (holding that scheduled injury section of workers' compensation act is not exclusive where there is proof of separate and distinct impairment of other parts of body). Compare *Federal Compress & Warehouse Co. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996) (in case involving eye as well as cervical and thoracic spine injuries, court held that because eye injury was scheduled, it could not and should not have been considered when determining employee's wage-loss benefits).

We have been unable to find a published Nebraska case discussing stacking; however, the leading treatise in the area, 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 87.04 at 87-5 (2002), observes:

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any

scheduled loss as a partial or total disability of the body as a whole.

Admittedly, Larson's treatise suggests a position which is clearly contrary to the established Nebraska law, i.e., that industrial disability is immaterial when there is only a scheduled injury. The treatise points out that the employee's inability to get work is an indispensable ingredient in the concept of total disability and that "it is difficult to see why this factor is relevant in case of loss of a lung but not in case of loss of a leg." *Id.* at 87-6. To include consideration of employability in a case where there is only a scheduled injury would require amendment of § 48-121. But, Larson's view that the law is moving away from the exclusivity of scheduled compensation for member disabilities is worth noting. We believe that Nebraska has implicitly recognized stacking.

In *Barbaglia v. General Motors Acceptance Corp.*, 190 Neb. 529, 209 N.W.2d 353 (1973), the court affirmed a workers' compensation award of a 5-percent disability rating to the body as a whole as a result of a two-member injury to the claimant's legs and an additional 25-percent permanent and partial disability rating to the body as a whole due to crushing injuries to the claimant's chest and larynx. While the case proceeded on the claimant's argument that he should have been found totally disabled, the court nonetheless allowed stacking, in that after two scheduled leg injuries had been converted to a 5-percent permanent partial disability of the body as a whole, recovery was allowed for an additional 25-percent disability for the crushing injuries, which produced residual impairment of function of the larynx and chest.

In a more recent case, *Ideen v. American Signature Graphics,* 257 Neb. 82, 595 N.W.2d 233 (1999), the parties stipulated that the claimant had permanent impairment of her right arm, but she also claimed permanent damage to the muscles of her right shoulder and thoracic and cervical spine. While the compensation court awarded benefits for impairment of the right arm, no award was made for a whole body injury. The claimant retained a Dr. Gammel for impairment rating purposes, and he assigned her a 12-percent impairment of the upper right arm and a 5-percent impairment of the cervical spine, both of which ratings he then

combined to yield a 12-percent disability rating for the body as a whole. At the request of the defendant, the claimant saw a Dr. McCarthy, who gave her a 12-percent disability rating for her arm and nothing else.

The *Ideen* court recited the rule that the factual findings of the compensation court are not to be disturbed upon appeal unless they are clearly wrong, as well as the test from *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983), that whether a disability is to a scheduled member or the body as a whole is dependent upon the location of the residual impairment, not the situs of the injury. While speaking in the nature of dicta, the court nonetheless said, "A review of the evidence in the case reveals that such evidence [from Drs. Gammel and McCarthy] would be sufficient to support a finding of either a scheduled member impairment alone or impairment to both the member and to the body as a whole." *Ideen*, 257 Neb. at 86, 595 N.W.2d at 236. If scheduled injuries and unscheduled injuries could not be considered together and stacked, then the Supreme Court's statement in *Ideen* quoted above would seem incorrect.

[8] We observed in *Haake v. American Tool Cos.*, 8 Neb. App. 59, 588 N.W.2d 839 (1999), that it has long been established that the policy of liberal construction of the Nebraska Workers' Compensation Act is for the benefit of the claimant, citing *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). That policy favors taking a view of § 48-121 that allows what is not directly prohibited, and there is no statutory prohibition against stacking a scheduled injury and an unscheduled injury to arrive at a true assessment of how the two injuries have impacted a claimant's employability—which is at the heart of understanding the concept of disability.

[9] The Nebraska Workers' Compensation Act is of general interest—to employees, employers, and the public—and it should be construed so that technical refinements of interpretation do not defeat its purpose. See *Speas v. Boone County*, 119 Neb. 58, 227 N.W. 87 (1929). Its broad purpose is that when a personal injury is sustained by an employee, by accident or occupational disease, in the scope and course of employment, the "employee shall receive compensation therefor from his or her employer." Neb. Rev. Stat. § 48-101 (Reissue 1998). Stacking of

scheduled and unscheduled injuries serves that purpose by more fairly and accurately compensating injured workers.

[10] Therefore, after considering the state of the law in other jurisdictions, the apparent approval of stacking by the Nebraska Supreme Court, the liberal interpretation to be accorded the Nebraska Workers' Compensation Act for the benefit of the claimant, and the absence of an express limitation in the act against stacking a scheduled injury and an unscheduled injury to form permanent total disability, we hold that Nebraska law does not prohibit consideration of the effect of a member injury when loss of earning capacity is assessed for a worker who also has sustained a whole body injury. But, we emphasize that the key to our conclusion herein is that the claimant, Zavala, has two separate areas of injury, arm and cervical spine, which are considered together to determine the extent of loss of earning capacity.

[11] We should acknowledge the firmly established law that when an injury to a member results in an unusual or extraordinary condition of other members or other parts of the body, the claimant is entitled to compensation based on lost earning capacity under § 48-121(1) or (2). *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 259, 475 N.W.2d 513, 515 (1991) (injured leg caused traumatic neurosis "as an 'extraordinary' reaction to the stress" of injury); *Burrious v. North Platte Packing Co.*, 182 Neb. 122, 153 N.W.2d 353 (1967). Therefore, we emphasize that this case falls into a different category: one work accident producing two injuries—one scheduled, one unscheduled. If the combination of the two injuries produces permanent total disability, see *Benish Kaufman v. Control Data*, 237 Neb. 224, 465 N.W.2d 727 (1991), then the Nebraska Workers' Compensation Act does not preclude such an award as a matter of law. And, if the member impairment adversely affects the worker such that loss of earning capacity from the unscheduled injury cannot be fairly and accurately assessed without considering the impact of a scheduled injury on the worker's employability, then stacking is permissible.

## RESOLUTION

Because the trial judge's view that stacking is impermissible under Nebraska law appears to have been part of the basis for

her finding that Hope's opinion that Zavala was an odd-lot worker had been rebutted, this matter must be reversed for consideration anew on the record already made of Hope's opinion in light of our holding that stacking of a member impairment with a whole body injury is permissible. This action is further necessitated because the trial judge's finding that Hope's opinion had been rebutted is not explained with a clear and concise rationale as required by rule 11.

Moreover, because in our view, the findings of both the trial judge and the review panel concerning Zavala's entitlement to vocational rehabilitation are inextricably intertwined with their positions that stacking is impermissible under Nebraska law, we reverse the decision of the review panel which eliminated the award of vocational rehabilitation and direct that the question of vocational rehabilitation be reconsidered by the trial judge on the record already made in light of our holding about stacking.

REVERSED AND REMANDED WITH DIRECTIONS.

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## MARGARET TIGHE AND RICK TIGHE, WIFE AND HUSBAND, APPELLANTS, V. CEDAR LAWN, INC., APPELLEE.

649 N.W.2d 520

Filed July 2, 2002. No. A-01-562.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Landlord and Tenant.** The underlying policy and purpose of the Uniform Residential Landlord and Tenant Act, in addition to making uniform, clarifying, simplifying, and modernizing the law, is to encourage landlord and tenant to maintain and improve the quality of housing.
4. **Landlord and Tenant: Torts.** The Uniform Residential Landlord and Tenant Act unambiguously states that the obligations imposed by Neb. Rev. Stat. § 76-1419(1)(f) (Reissue 1996) are not intended to change existing tort law in the state.
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. **Landlord and Tenant: Torts.** Neb. Rev. Stat. § 76-1419(1)(f) (Reissue 1996) provides that existing tort law is not affected by § 76-1419.
7. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. **Landlord and Tenant: Contracts.** In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them. Absent a contract to the contrary, the lessor is not bound to make any repairs. The contract defines the extent of the lessor's duty.
9. **Landlord and Tenant.** A landlord does have a duty to keep the common areas of leased premises, such as areas under his or her control and areas used by more than one tenant, reasonably safe.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Daniel L. Lindstrom and Trent W. Steele, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Margaret Tighe (Maggie) fell into a wellhole, which was covered with a deteriorated plywood cover, on premises she and her husband, Rick Tighe, leased from Cedar Lawn, Inc. Maggie sued Cedar Lawn for her injuries in the district court for Buffalo County, Nebraska. Rick sued for loss of consortium. Holding that the Tighes failed to establish that Cedar Lawn owed them a duty, the court granted a directed verdict in Cedar Lawn's favor.

## FACTUAL BACKGROUND

In 1986, Maggie and Rick leased a residence from Cedar Lawn approximately 10 miles northeast of Kearney, Nebraska. Although the Tighes made their rent payable to Cedar Lawn, for practical purposes we will refer in this opinion to Andrew Howe and his wife as the Tighes' landlords. Andrew is the president of Cedar Lawn.

The Tighes lived in the Cedar Lawn residence from 1986 until 1997, and their original lease, in evidence as exhibit 21,

was never altered during that 11-year period. The lease included "[t]he house and garage, lawn, and garden," and the Tighes were required to "cut and water said lawn and keep weeds cut on the premises, and maintain said yard in a neat, orderly condition at all times." The lease also required the Tighes to "maintain and keep said property in a good state of repair." Cedar Lawn agreed to "pay for major repairs or maintenance that [had] written prior approval" by Cedar Lawn.

According to the lease, if "improvements" on the property became "untenantable by reason of extensive damage or destruction," Cedar Lawn had the "sole option [of] electing whether to repair, replace or remodel said property to its prior condition." Finally, a lease provision required the Tighes to "hold [Cedar Lawn] harmless from any and all damages to property or injury or death to person . . . on the leased premises resulting from the negligence or carelessness of the [Tighes]."

The south yard of the house contains a wellhole between 5 and 6 feet deep, with a gravel and dirt bottom and brick sides. The wellhole is surrounded at the top by a concrete pad approximately 54 inches in diameter. The testimony is somewhat unclear on the wellhole's precise shape, but it appears that the plywood cover placed over the hole was shaped somewhat like a "square" frying pan, with the "pan" measuring approximately 18 by 21 inches and the "pan handle" measuring approximately 12½ by 7½ inches. The wellhole, approximately 2 inches smaller in diameter than the cover, contains two small pressure tanks measuring approximately 12 inches in diameter and 3 feet tall, a pressure gauge, a pressure switch, and circuit breaker controls. The equipment in the wellhole is connected to a submersible well approximately 17 feet away. Andrew placed this equipment in the wellhole "because the hole was there."

Andrew testified that every 2 years, he routinely filled the pressure tanks to keep the water system running smoothly. When he filled the tanks, he checked the condition of the wellhole's plywood cover. If the cover was in "bad condition," Andrew replaced it with a new one which he cut from ¾-inch exterior grade plywood and to which he applied several coats of sealant with stain to protect against moisture. Andrew testified that he never asked the Tighes to replace the wellhole cover and

that throughout the term of the Tighes' lease, all work on the well and the wellhole cover was performed by him or at his direction. The Tighes agree that it was Andrew's responsibility to maintain the well. Andrew testified that the last time he replaced the cover before Maggie's accident was in 1994.

For winter, Andrew would place 8 to 10 straw bales over the wellhole to insulate the pump. At some point during their tenancy, the Tighes began putting the straw bales over the wellhole in the fall and removing them in the spring. It is unclear from the record whether Andrew requested the Tighes to do this job or whether the Tighes volunteered. Maggie testified that at least twice a year, when the Tighes placed and removed the straw bales, she got a good look at the wellhole cover. She testified that the bales usually got wet during the winter and that she noticed that the cover was splintered and "very moist underneath those . . . bales when [the Tighes] removed them."

The lease required the Tighes to maintain the lawn, and when Maggie mowed, she noticed "several different times" that the wellhole cover was deteriorating. Maggie testified that because neither her riding mower nor her push mower would fit between the wellhole and a nearby fence, she always had to "go in and pull the weeds out between the fence . . . and the well." However, she "never walked on that wooden well cover." Maggie stated, "I didn't trust it" and "I did not feel safe with that well." Maggie testified that she advised the Tighes' landlords "several times" of the cover's condition. She specifically remembers telling them at the end of March or beginning of April 1996, when she delivered her rent, that the cover needed replacing.

Each summer, Maggie placed a plastic swimming pool over the wellhole cover to "cover up the well and to keep kids and people from walking on top of it." Maggie put water in the pool for her dogs and to keep the pool from blowing away, and she testified that the pool had no holes in it and did not leak water. On cross-examination, however, Maggie testified that she "had one pool that cracked" and that she "noticed there was a leak in it." Apparently, she replaced the pool at least once due to leakage.

Maggie testified that while mowing on July 9, 1996, she removed the pool from the wellhole cover to change the water. While pulling weeds between the wellhole and the fence, her

"big toe" was "right on the edge . . . of the ply[wood] board and the concrete." Maggie "went to get up," her "right leg went back," and she "felt it giving." Maggie testified, "When I turned, at that moment . . . it gave, and then I went down the well." Maggie's right knee hit a pump in the well as she fell. Maggie told the Tighes' landlords about the accident, and Andrew made a new, temporary cover for the wellhole. The Tighes moved out of the Cedar Lawn house in November 1997. Due to her knee injury, Maggie has seen several doctors and has had at least two surgeries.

Andrew testified that before the accident, neither Rick nor Maggie had ever asked him to replace the wellhole cover. He also testified that he at no time advised the Tighes the cover might be hazardous and that he erected no barriers to prevent them from stepping on the cover. According to Andrew, the cover became wet in July 1996 not because of the straw bales that had covered it during the winter, but because Maggie's swimming pool leaked.

## PROCEDURAL HISTORY

The Tighes' operative petition, dated September 9, 1999, stated that Cedar Lawn's negligence was the proximate cause of Maggie's fall and that Cedar Lawn was negligent in "failing to properly maintain a safe and adequate covering over the well hole," "failing to inspect and repair the defective covering," "failing to warn of the defective covering," "failing to erect barriers around the well hole," and "failing to erect notices that would warn of the existence and location of the well hole."

At the close of the Tighes' case, Cedar Lawn moved for a directed verdict, which motion the trial court sustained.

## ASSIGNMENT OF ERROR

The Tighes claim that the trial court erred in sustaining Cedar Lawn's motion for a directed verdict.

## STANDARD OF REVIEW

[1] In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. *Koch v. Norris Pub. Power*

*Dist.*, 10 Neb. App. 453, 632 N.W.2d 391 (2001). A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Id.* If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Burgess v. Miller*, 9 Neb. App. 854, 621 N.W.2d 828 (2001).

## ANALYSIS

*Uniform Residential Landlord and Tenant Act.*

At the close of all the evidence, the court sustained Cedar Lawn's motion for directed verdict on the ground that the Tighes knew about the wellhole cover's defective condition, such knowledge releasing Cedar Lawn from any duty to warn. In addition, the court held that the original lease placed no duty on Cedar Lawn to maintain the wellhole cover, and the Tighes did not plead a "modification" of the original lease agreement. Therefore, the court found that there was "no course of conduct from the evidence that would create a new contractual obligation." Ultimately, the district court refused to allow an amendment to the pleadings based on a theory of recovery under the Uniform Residential Landlord and Tenant Act (URLTA) and refused to consider modification of the original lease agreement through conduct. The court considered only the original lease and negligence law in determining that Cedar Lawn owed the Tighes no duty with respect to the wellhole cover.

The Tighes rely primarily on URLTA in arguing to this court that Cedar Lawn owed them a duty. The Tighes did not plead URLTA as a theory of recovery. They argue, however, that under URLTA, Neb. Rev. Stat. § 76-1419(1) (Reissue 1996) creates a statutory duty which applies to Cedar Lawn as a matter of law even if such duty was not specifically pled. Section 76-1419(1) states that the landlord shall "[m]ake all repairs and do whatever is necessary, after written or actual notice, to put and keep the premises in a fit and habitable condition" and shall "[m]aintain in good and safe working order" all plumbing facilities. In addition, the Tighes argue that Neb. Rev. Stat. § 76-1425(2) (Reissue 1996) "gives [the Tighes] a cause of action for damages for any

noncompliance" with § 76-1419 or for any noncompliance with the lease agreement. Brief for appellant at 10. The Tighes claim that this remedy is available to them because they "did allege that [Cedar Lawn] was negligent . . . by failing to properly maintain an adequate covering over the well hole cover." *Id.*

[2] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). While URLTA does provide a cause of action for damages in the event of a breach of duty defined by § 76-1419, a review of the entire act shows that it is designed to ensure that the premises are habitable, not to create a tort action for damages which did not previously exist.

[3] The text of URLTA speaks for itself. According to § 76-1402 (Reissue 1996), the underlying policy and purpose of URLTA, in addition to making uniform, clarifying, simplifying, and modernizing the law, is to "encourage landlord and tenant to maintain and improve the quality of housing." Neb. Rev. Stat. § 76-1407 (Reissue 1996) states that URLTA "appl[ies] to, regulate[s], and determine[s] *rights, obligations and remedies under a rental agreement*, wherever made, for a dwelling unit located within this state." (Emphasis supplied.) Even in § 76-1419, the section entitled "Landlord to maintain fit premises," upon which the Tighes rely so heavily, URLTA focuses on the landlord's duty to maintain habitability, not on any tort duty. Under that section, the landlord is required, among other things, to keep the premises in a "fit and habitable" condition; keep all *common areas* of the premises in a clean and safe condition; maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances; and supply running water and reasonable amounts of hot water at all times and reasonable heat. Neb. Rev. Stat. § 76-1427 (Reissue 1996) provides a remedy if "the landlord deliberately or negligently fails to supply running water, hot water, or heat, or essential services." URLTA also deals with other practical matters such as rent payments, evictions, landlord access and entry, and possession.

The point we make here is that URLTA does not provide the legal basis for the Tighes' argument. Although URLTA incorporates the common-law rule that the landlord must keep common areas safe, URLTA really is designed to assist tenants whose landlords fail to provide the basic necessities which make a dwelling unit habitable.

The legislative history of 1974 Neb. Laws, L.B. 293, sheds light on the policies underlying URLTA as well. At a public hearing on L.B. 293, a number of landlords expressed concern that a violation of § 76-1419, by creating evidence of negligence, would ultimately result in strict liability for landlords. Some landlords believed that this would raise their insurance rates and opposed the bill on that ground. Thereafter, the bill was adopted with amendments, and § 76-1419 in its final form contained the following language not present in the version of URLTA promulgated by the National Conference of Commissioners on Uniform State Laws: "The obligations imposed by this section are not intended to change existing tort law in the state."

[4] Finally, Neb. Rev. Stat. § 76-1403 (Reissue 1996) states that "[u]nless displaced by [the provisions of URLTA], the principles of law and equity . . . supplement [URLTA's] provisions." And, as mentioned above, § 76-1419(1)(f) unambiguously states in part: "The obligations imposed by this section are not intended to change existing tort law in the state." See, also, *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989) (URLTA does not exclude or otherwise alter common law unless expressly by URLTA provisions).

[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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). The Tighes point to neither any language in URLTA nor any case law providing that the duties in § 76-1419 change, displace, or expand the common law. In fact, § 76-1419(1)(f) provides exactly the opposite: that existing tort law is not affected by § 76-1419. Thus, the Tighes' attempt to overturn the directed verdict by arguing that URLTA forms the substantive law governing this case, whether pled or not, lacks merit.

"An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal." *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 419, 520 N.W.2d 189, 194 (1994). "This court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried." *Id.* Thus, in discussing the directed verdict, we will consider the only cause of action pled—negligence—and consider URLTA no further.

*Common-Law Negligence.*

For the plaintiff to prevail in a negligence action, 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 caused by a failure to discharge that duty. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000). Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person, and it necessarily requires some degree of knowledge. 57A Am. Jur. 2d *Negligence* § 89 (1989).

[7] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001). When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001).

Because our analysis of "duty" necessarily involves determinations of underlying fact, especially as it concerns "control" of the premises, we note that " '[t]he fact that a question of law involves the consideration of factual issues does not turn the former into a "question of fact" or necessarily mire the court in evidentiary issues of weight and credibility.' " *Knoll v. Board of Regents*, 258 Neb. 1, 6, 601 N.W.2d 757, 763 (1999), quoting *Clemets v. Heston*, 20 Ohio App. 3d 132, 485 N.E.2d 287 (1985) (stating that duty is question of law for court).

*Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), abrogated the distinction between invitees and licensees and held that owners and occupiers of land owe a general duty

of reasonable care to all lawful entrants. The *Heins* ruling was prospective, however, applying only to actions arising after the August 23, 1996, ruling, whereas Maggie's accident occurred on July 9, 1996. We do not consider how *Heins* might affect this case. Nonetheless, because Maggie's accident occurred before *Heins*, precedent which *Heins* abrogated or disapproved still has viability in deciding this case.

[8] In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them. See *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966). And, absent a contract to the contrary, the lessor is not bound to make any repairs. The contract defines the extent of the lessor's duty. *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980); *Reicheneker v. Seward*, 203 Neb. 68, 277 N.W.2d 539 (1979).

It is undisputed that the original lease agreement places no duty upon Cedar Lawn to maintain the wellhole cover, and as the district court noted, the Tighes "pled only the [original lease] and [have] expressly pled that contract, and to allow the injection of a whole new contract at this stage [the end of the trial] would be entirely impermissible." Amendments to the pleadings should not be allowed at certain stages of trial where amendments change the issues or quantum of proof on an issue. *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996). Whether to allow such an amendment is left to the discretion of the trial court. *Id.* Given the obvious change in the nature of the case by the Tighes' attempted last-minute amendment, we cannot say the trial judge abused his discretion by refusing to allow it. Therefore, we do not consider the Tighes' suggestion that the parties' conduct modified the original lease agreement, creating a duty for Cedar Lawn to repair the wellhole cover.

Although the Tighes did not so plead, they argue further that the wellhole was a common area and that under the exception to the rule that a landlord is not bound to keep lease premises in repair unless he contracts to do so, Cedar Lawn had a duty to maintain the wellhole area. See *Smith v. Rizzuto*, 133 Neb. 655, 276 N.W. 406 (1937) (lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to

lessee reasonably safe for those having lawful occasion to use them for purpose for which they were intended).

[9] A landlord does have a duty to keep the common areas of leased premises, such as areas under his or her control and areas used by more than one tenant, reasonably safe. See, *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987); *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986). To hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover. See, *Weiss, supra*; *Hiatt v. Tallmage*, 219 Neb. 635, 365 N.W.2d 448 (1985) (landlord not liable to tenant who slipped on dog excrement on stairway intended for tenant's exclusive use and under tenant's control).

We cannot say, despite testimony that Andrew maintained the wellhole, its contents, and its cover, that the wellhole was a common area. Clearly, the area was not reserved for the use of multiple tenants, as the Tighes were the only tenants of the property in question. Where liability is sought to be imposed upon a landlord for injury which occurred in areas used by more than one tenant, liability is based on the fact that such area was not demised to any one tenant and was therefore retained under the control of the landlord. Annot., 65 A.L.R.3d 14 (1975). Courts typically hold that retention of control is not established where there is no clear proof that more than one tenant had the right to use such premises. *Id.*

In addition, as Cedar Lawn notes in its brief, Nebraska case law distinguishes between areas which are demised entirely to the tenants and those of which the landlord retains possession: a lessor is bound to exercise reasonable care in keeping premises used in connection with *but not demised to the lessee* reasonably safe for those having lawful occasion to use them for the purpose for which they were intended. *Esbenshade v. National Life Ins. Co.*, 208 Neb. 216, 303 N.W.2d 272 (1981); *Smith v. Rizzuto, supra*. The Tighes do not dispute that the entire lawn area, including the wellhole area, was demised to them, and the lease specifically lists the lawn as part of the property which the Tighes rented and were responsible for maintaining.

Further, although Andrew testified that he typically inspected and performed routine maintenance on the wellhole cover every 2 years or so, in the light of other factors which determine control or lack thereof, that evidence alone does not establish that Cedar Lawn retained sufficient control over the wellhole to make it a common area. Indeed, the Tighes testified that from the time they leased the premises in 1986, they never saw anyone change the wellhole cover and never heard that the wellhole cover had been replaced, and that they believed the same cover had been there from 1986 until the time of the accident. The implication from this evidence, that Andrew never changed the cover, negates the Tighes' own theory that Andrew was in control of that area. In addition, the Tighes testified that for the majority of their lease term, they were responsible for placing and removing the straw bales which covered the wellhole during the winter. Finally, the Tighes were responsible for maintaining the lawn surrounding the wellhole.

In reviewing the action of a trial court, an appellate court must treat a motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. *Koch v. Norris Pub. Power Dist.*, 10 Neb. App. 453, 632 N.W.2d 391 (2001). Thus, despite any testimony to the contrary, we must and do accept the Tighes' assertions as true. Their testimony establishes that they exercised some control over the wellhole area, that they alone were demised the wellhole area, and that the control actually asserted by Cedar Lawn, as opposed to any control that Cedar Lawn retained in theory, was so negligible that the Tighes cannot now force this case to fit into the common area doctrine—putting aside their failure to plead such facts and theory.

## CONCLUSION

The district court was correct in finding as a matter of law that Cedar Lawn owed no duty to the Tighes. Cedar Lawn neither contracted to repair the wellhole nor retained sufficient control of the wellhole area to create a duty of repair under the common area exception. Because the Tighes did not plead modification of the original lease, the district court did not err in declining to consider whether the parties' course of conduct

would alter the lease. Finally, we are wholly unpersuaded by the Tighes' argument that URLTA requires Cedar Lawn to maintain the wellhole cover. As discussed previously, the Tighes failed to plead URLTA, which in any event does not alter existing tort law, and the plain language of the lease agreement requires the Tighes to "maintain and keep said property in a good state of repair" while imposing no such duty on Cedar Lawn. We therefore affirm the district court's finding that the Tighes did not establish Cedar Lawn's duty, and we hold that the court was correct in directing a verdict in Cedar Lawn's favor.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. PHILLIP J. MAESTAS, APPELLEE, AND TORI MAESTAS, APPELLANT.

647 N.W.2d 122

Filed July 2, 2002. No. A-01-653.

1. **Final Orders: Appeal and Error.** An appellate court may review a final order affecting a substantial right made on summary application in an action after a judgment is rendered.
2. **Criminal Law: Courts: Evidence: Standing.** Property seized in enforcing a criminal law is in custody of the court, referenced as in custodia legis, and the proper procedure for the return of property taken is to apply to the court for its return, especially if the property has been offered in evidence. The owner is the person with standing to make such application.
3. **Standing: Jurisdiction: Justiciable Issues.** 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.
4. **Search and Seizure: Appeal and Error.** The trial court's decision on the return of seized property is reviewed for an abuse of discretion.

Appeal from the District Court for Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed.

J. Blake Edwards, of McGinley, O'Donnell, Reynolds & Edwards, P.C., for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee State of Nebraska.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Tori Maestas, mother of defendant Phillip J. Maestas, filed a motion in the district court for Cheyenne County, under this case caption, for the return of property seized from her residence in connection with a case involving first degree murder charges against Phillip. Phillip ultimately pled guilty to second degree murder in that case, and his time for a direct appeal has passed. Tori appeals the district court's partial denial of her motion.

## FACTUAL AND PROCEDURAL BACKGROUND

After Phillip was convicted of second degree murder, Tori filed a motion for the return of seized property in the district court for Cheyenne County. Tori requested that the following property be returned to her: a Ruger "model 10/22" carbine, .22-caliber, serial number 115-54588 (gun No. 1); a Ruger "model 10/22" carbine, .22-caliber, serial number 236-23575 (gun No. 2); four boxes of Winchester "expert" .22-caliber hollow point long rifle ammunition; one brick of .22-caliber "thunderbolt" long rifle ammunition (minus 1 box); one brick of "Dynamit Nobel" .22-caliber long rifle cartridges; one box of 50 rounds of "federal lightning" .22-caliber long rifle ammunition; and one .22-caliber firearm stock with barrel.

The district court heard the motion on May 8, 2001, and Paul Schaub, the Cheyenne County Attorney, represented the State. Investigator John Jenson's affidavit was placed into evidence, and in it, he averred that only the two guns were still needed as evidence. The affidavit noted that the FBI positively identified Phillip's fingerprint on gun No. 1 and that Phillip's codefendant identified gun No. 2 as the murder weapon. This latter gun, according to Jenson's affidavit, "has features that make it almost identical with the . . . murder weapon."

Schaub argued that the guns should not be released because Phillip could still request postconviction relief, which could conceivably result in a trial. As to gun No. 1, Schaub argued that "if [Phillip] testifies that he's never handled a weapon before, we can at least bring this up as a rebuttal, there's the weapon, there's the fingerprint." Schaub argued that the State should retain gun

No. 2 in case the State needs to show a jury why the codefendant might have misidentified the murder weapon (because gun No. 1, the murder weapon, and gun No. 2 are nearly identical).

The district court released all of the property listed in Tori's motion except for the two guns. The court did not explain its reasons for denying their return. Tori, the guns' owner, appeals, arguing that "[t]he remote possibility of a [postconviction] filing . . . sometime in the future is just not enough to retain the property not used in the commission of a crime." Brief for appellant at 4.

## ANALYSIS

[1] Nothing in the record suggests that the State challenged Tori's right to file this motion in Phillip's criminal case for the return of her property. However, on appeal, the State argues, "The motion by Tori Maestas is improper because she is not the true Appellant in this criminal matter. She is not the defendant, she is the defendant's mother. . . . She can not [sic] file an appeal for [Phillip] or in [Phillip's] name." Brief for appellee at 3-4. In making this argument, the State relies on Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000), which states in part that "[u]pon conviction after trial the defendant may on appeal challenge the correctness of the order by the judge." The State argues that because Tori was not the defendant at trial, this statute does not give her the right to appeal. But, Tori is not appealing Phillip's conviction and sentence. She is appealing from the ruling made upon her motion to the district court for the return of her property. The Court of Appeals may review a final order affecting a substantial right made on summary application in an action after a judgment is rendered. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[2,3] Property seized in enforcing a criminal law is in custody of the court, referenced as in custodia legis, and the proper procedure for the return of property taken is to apply to the court for its return, especially if the property has been offered in evidence. *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954). Tori, as the owner, is the person with standing to make such application concerning the two pieces of property at issue herein. 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. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). Tori has a personal stake in what happens to her property. Thus, we find that Tori properly applied to the district court for the return of her property. That being true, she has a right to appellate review of the lower court's ruling. Thus, we turn to the merits.

Neb. Rev. Stat. § 29-818 (Reissue 1995) states as follows:

> Property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same unless otherwise directed by the judge or magistrate, and shall be so kept so long as necessary for the purpose of being produced as evidence on any trial. Property seized may not be taken from the officer having it in custody by replevin or other writ so long as it is or may be required as evidence in any trial, nor may it be so taken in any event where a complaint has been filed in connection with which the property was or may be used as evidence, and the court in which such complaint was filed shall have exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof.

According to § 29-818, a court in custodia legis is not required to return lawfully seized property to the owner upon application when, as here, the State has shown that the property may be needed as evidence in the future. See § 29-818. The standard for determining whether there is such future need, i.e., whether "it is or may be required as evidence," is clearly within the trial court's discretion.

[4] While a trial because of a postconviction proceeding is typically a very unlikely occurrence, particularly after a plea bargain reducing a first degree murder charge to one of second degree murder, we cannot say its likelihood is so remote that the statutory standard requires that the guns be returned to Tori. We find no abuse of discretion by the district court, which we find to be the applicable standard of our review under § 29-818, and we affirm its ruling.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
RAFAEL G. MUNOZ, APPELLEE.
647 N.W.2d 668

Filed July 2, 2002. No. A-01-779.

1. **Appeal and Error.** The purpose of appellate review in error proceedings is to provide an authoritative exposition of the law to serve as precedent in future cases.
2. **Proof.** Where the State is able to prove alcohol content only within a specified range, the lower point of which falls below the statutory value, the State has failed to meet its burden of proof.
3. **Administrative Law: Blood, Breath, and Urine Tests.** The regulations of title 177 of the Nebraska Administrative Code do not purport to convey any particular margin of error for testing devices, except to the extent the Nebraska Department of Health and Human Services Regulation and Licensure has made determinations concerning how accurate particular devices must be calibrated for test results to be considered acceptable.

Appeal from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge, on appeal thereto from the County Court for Sarpy County, TODD HUTTON, Judge. Exception sustained.

John W. Reisz, Deputy Sarpy County Attorney, for appellant.

Thomas J. Garvey, Sarpy County Public Defender, for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

Rafael G. Munoz was charged with driving under the influence of alcohol. The county court found Munoz not guilty, based in part on a finding that title 177 of the Nebraska Administrative Code, which had been received into evidence on behalf of the State, was substantive evidence of a "margin of error" for the Intoxilyzer, which the trial court then found had to be applied in Munoz' favor. This resulted in Munoz' breath test's being below the legal limit. The district court affirmed the county court's judgment. The State subsequently filed with this court an application for leave to docket error proceedings, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). We granted the application, and this appeal ensued. We find that the county court erred in finding that title 177 of the Nebraska Administrative Code

should be considered substantive evidence of a margin of error for the Intoxilyzer, and the State's exception is sustained.

## II. BACKGROUND

On April 29, 2000, at approximately 1 a.m., Munoz was stopped by Officer Greg Kunz of the LaVista Police Department. Munoz was initially stopped for not having license plates on his vehicle. Officer Kunz determined from Munoz' driver's license that Munoz had failed to update his license to reflect his address in LaVista, and Officer Kunz proceeded to issue a "fix-it" ticket instructing Munoz to update his license. When Officer Kunz returned to Munoz' vehicle with the ticket, Officer Kunz "detected an odor of intoxicants coming from the vehicle."

Officer Kunz instructed Munoz to perform field sobriety tests. Officer Kunz also administered a preliminary breath test. Based on Officer Kunz' experience, training, and personal observations of Munoz, Officer Kunz formed the opinion that Munoz was impaired and was operating a motor vehicle while under the influence of alcohol. As a result, Officer Kunz placed Munoz under arrest.

After the arrest, Munoz was transported to the Sarpy County jail for booking and further testing. At that location, an Intoxilyzer test was administered. There was evidence presented at trial concerning whether the provisions of title 177 of the Nebraska Administrative Code were complied with regarding the necessary requirements for administration of an Intoxilyzer test. There is no issue raised on appeal concerning this compliance. The Intoxilyzer test administered to Munoz revealed a digital reading of "0.103 of a gram of alcohol per 210 liters of breath."

At the conclusion of the trial to the county court, the court indicated that "it appears as though . . . built within the calibration of this machine of the Intoxilyzer 5000 is a ten percent standard of deviation which means that as long as the machine is working within a 10 percent range, any test result which is given is deemed to be acceptable." Based on the county court's reading of the calibration provisions of title 177, it concluded that Munoz was entitled to have the alleged 10-percent standard of deviation applied in his favor, which would cause his breath test results to fall below the then legal limit for intoxication. The county court thus found Munoz not guilty.

On appeal, the district court affirmed. In its order, the district court stated the Nebraska Supreme Court has held that "where there is a margin of error in a chemical test for alcohol, the results of the test must be adjusted and the benefit given to the Defendant," citing *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997), and *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). The district court further stated that *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000), limited that holding to the extent that a margin of error is not automatically applied. Nonetheless, the district court found no error in the county court's adjustment of Munoz' test result by 10 percent and affirmed the finding that Munoz was not guilty. This error proceeding followed.

## III. ASSIGNMENT OF ERROR

The State's assignment of error is as follows: "The District Court erred in its finding that [t]itle 177 of the Nebraska Administrative Code is evidence of a permissible [margin of] error of 10% of the Intoxilyzer result which must be granted to the Defendant."

## IV. ANALYSIS

### 1. Scope and Purpose of Review

The instant appeal is before the court as an error proceeding filed by the county attorney pursuant to § 29-2315.01, which states:

> The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. . . . The county attorney shall then present such application to the appellate court within thirty days from the date of the final order.

[1] The scope and purpose of appellate review in error proceedings are defined in Neb. Rev. Stat. § 29-2316 (Reissue 1995). The purpose of the review is to provide an authoritative exposition of the law to serve as precedent in future cases. *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000); *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

2. MARGIN OF ERROR PRECEDENTS

At issue in this appeal is whether title 177 of the Nebraska Administrative Code, when received into evidence by the trial court, should serve as substantive evidence of the margin of error for the Intoxilyzer. The issue of applying a margin of error or margin of tolerance to blood or breath test results has been the subject of a line of appellate cases in this state dating back to 1978. Although none of those cases specifically address the issue presented in the instant case, the development of this area of the law is relevant to answering the issue presented.

In *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978), the State's chemist testified during cross-examination that the testing used in that case was accurate to within five-thousandths of 1 percent. Applying the margin of error to the defendant's test results caused those results to fall below the .10 level that was required for a finding of intoxication. The Nebraska Supreme Court held that where a driving under the influence conviction is based solely on test results, the test must show "outside of any error or tolerance inherent in the testing process" that the prohibited percent of alcohol was present in the defendant. *Id.* at 711, 271 N.W.2d at 840. Accordingly, the court reversed the conviction.

In *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), *overruled in part, State v. Baue, supra*, the Supreme Court was presented with a defendant with a breath test result of .164. The defendant offered evidence regarding the margin of error for Intoxilyzer results, and the State offered nothing to rebut the defendant's evidence. The Supreme Court held that based on the testimony of the defendant's expert, the .164 test result had to be lowered to the bottom level of the margin of error, which was .086. The court affirmed the conviction, however, based on other evidence that the defendant was intoxicated.

In *State v. Hvistendahl*, 225 Neb. 315, 405 N.W.2d 273 (1987), the Supreme Court was presented with an Intoxilyzer result of .133. Both the State and the defendant presented expert testimony concerning the margin of error. The Supreme Court held that when there is conflicting testimony concerning the margin of error, the question is for the trier of fact to resolve. The court further noted that the trial court was not bound to accept the defendant's expert testimony anyway, as trial courts

are not bound to accept an expert's testimony. To this extent, the holding appears to contradict and implicitly overrule the Supreme Court's findings in *State v. Burling, supra*, where the defendant had presented unrefuted expert testimony and the court indicated that the test results had to be altered by the margin of error testified to by that expert.

In *State v. Babcock*, 227 Neb. 649, 419 N.W.2d 527 (1988), the defendant argued that the Supreme Court's holding in *State v. Burling, supra*, required the trial court to always reduce test results by the margin of error specified in that opinion. The *Babcock* court clarified that each case depends on its own credible evidence. Because the defendant had not presented any evidence concerning the margin of error, the court found sufficient evidence to affirm his conviction.

The issue does not appear to have been before the Supreme Court again until 1997, when the court decided *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). In *State v. Adams*, the State's expert testified that the defendant's breath test, when allowing for the margin of error for the testing machine, was between .084 and .109. The testimony indicated that the actual readout was .097. The Supreme Court held that prior opinions had held that "when there is a margin of error in a chemical test for alcohol, the test result must be adjusted and the defendant given the benefit of the adjusted reading." *Id.* at 467, 558 N.W.2d at 302. The court held that the State had failed to prove, as a matter of law, that the defendant was intoxicated.

[2] In *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000), the Supreme Court attempted to clarify this issue and the court's prior, seemingly inconsistent, holdings. The defendant's Intoxilyzer readout was .11. At a pretrial hearing, the defendant presented the testimony of an expert who testified that the margin of error for the Intoxilyzer was plus or minus .03 and the State did not present any contrary evidence. The State did present refuting evidence at trial. The court recognized the above-quoted statement in *State v. Adams, supra*, that the test *must* be adjusted where there is a margin of error. The court held that the rationale underlying the earlier opinions was that "where the State is able to prove alcohol content only within a specified range, the lower point of which falls below the statutory value," the State has

failed to meet its burden of proof. *State v. Baue*, 258 Neb. at 978, 607 N.W.2d at 200. The court held that the same is not true if the State makes a prima facie showing regarding the test and the defendant rebuts with unrefuted expert testimony. The *Baue* court overruled *State v. Burling, supra*, to the extent it was contrary to this holding.

### 3. Application

In the present case, the county court found that language in title 177 of the Nebraska Administrative Code, indicating a test result is considered acceptable so long as the testing device calibration is verified to be accurate within plus or minus .010 of the target value of the simulator solution, should be considered evidence that the Intoxilyzer has a margin of error of 10 percent. See 177 Neb. Admin. Code, ch.1, § 007.05D8 (1998). We disagree.

[3] Title 177 of the Nebraska Administrative Code contains the rules and regulations relating to the analyses for the determination of the alcohol content in blood, breath, or urine, as adopted by the Nebraska Department of Health and Human Services Regulation and Licensure (Department). A thorough review of title 177 indicates that nowhere do the regulations purport to convey any particular margin of error for testing devices, except to the extent the Department has made determinations concerning how accurate particular devices must be calibrated for test results to be considered acceptable. There is no evidence, expert or otherwise, in the record before us to indicate that the calibration requirements set forth by the Department are in any way related to the actual margin of error for the testing devices. While these requirements may be related to the actual margin of error, the record before us contains no evidence to support this critical and far-reaching conclusion.

There is nothing in title 177 to indicate what, if any, correlation there is between these standards for calibration and operation adopted by the Department and the actual margin of error for the testing devices. For example, if the Department would choose to amend the regulations and to require the testing device calibration to be verified to be accurate within plus or minus .005, such a change would not necessarily bear any correlation to the actual margin of error for the testing device, which could

be greater or less than the calibration requirements espoused in the regulations. Indeed, the evidence in the present case indicates that the machine's calibration tests indicated a degree of deviation that was substantially lower than the .010 permitted by title 177.

A review of the record presented in the instant case indicates no evidence whatsoever was presented, either by the State or by the defendant, concerning the margin of error for the Intoxilyzer. As noted, title 177 does not contain any such evidence. The State's exception is therefore sustained.

Finally, we note that the district court's order affirming the county court's finding that the State had failed to prove Munoz' guilt also indicates that "[w]hen competent evidence of a margin of error is presented in the State's case or when the [d]efendant presents a margin of error in it's [sic] case, which is unrebutted, it appears to this court the margin of error is then automatically applied to the test of the [d]efendant." As we indicated in our discussion above, the Supreme Court has specifically held to the contrary concerning unrefuted expert evidence presented by a defendant regarding the margin of error for an Intoxilyzer. Rather, the rule is that when the State presents evidence indicating that the test results are accurate only within a specified range, the lower portion of which would place the defendant's test results outside the range prohibited by law, the State has failed to meet its burden of proof. When the State has proven a prima facie case and the defendant then attacks the State's case by presenting unrefuted expert testimony, the trial court is free, as in other cases, to either credit or not credit the expert's opinion.

### 4. Effect of Ruling

As noted, this is an appeal by a county attorney pursuant to § 29-2315.01. Section 29-2316 describes the effect of this court's ruling pursuant to § 29-2315.01:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any

similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state.

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects "'"an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."'" *State v. Falcon*, 260 Neb. 119, 124-25, 615 N.W.2d 436, 440 (2000) (quoting *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986), and *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). Under Neb. Const. art. I, & 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. *State v. Falcon, supra.*

In the instant case, jeopardy has attached because the county court heard evidence as to the guilt or innocence of Munoz. Therefore, under § 29-2316, because jeopardy has attached, our decision will not affect the judgment of the county court or district court herein. It will determine the law to govern in any similar case which may be pending at the time this decision is rendered or which may thereafter arise in the state. See § 29-2316.

## V. CONCLUSION

We find the lower court erred in finding that title 177 of the Nebraska Administrative Code should be considered substantive evidence of the margin of error for an Intoxilyzer such that a defendant's test results should be automatically adjusted according to the calibration standards set forth in title 177. Accordingly, although Munoz stands acquitted, the State's exception is sustained.

EXCEPTION SUSTAINED.

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STATE OF NEBRASKA, APPELLEE, V.
STEVEN R. BOCKMAN, APPELLANT.
648 N.W.2d 786

Filed July 2, 2002. No. A-01-887.

1. **Constitutional Law.** The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract.

2. **Search Warrants: Affidavits.** Affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion, and technical requirements of elaborate specificity once extracted under common law pleadings have no proper place in this area.
3. **Search Warrants: Affidavits: Probable Cause.** The supporting affidavit must provide the judicial officer with sufficient reliable information to evaluate probable cause, and in the course of such evaluation, the judicial officer is entitled to draw reasonable inferences from the material in the affidavit.
4. **Police Officers and Sheriffs: Presumptions.** Statements by law enforcement officials based upon personal observation or upon the observation of fellow officials participating in the same investigation are entitled to a presumption of reliability.
5. **Search Warrants: Affidavits: Probable Cause.** Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the firsthand knowledge of the officer who executes the affidavit.
6. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.
7. **Search Warrants: Affidavits: Probable Cause.** The judicial officer who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
8. **Rules of Evidence: Other Acts.** The admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.
9. **Trial: Words and Phrases.** 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.
10. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is a rule of inclusion, rather than exclusion, and it permits the use of evidence of prior activity except to prove the character of a person in order to prove that the person acted in conformity with that character.
11. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of evidence of other acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
12. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.

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

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

Steven R. Bockman appeals his convictions for burglary and first degree sexual assault. On appeal, Bockman challenges the district court's ruling denying a motion to suppress DNA evidence, the district court's ruling allowing the State to introduce evidence of an attempted burglary charge to which Bockman had previously pled guilty, and the sufficiency of the evidence to support the convictions. We find the district court had a substantial basis for finding probable cause existed to issue a warrant for the DNA evidence to be gathered, and the court did not err in denying the motion to suppress. We find no abuse of discretion in the court's ruling that the State could introduce evidence of Bockman's prior conviction for attempted burglary. We also find sufficient evidence to support Bockman's convictions. Accordingly, we affirm the judgment of the district court.

## II. BACKGROUND

On November 7, 2000, an information was filed charging Bockman with burglary and first degree sexual assault and alleging the events occurred on or about June 10, 1998. Amended informations containing the same charges were filed on February 26 and March 1, 2001. The alleged events occurred in Grand Island, Nebraska.

On December 6, 2000, the State filed a notice of intent to offer evidence of Bockman's "prior 'bad acts' from 1998 crimes which were not charged and one prior conviction of attempted burglary." The State indicated the evidence would be offered for purposes of showing intent, plan, motive, and opportunity.

On February 28, 2001, Bockman filed three motions to suppress. Bockman sought suppression of statements, physical evidence collected during the execution of a search warrant, and

DNA evidence obtained as a result of a court order. The district court held hearings on the State's motion for admission of Bockman's other bad acts and Bockman's motions to suppress on March 7 and 16.

On March 19, 2001, the court made a journal entry reflecting that the court was granting Bockman's motions to suppress statements and physical evidence collected during the execution of a search warrant. The court made an additional journal entry denying Bockman's motion to suppress DNA evidence and another journal entry ordering that the State could present evidence of Bockman's plea to an unrelated charge of attempted burglary and evidence of the circumstances of the other case. The court denied the State's motion to present evidence of any other bad acts.

### 1. DNA Evidence

On March 7, 2001, the court heard Bockman's motion to suppress DNA evidence. At the hearing, the only evidence presented by the State in support of the admission of the DNA evidence was an exhibit which contained the application, supporting affidavit, and subsequent order of the court granting the State's application to collect DNA evidence. The court, in ruling on the motion to suppress, specifically excluded three paragraphs of the affidavit because the paragraphs referenced physical evidence collected during the execution of a search warrant, which evidence the court separately held should be suppressed.

The remainder of the affidavit includes assertions that the affiant is a police officer who was assigned to investigate a burglary and first degree sexual assault occurring on or about June 10, 1998, assertions that the affiant personally spoke with the victim of the burglary and sexual assault, details from the affiant's conversation with the victim, assertions concerning the results of "[t]he investigation by officers of the Grand Island Police Department," and other factual assertions that do not specifically indicate their source or foundation.

For example, one assertion is that "[t]wo weeks prior [to June 10, 1998], D.L. [the victim] had come hame [sic] and found the same basement screen off and the window to her basement bedroom open." Additional assertions are that Bockman was arrested on April 7 for a burglary, that Bockman was found hiding

in an apartment shower, that Bockman advised officers that he had been looking for money, and that Bockman was subsequently convicted and sentenced on charges of criminal trespass and attempted theft. Another assertion is that Bockman was also convicted of attempted burglary for a July 2 incident, in which Bockman had stolen items including women's underwear and personal photos, had entered a house through a window, and had other stolen items in his possession. Further assertions are that Bockman had been arrested on April 14 for disturbing the peace when he had been "allegedly looking into the window of a bedroom" and that Bockman was also a suspect in other cases of "window peeking."

The affidavit also contains assertions that the investigation by Grand Island police officers revealed that the perpetrator of the burglary and sexual assault at issue had entered the victim's residence by removing a screen and entering through a basement window, that officers located footprints in the alley behind the victim's home, and that testing by the state criminalistics laboratory revealed a boot worn by Bockman showed "some correspondence in design and physical size" to the footprints. The details of the burglary and sexual assault at issue indicate that the victim was asleep on a couch in her home when she was awakened by the sound of someone in her home and that the intruder placed a blanket over the victim's head and sexually assaulted her.

Based on the affidavit, the district court filed an order on June 28, 1999, finding that Bockman should be compelled to provide the requested evidence of blood, hair, and saliva samples. In Bockman's motion to suppress this evidence, he asserted that the affidavit contained insufficient probable cause. On March 19, 2001, the district court overruled the motion to suppress this DNA evidence. In so ruling, the court found that the assertions concerning the footprints and Bockman's boot, the similar mode of entry in both the July 2, 1998, crime and the present case, and the "sexual nature" of the items stolen on July 2 established probable cause that Bockman committed the crimes under investigation.

### 2. Other Bad Acts Evidence

On March 7 and 16, 2001, the court heard the State's motion for admission of evidence of other crimes allegedly committed

by Bockman. As noted above, the motion filed by the State indicated that the evidence was being offered for purposes of showing intent, plan, motive, and opportunity. Further, at the hearing on the State's motion, the State indicated the evidence was also being offered for purposes of showing identity.

During the course of the hearing, the State presented evidence concerning several other crimes in which Bockman was allegedly involved. The crimes were largely burglaries involving theft of property, and none involved a sexual assault. The court ultimately held that only one of the other bad acts would be admissible, an attempted burglary conviction arising out of events occurring on or about July 2, 1998, in which the victim was identified as Nancy Gonzalez.

During the hearing, Gonzalez testified she had lived alone at 2512 West First Street in Grand Island in July 1998. Gonzalez indicated she returned to her home in the early morning hours of July 3 and found a window open. After searching the house to determine if her valuables were missing, Gonzalez reported that "nothing significant" was missing. Grand Island police officers later arrested Bockman at a separate location and found in his possession a pair of silk underwear belonging to Gonzalez, as well as some keys, some paperwork, and a photograph which had been taken from Gonzalez' home.

During the hearing, the victim in the present case also testified. She indicated she lived at 2414 West First Street in Grand Island in June 1998. In the early morning hours of June 11, she was sleeping on her couch and was awakened by the sound of somebody coming up the stairs from her basement. She indicated she was sexually assaulted by the intruder. She further testified that although no items were stolen from her, she determined later that morning that some lingerie appeared to have been moved, as well as a pair of handcuffs she had received as a gag gift. She further testified a screen had been "misplaced" from a basement window.

After the conclusion of the hearing, the court filed a journal entry. The court found the State would "be allowed to present evidence of prior acts for the limited purpose of identity only to include an incident involving victim Nancy Gonzales [sic] occurring July 2, 1998." As such, the court did not allow the

State to present evidence of other alleged bad acts or to present evidence for a purpose other than to show identity.

### 3. Conviction and Sentence

On March 23, 2001, a jury returned a verdict of guilty on both counts. On July 3, the court sentenced Bockman to consecutive terms of 3 to 5 years' imprisonment for the burglary conviction and 16 to 20 years' imprisonment for the first degree sexual assault conviction. Bockman has appealed.

## III. ASSIGNMENTS OF ERROR

On appeal, Bockman has assigned three errors. First, Bockman asserts the district court erred in overruling his motion to suppress DNA evidence. Second, Bockman asserts the district court erred in allowing the State to introduce evidence of the Gonzalez incident to show identity. Third, Bockman asserts the evidence was not sufficient to support his convictions.

## IV. ANALYSIS

### 1. Suppression of DNA Evidence

First, Bockman asserts the district court erred in overruling his motion to suppress DNA evidence. In so asserting, Bockman challenges the sufficiency of the affidavit upon which the warrant for collection of the DNA evidence was issued. Bockman argues the affidavit was insufficient because the assertions in the affidavit include information that was not alleged to have been within the personal knowledge of the swearing officer and because no further basis for crediting the information was provided. Because we find that a reasonable interpretation of the affidavit compels the conclusion that the information contained therein emanated from either the personal observations of the affiant or from information obtained by fellow officers engaged in a common investigation, we find no merit to Bockman's assertion.

[1-3] In determining the sufficiency of the affidavit in the present case,

> we are mindful that "the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract . . . [A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. . . . Technical requirements

> of elaborate specificity once extracted under common law pleadings have no proper place in this area."

*U.S. v. May*, 819 F.2d 531, 535 (5th Cir. 1987) (quoting *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)). The supporting affidavit must, of course, provide the judicial officer with sufficient reliable information to evaluate probable cause, and in the course of such evaluation, the judicial officer is entitled to draw reasonable inferences from the material in the affidavit. See *id.*

The affidavit in the present case specifically indicated that the affiant "was assigned to investigate" a burglary and a first degree sexual assault. The affidavit further indicated that there was an "investigation by officers of the Grand Island Police Department." The affiant set forth the information he personally gathered from interviewing the victim and further set forth information revealed by "[t]he investigation." A commonsense and realistic reading of the affidavit indicates that the information in the affidavit either is the personal knowledge of the affiant or was learned from other officers engaged in the common investigation of the burglary and first degree sexual assault of D.L.

[4,5] It has long been held that statements by law enforcement officials based upon personal observation or upon the observation of fellow officials participating in the same investigation are entitled to a presumption of reliability. *United States v. Reed*, 700 F.2d 638 (11th Cir. 1983). See, also, *United States v. Ventresca, supra*. The Nebraska Supreme Court has similarly held that observations by fellow officers engaged in a common investigation are a reliable basis for a search warrant. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980). Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the first-hand knowledge of the officer who executes the affidavit. *Id.* In general, no special showing of reliability is necessary where the affidavit indicates the source of information to be a law enforcement officer. See 2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 3.5(a) (3d ed. 1996). As such, it is sufficient if the affidavit recites at the outset, or if it is clear from reading the affidavit as a whole, that it is based in part upon information obtained from other law

enforcement officers. *United States v. Kirk*, 781 F.2d 1498 (11th Cir. 1986).

Although we recognize that the affidavit at issue is not as clear or as artfully drafted as would be ideal, the U.S. Supreme Court has clearly indicated that such inartfulness should not result in a warrant's being invalidated. See *United States v. Ventresca, supra*. The U.S. Supreme Court recognized that affidavits for search warrants are often drafted by nonlawyers in the midst and haste of a criminal investigation. *Id.* Further, the U.S. Supreme Court has recognized that a grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. *Id.* As such, in evaluating the sufficiency of the warrant, the U.S. Supreme Court's dictates require an evaluation that is responsive both to the needs of individual liberty and to the rights of the community. *Id.*

The affidavit could have more clearly indicated what information was personally obtained or observed by the affiant and what information was personally observed or gathered by particular officers involved in the investigation. Nonetheless, a reasonable person reading the affidavit would be compelled to conclude that the information contained in the affidavit was acquired in the course of the common investigation. See *United States v. Reed, supra*. As such, a reasonable interpretation of the affidavit indicates that the issuing judge had sufficient reliable information to make a finding of probable cause.

[6,7] In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *State v. Stickelman, supra*. In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, the Nebraska Supreme Court has adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). The judicial officer who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of

knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The question is whether the judicial officer had a substantial basis for finding that the affidavit established probable cause. *Id.*

In the present case, as noted, the affidavit revealed information discovered by law enforcement officers during the investigation. This information suggested that a burglary and first degree sexual assault occurred at D.L.'s home; that the method of entry was similar to Bockman's method of entry in unrelated burglary offenses; that footprints bearing some correspondence to boots worn by Bockman were found outside D.L.'s home; that Bockman had previously stolen items of a personal nature, including women's underwear, from a previous victim; and that the present offense and Bockman's other offenses occurred in close physical proximity and time to each other. Our review of the totality of the circumstances indicates that the issuing judge had a substantial basis for finding probable cause. Bockman's assigned error concerning the sufficiency of the affidavit is without merit.

### 2. Uncharged Bad Acts Evidence

Bockman next alleges the district court erred in allowing the State to introduce evidence of Bockman's prior conviction for attempted burglary of Gonzalez. The court allowed the State to introduce evidence of the other bad act for the purpose of showing identity. Bockman asserts the evidence was not relevant because the other bad act was not sufficiently similar to the present alleged offense. We disagree.

[8,9] The admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Carter*,

246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman, supra.* 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. Carter, supra.*

[10] Rule 404(2) is a rule of inclusion, rather than exclusion, and it permits the use of evidence of prior activity except to prove the character of a person in order to prove that the person acted in conformity with that character. *State v. Freeman, supra.* See *State v. Carter, supra.* Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of acceptable uses recited in the rule is illustrative and not intended to be exclusive. *State v. Carter, supra.* However, evidence which is otherwise admissible under rule 404(2) may be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), if its probative value is substantially outweighed by other considerations. *State v. Carter, supra.*

[11,12] An appellate court reviews the admission of evidence of other acts under rule 404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Freeman, supra*; *State v. Carter, supra.* See, also, *State v. Sanchez, supra.* The Nebraska Supreme Court has further held that the proponent of rule 404(2) evidence must state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received. *State v. Sanchez, supra.* Any limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received. *Id.*

Bockman specifically asserts the other crimes evidence in the present case was not relevant for a proper purpose. Bockman further asserts any probative value of the evidence did not substantially outweigh the potentially prejudicial effect of the evidence. Bockman does not dispute that the trial court did give a limiting instruction specifically informing the jury the other crimes evidence was being received solely for purposes of showing identity.

Gonzalez testified concerning an attempted burglary for which Bockman had previously been convicted. When comparing the factual context of the attempted burglary of Gonzalez with the factual context of the burglary and first degree sexual assault of D.L., the following similarities are apparent:

In both situations, the evidence indicates the victim was a woman. Both crimes occurred close in proximity to each other, the attempted burglary of Gonzalez occurring at 2512 West First Street in Grand Island and the burglary and first degree sexual assault of D.L. occurring at 2414 West First Street in Grand Island. Both crimes occurred close in time to each other, the attempted burglary of Gonzalez occurring on or about July 3, 1998, and the burglary and first degree sexual assault of D.L. occurring on or about June 11. Both crimes occurred during the early morning hours. The means of entry for both crimes was through a window. The attempted burglary of Gonzalez involved Bockman's removing a pair of Gonzalez' silk underwear from Gonzalez' home, and the burglary of D.L. involved some lingerie allegedly being moved, as well as a pair of handcuffs D.L. had received as a gag gift.

We do not find any abuse of discretion in the district court's conclusion that the evidence of Bockman's attempted burglary of Gonzalez was relevant and admissible for the proper purpose of demonstrating identity. Concededly, some differences between the two crimes do exist. However, an absolute identity in every detail is not and cannot be expected. See *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). The question is whether the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *Id.* If so, the evidence

may be admitted, and any dissimilarities merely go to the weight of the evidence. *Id.* As such, we find Bockman's assertions that the evidence was not relevant and was not admissible for a proper purpose to be without merit.

The question of whether the evidence was unfairly prejudicial hinges on whether the court properly instructed the jury concerning the evidence's limited use. *State v. Carter, supra.* See *State v. Freeman, supra.* When Gonzalez testified during the trial, the court gave the following limiting instruction to the jury:

> Members of the jury, the evidence regarding the incident which occurred on July 2nd and 3rd, 1998, involving Nancy Gonzalez shall be admitted for the limited purpose of proof of identity. You are not to consider it to prove the character of the defendant and that he acted in conformity with that character.

Additionally, at the conclusion of the trial, the court instructed the jury as follows:

> The evidence that the defendant may have committed a burglary on July 2nd or 3rd, 1998 at the home of Nancy Gonzales [sic] has been received only for the limited purpose of helping you to decide identity, that is, whether the defendant was the person who committed the Burglary and First Degree Sexual Assault charged. You must consider the evidence for that limited purpose and for no other. You may not consider such evidence to prove the character of the defendant and that he acted in conformity therewith.

The trial court's instruction, both at the time the evidence was received and at the conclusion of the trial, clearly directed the jury as to the limited use of the evidence. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). The evidence bears on the issue of identity, and that issue is what the court directed the jury to consider the evidence for, so it cannot be said that the evidence had a tendency to suggest a decision on an improper basis. See *id.* Therefore, we also find Bockman's assertion that the probative value of the evidence did not substantially outweigh any potential prejudicial effect to be without merit. The court did not commit an abuse of discretion in admitting the testimony of Bockman's attempted burglary of Gonzalez.

### 3. Sufficiency of Evidence

Bockman's final assertion of error is that the evidence was not sufficient to support a conviction for burglary and first degree sexual assault. Bockman argues the evidence was insufficient because the DNA evidence and the other crimes evidence were both inadmissible and because the remaining evidence was inadequate to support the guilty verdict. Inasmuch as we have concluded above that neither the DNA evidence nor the other crimes evidence was inadmissible, Bockman's assertion concerning the sufficiency of the evidence is also without merit.

## V. CONCLUSION

We find no reversible error in the trial court's rulings overruling Bockman's motion to suppress DNA evidence or allowing the State to introduce evidence of another crime committed by Bockman. We further find the evidence sufficient to support Bockman's guilty verdicts. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
CONNIE S. HUTTON, APPELLANT.
648 N.W.2d 322

Filed July 9, 2002. No. A-01-530.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** Neb. Rev. Stat. § 29-1207(1) (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
3. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged.
4. ____. The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
5. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of

a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.

6. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
7. **Speedy Trial: Complaints: Time.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
8. **Speedy Trial: Indictments and Informations: Time.** It is well established that the statutory 6-month speedy trial period commences to run from the date the information is filed and not from the time the complaint is filed.
9. ____: ____: ____. The time chargeable against the State under Nebraska's speedy trial act commences with the filing of an initial information against a defendant; the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and the refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.
10. ____: ____: ____. When the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial act.
11. **Speedy Trial: Indictments and Informations: Complaints: Time.** An amended complaint or information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in Neb. Rev. Stat. § 29-1207 (Reissue 1995).
12. ____: ____: ____: ____. If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of Nebraska's speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed.

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

Thomas P. Strigenz for appellant.

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

HANNON, INBODY, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Connie S. Hutton appeals the decision of the Sarpy County District Court denying Hutton's application for discharge that was based upon an alleged violation of her statutory speedy trial rights. Pursuant to authority granted this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2000), this case was ordered submitted without oral argument. For the reasons set forth herein, we affirm.

## BACKGROUND

Hutton was originally charged by criminal complaint in Sarpy County Court on July 11, 2000, with a Class IV felony, theft by shoplifting, third offense. At a preliminary hearing held on August 17, the State amended the felony complaint to a Class I misdemeanor, charging theft by shoplifting, second offense. Trial was set for October 23. On October 23, the State motioned the county court for leave to again amend the complaint and charge Hutton with the felony offense as originally charged. The Court granted the State's motion, and on the same day, Hutton entered a plea of not guilty. Also on October 23, the case was bound over to district court, and on October 31, an information was filed in Sarpy County District Court. On November 17, Hutton pled not guilty to the charge of theft by shoplifting, third offense, a Class IV felony.

On January 12, 2001, Hutton waived her right to a jury trial which had been scheduled for January 29, and the case was set for a bench trial on February 14. On February 9, Hutton filed an application for discharge alleging that her constitutional and statutory rights to a speedy trial had been violated. The February 14 trial date was continued, and instead, Hutton's discharge hearing was heard on that date. The district court took Hutton's application under advisement and subsequently overruled the application on April 4. On April 30, Hutton filed a second application for discharge, which was again denied by the district court on May 2. Hutton now appeals from the May 2 order denying her second application for discharge.

## ASSIGNMENT OF ERROR

On appeal, Hutton alleges that the district court erred in failing to grant her application for discharge that was based on a

violation of her statutory right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1995). Hutton does not argue a violation of her constitutional right to a speedy trial.

## STANDARD OF REVIEW

[1] Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

## ANALYSIS

Hutton's sole assignment of error on appeal is that the district court erred in failing to grant her application for discharge that was based on a violation of her statutory rights to a speedy trial under § 29-1207.

[2-5] Section 29-1207(1) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. *Knudtson, supra.* If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged. *Id.* The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *Id.* To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *Knudtson, supra.*

[6,7] Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint. *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). In cases *commenced and tried in county court*, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. *Id.*

[8] It is also well established that the statutory 6-month speedy trial period commences to run from the date the information is filed and not from the time the complaint is filed. The Nebraska Supreme Court in *State v. Boslau*, 258 Neb. 39, 43, 601 N.W.2d 769, 772-73 (1999), although analyzing Nebraska's speedy trial act in relation to direct informations filed initially in

district court, set forth the procedure and application of the act in cases similar to the one at hand as follows:

> Ordinarily, when an individual is charged with the commission of a felony such as criminal mischief, a complaint is filed in county court. See, generally, Neb. Rev. Stat. § 29-110 (Reissue 1995). Thereafter, a preliminary hearing is held to determine if probable cause exists to charge the defendant with the commission of the crime or crimes as alleged in the complaint. Neb. Rev. Stat. § 29-504 (Reissue 1995). If probable cause is found, the defendant is bound over to the district court, where he or she is held unless bail is set and posted. Neb. Rev. Stat. § 29-506 (Reissue 1995). Once the defendant is bound over to district court, the State files an information with the district court, setting forth the charge or charges against the defendant. Under the foregoing scenario, pursuant to § 29-1207, *the statutory 6-month speedy trial period begins to run upon the filing of the information in district court* which is subsequent to the preliminary hearing. [Neb. Rev. Stat.] § 29-1607 [(Reissue 1995)].

(Emphasis supplied.)

In the instant case, the plain language of the statute compels us to conclude that the 6-month speedy trial period did not commence to run until the information was filed on October 31, 2000.

Hutton argues that the time when the amended complaint charging her with a misdemeanor was pending in the county court, beginning August 17, 2000, should be tacked on in calculating the 6-month period.

[9,10] The time chargeable against the State under Nebraska's speedy trial act commences with the filing of an initial information against a defendant; the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and the refiling of an information charging the defendant with the *same crime* alleged in the previous, but dismissed, information. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992). When the State dismisses an information against a defendant and refiles another information charging the defendant with the *same offense* alleged in the previous information, the periods during which the informations are pending for

the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial act. *Id.*

[11] The Supreme Court has recently enunciated a new rule in *State v. French*, 262 Neb. 664, 670, 633 N.W.2d 908, 914 (2001), with regard to charges of different crimes, as follows:

> We hold that an amended complaint or information which charges a *different crime*, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in § 29-1207. See *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

(Emphasis supplied).

[12] In determining whether the amended complaint or information charges the same crime or a totally different crime, the Supreme Court has stated:

> If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed.

*State v. French*, 262 Neb. at 670, 633 N.W.2d at 914.

While the previous complaints in this action all alleged the same crime, theft by shoplifting, as that alleged in the information, it does not follow that the time during which the amended complaint was pending should be tacked onto the speedy trial period as argued by Hutton. The plain language of § 29-1207 makes it clear that the 6-month period begins to run upon the filing of the information in district court. The time when an underlying complaint is pending in county court before the defendant is bound over to district court is not counted. See *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). In *Trammell, supra*, the original complaint was filed September 10, 1987. An information was subsequently filed on November 3, which was later dismissed on February 2, 1988. On June 15, 1989, a second

complaint was filed, followed by a second information filed on November 20, charging the same crimes as the first information. Trammell argued that the interval between the filing of the second complaint and the filing of the second information should be included in determining when his 6-month speedy trial period commenced. The court disagreed and counted only the periods during which the two informations were pending.

In the instant case, according to *Trammell, supra*, Hutton's speedy trial time should be calculated from the date on which the information was filed in Sarpy County District Court (October 31, 2000), and not the date on which the State amended its misdemeanor complaint back to the original felony charge (October 23) or the date the original complaint was amended to a misdemeanor offense (August 17).

With regard to the periods of time that are excluded in computing the time for trial, § 29-1207(4) states in part that the time from filing until final disposition of pretrial motions of the defendant shall be excluded. Thus, the periods of time that are excluded and not charged against the State in computing Hutton's time for trial under § 29-1207(4) are as follows: (1) the 54 days between the date Hutton filed her first application for discharge (February 9, 2001) and the date the district court overruled her application (April 4), and (2) the 2 days between the date Hutton filed her second application for discharge (April 30) and the date it was overruled (May 2). Therefore, the period of time between October 31, 2000, and May 2, 2001, is 6 months and 2 days. When the 56 days that are excludable under § 29-1207(4) are subtracted, it is clear that Hutton's statutory right to a speedy trial was not violated.

## CONCLUSION

We conclude that Hutton's right to a speedy trial has not been violated and that the district court's determination that the State was within the 6-month limit provided for in § 29-1207(1) was not clearly erroneous.

AFFIRMED.

# CAROL COFFEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD COFFEY, DECEASED, APPELLEE, V. WALDINGER CORPORATION, APPELLANT.

649 N.W.2d 197

Filed July 9, 2002. No. A-01-1120.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Proof: Words and Phrases.** The phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1998) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
5. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 1998), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
6. **Workers' Compensation.** Injuries sustained by an employee while going to and from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

David S. Houghton and William G. Garbina, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Michael P. Dowd, of Dowd & Dowd, for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

CARLSON, Judge.

## INTRODUCTION

Waldinger Corporation (Waldinger) appeals from an award granted to Carol Coffey, personal representative of the estate of Edward Coffey, deceased. This award was entered by a trial judge of the Workers' Compensation Court and affirmed as modified on appeal by a review panel of the Workers' Compensation Court on September 10, 2001. For the reasons set forth below, we affirm.

## BACKGROUND

On January 16, 2001, Carol filed an amended petition, stating that on or about July 17, 2000, Edward was killed in an accident arising in and out of the course of his employment with Waldinger. Carol alleged that Waldinger had notice and knowledge of Edward's accident, injury, and death on July 17. Carol stated that Edward's accident or injury occurred when Edward was traveling from an assigned parking lot to the Waldinger worksite, when he was struck and killed by an automobile. Carol sought death benefits, together with payment of funeral expenses.

On January 25, 2001, Waldinger filed an answer, stating that when Edward was involved in the accident, Edward may not have been at a place where either his duties were being performed or his services required his presence. Waldinger also stated that Edward's accident may not have arisen out of and in the course of his employment, but may have arisen from an independent hazard created by Edward. Waldinger requested that Carol's petition be dismissed.

A hearing was held on March 14, 2001. The following facts are uncontested: In the summer of 2000, construction was taking place on a project called the Omaha World-Herald Freedom Center (World-Herald). A parking garage for the World-Herald project was being built on the east side of 13th Street in downtown Omaha. On the west side of 13th Street, a new building was being built for the printing of newspapers. Peter Kiewit and Sons, Inc. (Kiewit), was the general contractor on the World-Herald project, and Waldinger was one of the subcontractors. Kiewit fenced an area east of 13th Street and north of the parking garage under construction. This fenced area held some of Waldinger's construction materials. The fenced area also included space for

75 to 100 automobiles. This fenced parking lot was not open to the public, but was restricted to onsite workers, the number of which was as many as 250 in the summer of 2000.

On July 17, 2000, Edward was employed as a plumber by Waldinger. On that date, Edward parked his vehicle in the fenced lot and was crossing 13th Street from east to west in order to reach one of Waldinger's trailers and report to work. At approximately 5:32 a.m., Edward was struck and killed by a motor vehicle driving northbound on 13th Street. Edward was scheduled to start work at 6 a.m.

Becky Smith, a plumber, testified that she was working for Waldinger at the time of Edward's death. Smith testified that during the summer of 2000, she worked on the World-Herald project. Smith testified that there was no place to park on 13th Street itself. Smith testified that Mike Fruehwald, a foreman with Waldinger, told her to park in the fenced lot. Smith testified that directly across the street from the fenced lot was a Waldinger trailer where employees were required to meet in the morning. Smith testified that commonly, employees who parked in the fenced lot would walk directly across 13th street to gain access to the Waldinger trailers.

Smith testified that the fenced lot was a restricted area and that cars that did not belong in the lot would be towed. Smith testified that to park in the lot, she was required to give Fruehwald the make, model, and license plate number of her vehicle. Smith testified that it was generally difficult to get a parking spot in the fenced lot unless one arrived at work early. Smith stated that it was not unusual for plumbers to arrive at work 15 to 30 minutes early. Smith also testified that besides finding it difficult to find a place to park, she was required to be at work a few minutes early to discuss her job assignment for the day.

On cross-examination, Smith testified that prior to Edward's death, some Waldinger employees parked in locations other than the fenced lot. Smith testified that there was some parking space on 12th Street near the jobsite as well as on various other streets surrounding the World-Herald project. The record shows that Waldinger employees were allowed to park in the fenced lot for free but would not be reimbursed if they paid to park elsewhere.

Cory Pemperton testified that he was a journeyman plumber employed by Waldinger at the time of Edward's death. Pemperton testified that he parked in the fenced lot for a while. Pemperton testified that the fenced lot was the designated parking place, but that at times, there was no room in the lot for him to park. Pemperton testified that Fruehwald directed him to park in the fenced lot and that when he parked in the fenced lot, he walked directly across the street to the Waldinger trailers. Pemperton further testified that there was an underground tunnel leading from the fenced lot to the other side of 13th Street, but that this tunnel was inaccessible at the time of Edward's death.

Pemperton testified that there were signs on the outside of the fenced lot indicating that the lot was a restricted area. Specifically, the record shows that a sign on the fence surrounding the lot stated, "construction area" and "unauthorized personnel keep out." Pemperton testified that Waldinger stored materials in the fenced lot and that at various times throughout the day, he would have to cross 13th Street in order to retrieve those materials.

Pemperton testified that he usually arrived at work approximately 15 to 20 minutes early in order to find parking and find out his job assignment for the day. Pemperton testified that although Waldinger did not require its employees to park in the fenced lot, they were encouraged to do so.

Henry Coran, also a journeyman plumber, testified that he was working for Waldinger on the date of Edward's death. Coran testified that when he first came to work, Fruehwald instructed him to park in the fenced lot and asked for a description of his vehicle. Coran testified that if one did not get to work very early, one could not get a space in the fenced lot. Coran testified that he typically arrived at work at 5:30 a.m. Coran testified that he did so to find a decent parking space in the fenced lot. Coran also testified that for 5 or 10 minutes prior to 6 a.m., the workers discussed their job assignments with their foreman.

Two other plumbers, Tom Ricceri and Robert Wonder, testified that they were also working for Waldinger on the World-Herald project at the time of Edward's death. Both gave testimony similar to that of the plumbers who testified before them. Both testified that they were told by Fruehwald to park in the fenced lot and

that they did park in that lot. Ricceri testified that he arrived at work 20 to 25 minutes early, and Wonder testified that he generally arrived anywhere from 15 to 30 minutes early. Both Ricceri and Wonder testified that they had to be at work prior to 6 a.m. to discuss their job duties with their foreman.

Wonder testified that there was a crosswalk located at the intersection of 13th Street and Capitol Avenue. Wonder testified that he could have walked down to Capitol Avenue when he arrived at work, crossed the intersection of 13th Street and Capitol Avenue, and then walked to the Waldinger trailers, but that he did not. Wonder testified that he always walked directly across 13th Street to the work trailers. Wonder testified that he never saw any Waldinger employee walk down to the intersection of 13th Street and Capitol Avenue and cross at the crosswalk.

Daryn Dimmitt testified that he was one of Waldinger's foremen working on the World-Herald project in the summer of 2000. Dimmitt testified that Fruehwald also instructed him to park in the fenced lot. Dimmitt testified that he commonly walked directly across 13th Street to reach the work trailers. Dimmitt testified that he never saw an employee walk a block up 13th Street, cross at Capitol Avenue, and walk back down a block to the work trailers. Dimmitt also testified that he never encouraged Waldinger employees to take the latter route. Dimmitt testified that he instructed Edward to park in the fenced lot. Dimmitt testified that the fenced lot was sponsored by Kiewit.

Dimmitt testified that it was common practice for Waldinger employees to arrive early to work. Dimmitt testified that prior to the usual summer 2000 start time of 6 a.m., he would discuss with the employees who was working where and what materials they required. Dimmitt testified that the employees did not get paid for being on the jobsite prior to 6 a.m. Dimmitt testified that he expected the employees to be at work prior to 6 a.m. and that if they showed up at 6 a.m., they were considered late. Dimmitt testified that he generally arrived at work 15 minutes early.

Fruehwald testified that he is a foreman for Waldinger and supervised the World-Herald project. Fruehwald testified that Kiewit was the general contractor for the World-Herald project and that Kiewit controlled both the project and the worksite.

Fruehwald testified that Waldinger was under Kiewit's control and direction.

Fruehwald testified that generally, Waldinger plumbers were to report to their work trailer at 6 a.m. Fruehwald testified that he did not meet with any of the plumbers prior to 6 a.m., but he could not say whether other foremen spoke to employees about their job assignments prior to 6 a.m.

Fruehwald testified that Waldinger employees were free to park wherever they wanted, including within the fenced lot. Fruehwald testified that he typically told Waldinger employees to park in the fenced lot on their first day of work, with the aim of making it easier for them to find the jobsite. Fruehwald testified that Kiewit passed out parking passes so that if employees continued to park in the fenced lot, Kiewit would know which employees were parking there. Fruehwald testified that that way, if a car had to be moved, the corresponding employee could be contacted. Fruehwald testified that the passes also helped keep nonemployees out of the lot.

Fruehwald testified that at no time did he instruct Waldinger employees not to cross 13th Street from the fenced lot to the work trailers. Fruehwald testified that he himself crossed 13th Street to get to the trailers. Fruehwald also testified that crossing 13th Street was the common route utilized by Waldinger employees to get to work.

Donald Holoubek testified that he is a sheet metal worker employed by Waldinger. Holoubek testified that he worked on the World-Herald project in July 2000. Holoubek testified that while working on the World-Herald project, he was never directed by Waldinger to park in a specific location. Holoubek testified that although he was made aware of available parking in the fenced lot, he usually parked elsewhere.

In an order filed March 21, 2001, the trial court found that Edward's accident arose out of and was in the course and scope of Edward's employment with Waldinger. The trial court also found that Edward was not willfully negligent, causing his own death. The trial court ordered Waldinger to pay Carol $487 per week after July 17, 2000, and to pay Carol funeral expenses totaling $6,766.85. The trial court stated that the weekly payment of $487 should continue for the remainder of Carol's life

unless Carol remarries. In that event, Carol should receive 2 years' indemnity benefits in one lump sum as provided for in Neb. Rev. Stat. § 48-122.01(3) (Cum. Supp. 2000).

Waldinger appealed to the review panel. The review panel held a hearing on August 7, 2001. In an order filed September 10, 2001, the review panel supported the trial court's order except for the award of funeral expenses in the amount of $6,766.85. The review panel stated that Neb. Rev. Stat. § 48-122(3) (Reissue 1998) sets a statutory maximum of $6,000 for burial expenses and therefore affirmed the trial court's order as modified, setting the award of funeral expenses at $6,000 instead of $6,766.85. Waldinger appeals.

## ASSIGNMENTS OF ERROR

On appeal, Waldinger contends that the trial court erred as a matter of law in finding that (1) Edward's fatal accident arose out of his employment with Waldinger, (2) Edward was acting in the course and scope of his employment at the time of his injury and death, and (3) Edward was not willfully negligent in jaywalking across 13th Street.

## STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

## ANALYSIS

On appeal, Waldinger contends that the court erred as a matter of law in finding that Edward's fatal accident arose out of and in the course of his employment with Waldinger.

Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), citing *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996).

[4] The phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *La Croix v. Omaha Public Schools, supra*, citing *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996), and *Johnson v. Holdrege Med. Clinic, supra.*

[5] The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *La Croix v. Omaha Public Schools, supra*, citing *Cox v. Fagen Inc., supra*, and *Johnson v. Holdrege Med. Clinic, supra.*

[6] Under *La Croix v. Omaha Public Schools*, the going to and from work rule as currently applied in Nebraska is that injuries sustained by an employee while going to and from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury.

Prior to the Supreme Court's decision in *La Croix v. Omaha Public Schools*, Nebraska adhered to a bright-line version of the going to and from work rule. This rule stated that an injury sustained by an employee while going to and from work, at a fixed place of employment, did not arise out of and in the course of employment.

Waldinger argues that the trial court erred in awarding Carol benefits because a distinct causal connection did not exist between a condition created by Waldinger and the occurrence of Edward's injury. We disagree.

In *La Croix v. Omaha Public Schools*, the plaintiff brought a workers' compensation action seeking compensation for injuries she incurred when she fell in a parking lot that was not owned by her employer, but in which the employer encouraged her to park her vehicle. The employer also provided transportation to the workplace from this lot. A single judge of the Nebraska Workers' Compensation Court dismissed the plaintiff's petition based on the bright-line premises rule set out by the Nebraska Supreme Court in *Johnson v. Holdrege Med. Clinic, supra*. A review panel of the Workers' Compensation Court affirmed. The Supreme Court concluded that there was a distinct, causal connection between the employer's sponsoring of the parking lot and the occurrence of the plaintiff's injury and therefore reversed, remanding the cause for further proceedings. In doing so, the Supreme Court stated:

> [T]he employer in the instant case encouraged or instructed employees to park in the Dill Field lot, which was often the only parking area available. Most importantly, the employer specifically provided transportation to the workplace from the lot. By providing transportation, the employer created a condition under which its employees will necessarily encounter hazards while traveling to the premises where they work. Thus, there is a distinct, causal connection between the employer's sponsoring of the parking lot and the occurrence of [the plaintiff]'s injury. Accordingly, because such a causal connection was present in the instant case, the injury to [the plaintiff] arose out of and in the course of her employment.

*La Croix v. Omaha Public Schools*, 249 Neb. 1014, 1019, 582 N.W.2d 283, 286 (1998).

Waldinger points to the Supreme Court's findings in *La Croix v. Omaha Public Schools* and suggests that there was no employer-created hazard in the instant case because Waldinger did not provide transportation to the Waldinger trailers from the fenced lot.

The trial court disagreed, and in its order finding that Edward's injuries arose out of the course of his employment, the trial court stated:

> There are similarities in the facts of the instant case to that of La Croix, supra. The employees were encouraged to park in the fenced lot. Parking in the fenced lot allowed the employees to park in close proximity to the work site. No transportation to the work site was required. The fenced area was adjacent to the parking garage under construction and immediately across the street from the printing plant part of the construction project. It is also noteworthy that Waldinger Corporation stored materials here which were retrieved from time to time by its employees. [Waldinger] made a point of establishing at trial that Kiewit erected the fence and issued the parking passes. Control of the lot in question is not necessarily determinative of the issue at hand, however. The Court notes that the City of Omaha owned and presumably controlled the parking lot used by the plaintiff in La Croix. Thus the Court concludes that Edward Coffey's fatal accident while traversing 13th Street from the fenced parking lot to the Waldinger work trailers located to the west of 13th Street was an accident arising out of his employment.

We conclude that the trial court's conclusion was not wrong as a matter of law. The record shows that Waldinger encouraged its employees to park in the fenced lot. Several employees testified at trial that they always walked directly across the street to reach the Waldinger trailers. Waldinger's supervisors testified that they took the same route. Although there was a tunnel leading from one side of 13th Street to the other, the record shows that this tunnel was not accessible at the time of Edward's death. The record shows that the fenced lot was for construction employees only, and a sign on the fence at the time of Edward's death read, "construction area" and "unauthorized personnel keep out." The record also shows that Waldinger stored construction materials in the fenced lot and that throughout the day, Waldinger employees would cross 13th Street to retrieve those materials.

By providing parking directly across 13th Street from the worksite, Waldinger created a condition under which its employees would necessarily encounter hazards while traveling to the premises where they worked. Fruehwald testified that he was aware of the danger inherent in crossing 13th Street that

existed at the time of Edward's accident. Given this evidence, there is a distinct, causal connection between Waldinger's encouragement of its employees' use of the fenced lot and the occurrence of Edward's injury.

Waldinger argues that even if this is true, the trial court erred in determining that Edward was in the course of employment at the time he was killed, because Edward crossed the street a half hour before he was to start work. In support of its argument, Waldinger states that although the court considered the start of work to be 5:50 a.m., the evidence shows that work started at 6 a.m. Our review of the record shows that although the plumbers were not paid for work prior to the 6 a.m. start time, they were required to report to work at approximately 5:50 a.m. to receive their job assignments for that particular day. Dimmitt testified that he met with employees prior to 6 a.m. and that if an employee reported to work at 6 a.m., he or she was considered late. Given this evidence, we conclude that Edward was at the jobsite within a reasonable time prior to 5:50 a.m. Therefore, the trial court did not err in finding that Edward was in the course of his employment at the time of his fatal accident.

Lastly, Waldinger argues that the trial court erred in failing to find that Edward was willfully negligent and that his negligence was sufficient to make his injury and death noncompensable. Waldinger contends that having knowingly and deliberately chosen to jaywalk, Edward ought to have been found willfully negligent.

As previously stated, the record shows that all Waldinger employees, including Waldinger's foremen, crossed directly across 13th Street from the fenced lot to the Waldinger trailers. Although there was a traffic signal approximately one and a half blocks to the south at Capitol Avenue, the witnesses at trial testified that they never used that intersection with 13th Street as a crossing or saw anyone else do so. For this reason, the trial court did not err in failing to find that Edward was willfully negligent at the time of his accident.

Pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000), Carol has requested an award of attorney fees in this appeal. In accordance with § 48-125, Carol is entitled to attorney fees because Waldinger failed to obtain any reduction in Carol's award.

However, Carol has not yet filed a motion for the allowance of attorney fees, supported by an affidavit which justifies the amount of the fee sought for services in the appellate court, as required by Neb. Ct. R. of Prac. 9F (rev. 2000). Accordingly, we are unable to award attorney fees at this time.

## CONCLUSION

After reviewing the record, we conclude that the trial court did not err as a matter of law in finding that Edward's fatal accident arose out of and occurred in the course of Edward's employment with Waldinger. Therefore, we affirm the order of the review panel affirming the trial court's order as modified.

AFFIRMED.

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TINA M. KUMKE, APPELLANT, V.
MARK D. KUMKE, APPELLEE.
648 N.W.2d 797

Filed July 30, 2002. No. A-01-1028.

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. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Trial: Child Custody: Waiver: Appeal and Error.** Generally, where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
4. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
5. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Clay County: TERRI HARDER, Judge. Reversed and remanded for further proceedings.

L. William Kelly, of Kelly & Schroeder, for appellant.

Justin J. Cook, of Langvardt & Valle, P.C., for appellee.

HANNON, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

Mark D. Kumke filed an application in the district court for Clay County, Nebraska, seeking to modify the decree entered in the previous dissolution proceedings involving Mark and Tina M. Kumke. Mark requested the court to change the award of custody of the parties' children from Tina to himself. The district court found that a material change in circumstance had occurred since the entry of the decree of dissolution and granted Mark's request for a change of custody. Tina appeals from the district court's order denying her motion for new trial. For the following reasons, we reverse, and remand for further proceedings.

## BACKGROUND

The parties were married on February 16, 1991, in Blue Hill, Nebraska, and divorced on March 21, 1997. Two children were born during the marriage: Brock, born January 4, 1993, and Kaitlin, born February 17, 1994. In the decree dissolving the parties' marriage, the district court approved the parties' settlement agreement; determined that both parties were fit and suitable persons to have the care, custody, and control of the minor children; and awarded Tina custody, subject to Mark's reasonable rights of visitation. Child support was also established pursuant to the decree.

Mark initially filed an application to modify decree of dissolution on July 18, 1997; however, this application was apparently dismissed by Mark. Mark then apparently filed the instant application to modify custody sometime in the year 2000. While this application is not contained in the transcript before us on appeal, the district court's order ruling on the instant application stated that Mark alleged (1) that Tina had entered into a course of conduct of attempting to "poison the minor children's minds" against Mark, (2) that Tina had demonstrated an unstable lifestyle, and

(3) that because Tina's residence was being foreclosed, she would be without a residence.

Although Tina was represented by counsel at the time of the parties' divorce, her counsel was subsequently allowed to withdraw, and Tina appeared pro se at the June 18, 2001, hearing on Mark's application. Mark was present with his counsel. At the start of the hearing, Tina orally requested a continuance, wherein she indicated that she had undergone back surgery in April, that she had since suffered complications, and that she had a letter from her doctor. The letter was apparently filed with the court on the Friday prior to the Monday hearing. The medical reason identified for Tina's request was that her doctor had indicated that it would not be good for her to sit for prolonged periods. The court did not formally deny Tina's motion for continuance, but, rather, granted Tina permission to stand at the counsel table and gave Tina the opportunity to contact any additional witnesses that she might wish to have present at the hearing. Tina does not raise as error the district court's failure to grant her request for a continuance.

The evidence adduced at the hearing showed that the parties separated in late 1995, before their divorce in March 1997. At the time of their separation, Tina moved from Blue Hill to Deweese, Nebraska. Tina and the children lived in Deweese until July 2000, at which time they moved to Wolbach, Nebraska. The impetus for the move from Deweese to Wolbach was Tina's decision to move in with her boyfriend, who lived in Wolbach. Wolbach is roughly 90 miles north of Blue Hill. Mark continues to live in the family home in Blue Hill, where he has lived since the parties' separation. There was no evidence that Tina was ever without a place to live.

Since the parties' divorce, Tina has had two live-in boyfriends, including her living situation at the time of the hearing. There was evidence that the first live-in boyfriend used drugs and alcohol. Although Mark was "seeing" someone at the time of the hearing, she did not live with him.

Both parties were employed at the time of the hearing. Mark had been employed by the city of Blue Hill as the utilities foreman since 1989. Tina had several jobs following the parties' divorce, but at the time of the hearing, she was employed at the

Howard County Hospital in St. Paul, Nebraska, and was attending courses to receive a "surgical degree," allowing her to "further [her] job and work in the operating department." Tina was off work at the time of the hearing due to various complications following surgery for a herniated disk. She anticipated returning to work after a checkup in July unless her condition worsened.

There was testimony that the children, ages 8 and 7 at the time of the hearing, had made allegations of sexual and physical abuse by Mark. Evidence was also presented concerning Mark's drinking habits which caused Tina and the children concern. With respect to these issues, Tina sought the services of Dr. John Meidlinger, a clinical psychologist. Meidlinger concluded, after interviewing the children, that there was no evidence that the children were being abused either physically or sexually by Mark. In Meidlinger's deposition, which was admitted into evidence at the hearing, he testified that Tina related many and varied complaints to him, many of which he found to be preposterous. Meidlinger further testified that despite the fact that many of the complaints were preposterous, Tina did not question them. Meidlinger concluded that Tina's purpose for bringing the children to him was part of an agenda Tina had to stop visitations with Mark. Meidlinger also concluded that Tina was interfering in a destructive way with the children's relationship with Mark.

As to Tina's complaints with respect to Mark's drinking too much and drinking while driving with the children, Meidlinger indicated that these complaints were borne out by his interviews with the children. When confronted by Meidlinger about the drinking concerns, Mark admitted to drinking and driving with the children present. The district court received exhibit 3 with respect to the issue of Mark's alcohol use. Exhibit 3 is an alcohol evaluation report of Mark which indicates a significant history of alcohol use. The "diagnostic impression" identified in the report was "[a]lcohol [a]buse," which was in "sustained partial remission." The report indicated that Mark had "definitely abused alcohol in the past," but that he "apparently ha[d] successfully moderated his use."

At the close of evidence, the court, Mark's counsel, and Tina discussed the issue of whether the court should interview the

children. A pretrial motion to that effect had not been filed, but Tina expressed her interest in having "someone else" speak to the children. The court also expressed its interest in talking to the children in light of the evidence that had been presented at the hearing and granted Tina's "motion," although it had not been timely made. The court then outlined various ways that such an interview might take place and discussed the possibilities with Mark's counsel and Tina. The parties indicated their mutual preference for an in camera interview without the presence of counsel or either party. Mark's counsel, however, argued that any record of the interview should be sealed so that what the children said to the court could not be later misused by the parties in any way with respect to their children. In response to this concern, the court proposed that the interview be conducted without a record being made so as to avoid any need to seal the record. Upon the court's specific inquiry, both Mark's counsel and Tina responded that they had no problem with the interview's being conducted by the court without a record. The trial judge's docket notes contained in the transcript indicate that the scheduled interview of the children took place on June 21, 2001.

In its order filed July 16, 2001, the district court granted Mark's application and awarded the care, custody, and control of the minor children to Mark. In so ruling, the district court noted that Neb. Rev. Stat. § 42-364 (Reissue 1998) indicates that "[c]ustody and time spent with each parent shall be determined on the basis of the best interests of the minor child with the objective of maintaining the ongoing involvement of both parents in the minor child's life." The court reasoned, based on § 42-364, that what is in the children's best interests is, in part, a determination of which parent would most likely encourage a relationship with the noncustodial parent. The court found that visitation problems in the present case had existed since shortly after the decree of dissolution was entered. The court further found that Tina had, on occasion, frustrated or attempted to frustrate Mark's right to visit and have a relationship with the parties' children. The district court concluded that a material change in circumstance had occurred, granted Mark's application, and awarded Mark the care, custody, and control of the parties' children. The

court also granted Tina visitation rights and ordered Tina to pay child support.

Tina filed a timely motion for new trial, alleging that the district court's decision was contrary to the law and the evidence and that the court erred as a matter of law in determining that it was in the children's best interests for custody to be changed from her to Mark. Tina also alleged that the district court abused its discretion in not sustaining her motion for a continuance because she had been physically unable to properly represent herself at the hearing on Mark's application due to her recent back surgery. Finally, Tina alleged that there had been newly discovered evidence with regard to the truthfulness or lack thereof in the statements given by the parties' minor children to the court during the in camera hearing and to Meidlinger. Tina asserted that the newly discovered evidence would show that the minor children were coerced by Mark to give false information to the court and to Meidlinger.

Following a hearing, the district court entered an order denying Tina's motion for new trial. Tina subsequently perfected her appeal to this court.

## ASSIGNMENTS OF ERROR

Tina asserts, reordered, that the district court erred (1) as a matter of law in interviewing the parties' minor children in an in camera hearing without making a record of the interview and (2) in finding that there had been a material change in circumstances since the entry of the original decree of dissolution and thereby awarding Mark custody of the parties' minor children.

## STANDARD OF REVIEW

[1,2] 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. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

## ANALYSIS

*In Camera Interview.*

[3] Tina first asserts that the district court erred as a matter of law in interviewing the parties' minor children in an in camera hearing without making a record of the interview. Generally, where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal. *Capaldi v. Capaldi*, 235 Neb. 892, 457 N.W.2d 821 (1990); *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984). See, also, 24A Am. Jur. 2d *Divorce and Separation* § 965 (1998) (court's private interview with child); Annot., 99 A.L.R.2d 954 (1965) (propriety of court conducting private interview with child in determining custody).

In *Marez*, both parties filed applications to modify the original decree of dissolution, seeking permanent custody of the minor children. At the close of evidence, the court conducted an in camera interview of the children without the presence of counsel, a procedure to which the parties had previously agreed. A record of the interview was made. On appeal, the entire record revealed that the appellant and her counsel knew in advance that there would be an in camera hearing, that a record would be taken, and that the judge would ask the children questions. However, the appellant neither checked nor asked to see the record afterward and made no effort, at that time or by a motion for a new trial, to contradict what was said in the in camera interview. The Nebraska Supreme Court held that under those circumstances, any error in the trial court's procedure, which question it did not decide, had been waived. The court referenced 24A Am. Jur. 2d, *supra* (at that time 24 Am. Jur. 2d *Divorce and Separation* § 985 (1983)), and Annot., 99 A.L.R.2d, *supra*, and held that "[t]here appears to be uniformity in the opinions of courts which have considered the issue, that where the parties have given consent or acquiescence to such interview and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal." *Marez*, 217 Neb. at 621-22, 350 N.W.2d at 535. The *Marez* opinion does not indicate the exact nature of the appellant's objection on appeal to the in camera interview.

In *Capaldi*, a decree of dissolution was modified, changing custody of the children from the mother to the father. On appeal, the mother complained that the children had been questioned in camera by the trial court without being sworn as witnesses. The appellate opinion does not specifically state that a record was made of the in camera hearing, but does indicate that the attorney for each party, the guardian ad litem, and the judge all participated in the questioning of the children. The trial record did not reflect any objection by the appellant to that procedure at the trial. The *Capaldi* court cited the holding from *Marez* and concluded that the mother's assignment of error was without merit.

In the present case, like the appellants in *Marez* and *Capaldi*, Tina agreed to the procedure used by the trial court in interviewing the children. At the hearing on Mark's application, Tina requested that the court conduct an in camera interview of the children and agreed that such interview should be conducted without the presence of counsel or either party. Tina did not object and specifically agreed to the court's suggestion that it conduct the interview without making a record.

The Nebraska Supreme Court has stated with regard to the in camera interviewing of children:

> "Given our de novo review, such a practice is of questionable value unless an adequate record is made. Moreover, the young and impressionable age of the children [ages 8 and 7] would entitle any expression as to their preferred living arrangements to little, if any, weight. In the final analysis, no court can abdicate its obligation to determine what it deems to be in the best interests of the children, based upon the totality of the circumstances."

*Beran v. Beran*, 234 Neb. 296, 301-02, 450 N.W.2d 688, 692 (1990) (quoting *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984)).

[4] We also note Neb. Ct. R. of Prac. 5A(1) (rev. 2000), which provides: "The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived."

Rule 5 was amended on February 1, 1995, by adding the language currently contained in rule 5A(1) and (2). See *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 141, 525 N.W.2d 219, 221 (1995) (holding that "[h]enceforth, all evidentiary proceedings shall require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties"). We agree with Tina's assertion that the district court in the present case should have made a record of the in camera hearing with the parties' children. Accordingly, we reverse, and remand for a new evidentiary hearing. See, *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002); *Gerdes v. Klindt's, Inc., supra.*

*Modification of Custody.*

[5] Tina next asserts that the district court erred in finding that there had been a material change in circumstances since the entry of the original decree of dissolution and thereby awarding Mark custody of the parties' minor children. However, Tina does not argue this assigned error in her brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). Given our conclusion above, we need not consider this assignment of error further.

## CONCLUSION

We conclude that the district court erred in not making a record of the in camera hearing with the parties' children, and accordingly, we reverse, and remand for a new evidentiary hearing. Given that result, we need not consider Tina's second assignment of error further.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# IN RE INTEREST OF MARCUS W. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANGELA W., APPELLANT.

649 N.W.2d 899

Filed July 30, 2002. Nos. A-01-1287, A-01-1295, A-01-1296.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when 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. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
3. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
4. **Res Judicata: Judgments.** Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Res Judicata: Actions.** Whether the same cause of action is raised in a subsequent suit is determined by whether the right sought to be vindicated rests upon the same operative facts as that in the prior suit.
6. **Child Custody: Res Judicata: Judgments.** A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that circumstances have changed when the order is no longer in the children's interest.
7. **Parental Rights: Proof.** In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order.
8. **Judgments: Collateral Estoppel.** Collateral estoppel applies when an issue of ultimate fact has been determined by a final judgment, and that issue cannot again be litigated between the same parties in a future lawsuit.
9. **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.

10. **Res Judicata: Proof: Judgments.** When different proof is required, a judgment in the former action is not a bar to the subsequent action.
11. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
12. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests.
13. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeals from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Laurel Heer-Clark and Milo Alexander, of Nebraska Legal Services, for appellant.

James S. Jansen, Douglas County Attorney, and Karen Kassebaum Nelson for appellee.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

Angela W. appeals from an order of the separate juvenile court of Douglas County terminating her parental rights to Gabriella W., Asia W., and Marcus W. Although the case for each child was separately docketed, the cases have been consolidated for purposes of trial and this appeal. On appeal, Angela asserts that the juvenile court erred in failing to apply principles such as collateral estoppel to bar the action; in excluding testimony regarding the status of the parental rights of Greg W., who is Angela's husband and the father of the children and with whom she was residing at the time of the termination; in failing to prove that Angela is unable to discharge her parental duties; and in finding by clear and convincing evidence that the best interests of the children are served by the termination of Angela's parental rights. We affirm the decision of the juvenile court.

## PROCEDURAL BACKGROUND

On December 3, 1997, the court adjudicated Gabriella, born March 1, 1996, as a child within the meaning of Neb. Rev. Stat.

§ 43-247(3)(a) (Supp. 1997). On October 1, 1998, the court adjudicated Asia, born June 27, 1998, as a child within the meaning of § 43-247(3)(a) (Reissue 1998) and found that Angela and Greg had engaged in domestic violence in Asia's presence.

The State filed a motion to terminate the parental rights of Angela and Greg to Gabriella and Asia, alleging that termination was proper under Neb. Rev. Stat. § 43-292(2) (Reissue 1998) because Angela and Greg substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection in that they had failed to make sufficient progress to have the children placed with them despite nearly 2 years of intervention by the Nebraska Department of Health and Human Services (DHHS), and under § 43-292(5) because Angela was unable to discharge parental responsibilities because of a mental illness or mental deficiency that was expected to continue for a prolonged indeterminate period of time. At the hearing, the State asked for a continuance regarding the mental deficiency issue because it was unable to locate its chief witness, and the continuance was granted over Angela's objection. At the conclusion of the case, the State's motion to dismiss the count pertaining to § 43-292(5) was granted. In our review of the trial court's findings from the first hearing, we find no mention of evidence regarding mental illnesses or deficiencies.

The court granted the motions to terminate parental rights. The parents appealed, and this court entered a "Memorandum Opinion and Judgment on Appeal" in *In re Interest of Asia W. & Gabriella W.*, 9 Neb. App. xiv (Nos. A-99-669, A-99-729, Mar. 6, 2000). After concluding that the State had not proved by clear and convincing evidence that Angela and Greg had substantially and continuously or repeatedly neglected and refused to provide necessary parental care and protection to their children, this court reversed the juvenile court's order and remanded the matter for further proceedings. This court stated that the parental rights of Angela and Greg should not be terminated, given their efforts and improvements, and specifically referred to testimony indicating that both Angela and Greg made progress in learning appropriate parenting skills and were committed to improving themselves as parents.

On May 10, 2000, Angela and Greg gave birth to Marcus. The court noted in its October 4 order that a neuropsychological assessment on Angela was completed in 1998, but it was never offered into evidence. On November 8, Marcus was adjudicated as a child within the meaning of § 43-247(3)(a). The court found the second amended petition to be true in its entirety, which petition alleged that Angela and Greg engaged in domestic violence in the presence of Marcus, that Greg exhibited inappropriate parenting, and that Angela failed to protect Marcus.

As of July 3, 2001, the permanency objective for each child was reunification. However, the State filed motions to terminate Angela's parental rights on July 24, alleging that termination was proper under § 43-292(5) and was in the best interests of the children. On October 23, a hearing on the motions was held, wherein at the State's request, the court took judicial notice of all its previous orders, the pleadings, notice of previous motions, and notice of appeals and appellate decisions.

## FACTUAL BACKGROUND

Marjorie Padula, a licensed psychologist and neuropsychologist, met with Angela on May 14 and 24, 2001, for testing. Padula testified that in completing the neuropsychological evaluation, she obtained background information from the patient, reviewed collateral information, and then examined various functional parts of the brain, which parts included attention and concentration, memory, higher-level problem solving, motor functioning, and visuospatial abilities. She examined Angela's emotional and cognitive ability to function.

Padula testified that she diagnosed Angela with cognitive dysfunction consistent with frontal lobe impairment, generalized anxiety disorder, and mood disorder with mixed features secondary to frontal lobe dysfunction. Angela told Padula that she had a history of hydrocephalus, a condition where too much cerebral spinal fluid collects on the brain and which required several shunts as she was growing, and that she had a history of seizures. Padula found this significant because seizures can disrupt cognitive functioning and because hydrocephalus is known to impact cognitive ability, specifically frontal lobe functioning. Padula explained that cognitive functioning encompasses a person's

ability to remember, concentrate, and perceive things in three-dimensional space.

Angela reported that in the previous 6 months, she was feeling more stress and was quicker to anger, and Padula said that that spoke to Angela's current emotional distress level. The fact that Angela participated in counseling in high school was also clinically significant because it established a history of difficulty with mental health issues. Angela told Padula that she graduated from high school, had been pretesting for enrollment at the University of Nebraska at Omaha, and was interested in becoming a registered nurse. Angela had never been arrested, but apparently had interacted with legal authorities due to Greg's domestic violence and her children's being removed from the home by Child Protective Services.

Angela was married to Greg on July 10, 1996. At the time of testing, Angela told Padula that her children were ages 4, 2, and 1 and were in foster care, but that she had visitation on Mondays, Wednesdays, and Fridays from 11:30 a.m. to 2:30 p.m. In Padula's opinion, Angela would need assistance for daily living activities which require consistent attention or concentration, such as financial responsibilities, medical decision-making, treatment compliance, and parenting. Padula also testified that Angela would be unable to consistently attend to her own safety and the safety of others. High-stress situations would only further impair Angela's ability to problem solve. Padula therefore concluded that Angela would experience difficulty in discharging her parental responsibilities and that her conditions could be expected to continue unchanged. Although Padula had not observed Angela interact with her children, Padula based her opinion upon the results of the neuropsychological testing she administered and reports of a psychological evaluation and a neuropsychological evaluation, both of which evaluations were completed by others.

One of the tests Padula administered was the Shipley Institute of Living Scale, which showed Angela's estimated IQ to be 73, placing her in the borderline range of intelligence. As to results of other tests, Padula explained that Angela's composite scores indicated a very weak level of attention and concentration. Tests to measure motor functioning showed that Angela had normal

fine motor skills and slightly below expected grip strength, but not low enough to be clinically significant. The results of the Rapid Alternating Movement Clinical Exam were clinically significant because the results showed difficulty learning and sustaining movements, which is a function of the frontal lobe. Several tests showed evidence of frontal lobe dysfunction. Although the results of the Wechsler Memory Scale and the California Verbal Learning Test were not necessarily consistent with frontal lobe dysfunction, both of these tests were designed to measure memory functioning. Tests were administered to measure Angela's higher-level problem solving, and Padula said that Angela was "severely impaired on all the tests of higher level problem solving."

Padula explained that in examining the intellectual functioning composite score, she looks to see if there is a significant split between a patient's verbal and nonverbal abilities so that she can make a decision about whether or not one side of the brain is not functioning as it should be. Padula said that Angela did not have a significant split in her intellectual functioning composite score. Padula said that results showing Angela's IQ to be 73, her verbal ability to be in the 4th percentile, and her abstraction to be in the 11th percentile would not necessarily be a sign of frontal lobe dysfunction. Also, Angela's verbal fluency was at the 7th percentile, and verbal fluency is mediated by the frontal lobes. Padula testified that Angela's results on tests designed to measure memory functioning "would not necessarily be a marker for frontal lobe dysfunction but would be more a marker for how a person is able to hear and retain information. It does have some frontal lobe component but not a marker."

Tests designed to look at personality and emotional functioning showed "clinically significant anxiety and also paranoia or a distrust of others." According to Padula, improperly functioning frontal lobes affect impulse control, concentration, and the ability to initiate and plan in a normal way. Padula observed Angela on the two dates of the evaluations and testified that Angela was very angry, used curse words, was impulsive, and had difficulty paying attention and staying on task. Padula testified that Angela's behaviors were consistent for someone with frontal lobe dysfunction.

Padula specifically said that she was not testifying as to whether terminating Angela's parental rights was in the children's best interests because she did not feel qualified to do that. She was not aware of any services that could be offered to assist Angela with parenting short of having someone present 24 hours a day. Padula said that Angela could learn parenting skills involving rote memory in a low-stress, highly structured, and supervised environment if the tasks were simple and concrete and she had somebody with her to take over if there were interruptions.

Lisa Miller, a protection and safety worker for DHHS, testified that she had been working with Angela and her family since July 2000. Miller understood the nature of the cases to be abuse or neglect with some domestic violence issues. She said that Angela had been receiving and participating in services offered by DHHS since 1996, including supervised visits with her children, family support services, various evaluations, and counseling on assorted issues. In Miller's opinion, DHHS used reasonable efforts to reunify Angela with her children, and Miller was unaware of any additional services which could be offered. She said that it was not feasible to arrange for someone to be with Angela 24 hours a day, 7 days a week, to assist her in parenting.

Miller testified that she observed Angela with her children on only two occasions. Miller's opinion was that the children's best interests would be served by terminating Angela's parental rights, and Miller based her opinion upon safety issues, such as the ability to check the temperature of the food served to the children and whether a child's diaper needed to be changed. She further based her opinion upon whether the children viewed Angela as a caregiver, the age of the children, and the length of time the children had been in foster care placement. Miller stated that the children deserved permanency, since each child was residing in an adoptive placement. The examples of ability to check the temperature of the food and judging whether a diaper needed to be changed were not things Miller had observed, but were examples that she had read in the family support notes and heard from the family support worker.

Since Miller had previously testified that the children deserved a permanent home, she clarified that permanency meant adoption. Miller was asked whether she was aware that the State

was not requesting termination of the parental rights of Greg, the father. The State objected to the question based on relevance, and the court sustained the objection, stating that information concerning the status of Greg's parental rights was irrelevant to the pending matter. An offer of proof was made, wherein Miller testified she was aware the State was not requesting termination of Greg's parental rights.

Miller testified that at the time of the termination hearing in October 2001, Gabriella had been in foster care continuously for 54 months, Asia had been in foster care continuously for 40 months, and Marcus had been in foster care continuously since November 2000 (11 months). Miller also said that if Angela was going to be able to parent her children, she would need to make progress in implementing and using her parenting skills, and that she had not been able to do that.

Angela testified that she had been hired to begin working in December 2001 at Omaha Steaks, that she takes numerous medications for her seizures, and that no one assists her with those medications. She said she has the ability and determination to gain the skills necessary to parent and have a relationship with the children. Angela said that she lives with Greg, who is her husband and the father of the children. Angela further testified that she cooks, cleans, does the laundry and shopping, manages the family's finances, and pays the bills with no assistance. She said she has complied with every order of the court in an attempt to be reunified with her children, that she continues to participate in counseling, and that she recognizes the need for positive support. Angela testified that she knows what to do if she experiences unforeseen difficulties when parenting, knows how to properly change a diaper, and knows how to check the temperature of foods before serving them to the children. Angela stated that if she had some problems with Marcus and nobody was there to help her, she would call the Child Saving Institute, which has a parent assistance line. She testified that she loves her children and wants to parent them.

The court entered orders on October 26, 2001, terminating Angela's parental rights to Gabriella, Asia, and Marcus. The orders stated that "this matter shall be reviewed as previously ordered as to Greg [W.], father." Angela timely appealed the

termination of her parental rights to each child under each docket. In orders filed on March 5, 2002, the separate juvenile court acknowledged that it had received a "Relinquishment of Child by Parents," wherein Greg relinquished his parental rights to Gabriella, Asia, and Marcus.

## ASSIGNMENTS OF ERROR

Angela alleges that the juvenile court erred (1) in failing to consider the findings of this court in a previous opinion in this case under the doctrine of collateral estoppel; (2) in excluding testimony regarding the status of the parental rights of Greg, who is Angela's husband and the father of the children and with whom she was living at the time, on the basis that the testimony was irrelevant; (3) in finding clear and convincing evidence existed to support the termination of Angela's parental rights on the bases that she is unable to discharge parental responsibilities because of a mental illness or mental deficiency and that there were reasonable grounds to believe such condition would continue for a prolonged indeterminate period; and (4) in finding by clear and convincing evidence that the best interests of the minor children were served by the termination of her parental rights.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when 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 Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

[2] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

## ANALYSIS

*Collateral Estoppel, Res Judicata, and Law of Case.*

Angela argues that given the facts of this case, the doctrines of collateral estoppel and the law of the case preclude the State from seeking termination of parental rights under § 43-292(5) after previously being unsuccessful in an effort to terminate

parental rights under § 43-292(2). Initially, we note that these issues were not raised before the juvenile court, and Angela urges us to rule on them as plain error. In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999).

> 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.

*In re Interest of Torrey B.*, 6 Neb. App. 658, 665, 577 N.W.2d 310, 315 (1998). Since a substantial right of Angela is affected by the termination proceedings, we will consider these issues.

[3] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001). Angela's brief points to a number of statements made by this court in the first appeal, as follows:

> "[T]he record reflects that Angela and Greg have always been motivated to learn parenting skills and have in fact made progress in their efforts." . . . "The evidence showed that Angela seemed to be bonding with Asia and appeared capable of furthering her parenting skills." . . .
>
> . . . "The record permits the inference that Angela's learning disabilities have made it hard for her to learn and retain parenting skills; however, there was testimony that Angela and Greg had both made progress in learning appropriate parenting skills." . . . "[Angela] was in continuous

> contact with the various people who were working with her and Greg on parenting skills." . . .
>
> . . . "During the 1999 sessions, [a] Dr. Matthews observed that Angela and Greg were using the skills they had learned in their previous sessions in 1997 and 1998."

Brief for appellant at 18-19. These issues were, by their nature, findings of fact based upon conditions prior to the date of the hearing in the trial court. They could not bind the court on facts occurring after that date. After reviewing this court's prior opinion, we do not feel that the law-of-the-case doctrine precludes considering the issue of the existence of a mental illness or deficiency at the time of the second hearing, since it does not appear that that same issue or even a substantially similar issue was being reconsidered. In short, the law-of-the-case doctrine does not apply for essentially the same reasons that the doctrines of res judicata and issue preclusion do not apply, as discussed below.

[4,5] Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). In order that a judgment be final for res judicata purposes, the order must be such as puts an end to the particular litigation or definitely puts the case out of court. *Osborne v. Stanfield*, 7 Neb. App. 902, 586 N.W.2d 670 (1998). Whether the same cause of action is raised in a subsequent suit is determined by whether the right sought to be vindicated rests upon the same operative facts as that in the prior suit. See *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989). Res judicata operates to generally bar every question which was or might have been presented and determined in the first action. See *Sidel v. Spencer Foods*, 215 Neb. 325, 338 N.W.2d 616 (1983).

[6] In *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 372, 370 N.W.2d 119, 121 (1985), the Nebraska Supreme Court applied the following reasoning to parental termination cases:

> "A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot

> settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that 'circumstances have changed' when the order is no longer in the children's interest."

(Quoting *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984).)

[7] In *In re Interest of V.B. and Z.B.*, the State's motion to terminate parental rights was denied in 1983, and another such motion was filed and granted in 1984. The court explained that it would have been barred from using evidence prior to the 1983 order as the sole basis for terminating parental rights, but that it could correctly use evidence from the time period prior to the 1983 order in conjunction with evidence from the time period after the 1983 order in determining that there was a change of circumstances or lack thereof in the conditions needed to terminate the parental rights. That court stated:

> In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. [Citation omitted.] When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding.

*Id.* at 372, 370 N.W.2d at 122.

In the case before us, the State has to prove that Angela has a mental illness or deficiency that is expected to continue for a prolonged indeterminate time. In the prior termination action, the State had to prove that Angela substantially and continuously or repeatedly neglected and refused to give the children necessary care and protection because she failed to make sufficient progress despite the intervention by DHHS. Although any proof of Angela's mental deficiency could have been presented in the first termination action, the operative facts for the two termination proceedings are different, and different proof would be required in

each proceeding. Therefore, different grounds for termination are involved, and res judicata does not bar this proceeding.

[8,9] Collateral estoppel applies when an issue of ultimate fact has been determined by a final judgment, and that issue cannot again be litigated between the same parties in a future lawsuit. *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999). 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. *Thomas Lakes Owners Assn. v. Riley*, 9 Neb. App. 359, 612 N.W.2d 529 (2000). Angela argues that all four conditions have been met in this case and that although the issue was not framed in the same language, "[i]n the first termination trial the State essentially alleged that [Angela] would not or at least did not adequately care for her children. In the second it alleges that she cannot adequately care for them." Brief for appellant at 17-18.

[10] Our first inquiry under collateral estoppel is whether the issues are identical.

> "A former verdict and judgment are conclusive only as to the facts directly in issue, and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral. It must appear that the matter set up as a bar was in issue in the former case. The test as to whether the former judgment is a bar generally is, whether or not the same evidence will sustain both the present and the former action."

*Suhr v. City of Scribner*, 207 Neb. 24, 27, 295 N.W.2d 302, 304 (1980). When different proof is required, a judgment in the former action is not a bar to the subsequent action. See *id.* Proof of a mental illness or mental deficiency, which is necessary in this action, was not required in the first action where the State sought to prove that Angela substantially and continuously or repeatedly neglected and refused to give the children necessary care and protection because she failed to make sufficient progress despite the intervention by DHHS. Since the first element of collateral

estoppel has not been met, we need not discuss the other elements. 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 needed to adjudicate case and controversy before it).

We also note that the first such motion to terminate parental rights concerned only Gabriella and Asia, and not Marcus. Further, the evidence in the instant termination trial was largely based upon Padula's neuropsychological evaluation which was conducted in May 2001, over a year after this court's decision regarding the first motion for termination.

In Angela's reply brief, her counsel correctly points out that the State did proceed under § 43-292(5) at the first termination trial. The State asked for a continuance regarding that issue because it was unable to locate its chief witness, and the court granted a continuance over Angela's objection. At the conclusion of the case, the court granted the State's motion to dismiss the count pertaining to § 43-292(5). Angela's counsel argues that there is no change of circumstances, since the State was aware of a mental deficiency prior to the first trial. In our review of the trial court's findings from the first hearing, we find no mention of testimony regarding mental illnesses or deficiencies. Although the State had "an opportunity to fully and fairly litigate the issue in the prior action" but did not avail itself of it, we have concluded that the instant action is not barred.

All the statutory grounds for termination set forth in § 43-292 in existence at the time of filing a motion to terminate parental rights should be brought together. The instant case does not appear to be a situation where the State lost the first action and immediately moved to terminate upon a different ground. The grounds for termination under § 43-292(2) for neglect are frequently proved, at least in part, by numerous minor acts over a period of time. The manifestation of the mental illness or deficiency required to justify termination under § 43-292(5) is also frequently observed over a long period of time. At what point a sufficient number of events to evidence the grounds for termination under these subdivisions has been met is a matter of judgment, but by their very nature, if these grounds truly exist, the State's case will get stronger as time passes. An action which is perhaps prematurely brought should not function to keep the

child in a bad situation for his or her entire childhood. To hold otherwise would pervert our paramount concern of protecting the best interests of the child.

*Exclusion of Evidence.*

Angela argues that the juvenile court erred in excluding, on the basis of relevancy, evidence that there was no pending motion to terminate the parental rights of Greg. While the Nebraska Evidence Rules do not apply in parental rights termination cases, due process requires that fundamentally fair procedures be employed. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990). We conclude that this evidence should have been admitted, and we will therefore consider it in our de novo review. We note, however, that this fact is not controlling.

[11] The State argues that any issue of Greg's parental rights is now moot because a supplemental transcript in this matter contains an order filed on March 5, 2002, in which the juvenile court acknowledged the receipt of a "Relinquishment of Child by Parents," wherein Greg relinquished his parental rights to each child. A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992). Since this relinquishment was not contained in the bill of exceptions, we do not consider that fact in our de novo review of the evidence.

*Statutory Grounds for Termination of Parental Rights.*

[12,13] Angela contends the court erred in finding that the State met its burden regarding the statutory grounds for termination of parental rights under § 43-292(5). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Thus, in the instant case, the State's burden was to prove by clear and convincing evidence that Angela was unable to discharge parental responsibilities because of a mental illness or mental deficiency and that there were reasonable grounds to believe that such a condition would continue for a prolonged indeterminate period. See, *id.*; § 43-292(5). Clear and convincing

evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

Padula's testimony is set forth in detail above. She observed some behaviors consistent with frontal lobe dysfunction and some that were not necessarily consistent. Padula diagnosed Angela with cognitive dysfunction consistent with frontal lobe impairment. Padula explained that "[w]hen a person's frontal lobes are not working correctly . . . they don't have the same impulse control. They aren't able to initiate and plan in a way that would be what you would consider normal. They aren't able to inhibit outbursts." In Padula's opinion, the frontal lobe dysfunction would not change and Angela would "continue to have difficulty with attention and concentration, with planning, with organization, with following through." Padula opined that Angela would not be able to consistently attend to the safety of others based upon Angela's history of being in situations where she had not been safe. Based upon the diagnoses, Padula said that without having someone there with Angela, it would be difficult for Angela to be able to perform tasks which require shifting her mental set, and that she could learn simple repetitive things in a highly structured and supervised environment, but that Angela probably could not "wean" herself from the person standing next to her over time, especially if there was a high-stress situation. Padula said that the frontal lobe disorder she diagnosed Angela with would be a mental disease or defect that would significantly affect her ability to parent the children.

This case presents a much more difficult decision on the propriety of termination than most such termination cases we have reviewed. The evidence includes a diagnosis of frontal lobe impairment by Padula, a licensed psychologist and neuropsychologist, whose testimony regarding her observations and test results of Angela were not always consistent with her diagnoses. Padula said that Angela would need assistance for tasks that require higher-level problem-solving ability, such as financial responsibilities, medical decisionmaking, and treatment compliance. Angela testified that she is responsible for administering and filling her own medications, cooking, cleaning, doing laundry,

shopping, managing finances, and paying bills, and that she could do those things without assistance.

Padula testified that Angela could learn simple repetitive tasks in a low-stress environment, if it was highly structured and supervised. Her testimony was rife with discussion of "difficulties" with certain tasks that Angela would face. In that sense, our analysis would be much easier if the State's burden was to prove that it would be "difficult" for Angela to discharge parental responsibilities, rather than "unable" as called for in the statute.

We found the case of *In re Interest of C.A.A. and V.S.A.*, 229 Neb. 135, 425 N.W.2d 621 (1988), to be helpful in our determination. That case concerned a mother diagnosed with borderline intellectual ability and dependent personality disorder. The court noted the psychologist's opinion that the mother's mental condition would continue for a prolonged indeterminate period and that she would essentially need to have someone acting in a parental role for her in order for the children to be without danger. The Nebraska Supreme Court affirmed the termination pursuant to § 43-292(5) (Reissue 1984), stating: "Although termination of parental rights may sometimes appear cruel or harsh, experience has shown that failure to terminate parental rights in appropriate cases simply punishes the child for the uncorrectable deficiencies of the parents, thereby extending the same problems and conditions into successive generations." 229 Neb. at 138-39, 425 N.W.2d at 623.

Like in *In re Interest of C.A.A. and V.S.A.*, the expert testimony in this case was that Angela's condition would continue unchanged and that she would need someone around at all times in order to keep her on task and for the children to be safe. It is difficult to terminate the parental rights of someone who we believe truly loves her children, who appears to have consistently complied with the numerous orders of the juvenile court, and who has had this proceeding brought against her through no fault of her own. However, we find that the State has proved by clear and convincing evidence that Angela is unable to discharge her parental responsibilities because she suffers from a mental defect that is expected to last for a prolonged indeterminate period of time.

*Best Interests.*

Finally, Angela argues that the State did not meet its burden in showing that termination of her parental rights was in the children's best interests. In order to terminate parental rights, the State must also prove by clear and convincing evidence that termination is in the child's best interests. See *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001).

The evidence in this case establishes that at the time of the termination hearing in October 2001, Gabriella at age 5 had been in foster care continuously for 54 months, Asia at age 3 had been in foster care continuously for 40 months, and Marcus at age 1 had been in foster care continuously for 11 months. Miller testified that the children do not view Angela as a caregiver, that the children are very young, that all the children have been in foster care for significant portions of their lives, and that each was residing in an adoptive placement.

Miller's opinion that the children's best interests were served by terminating Angela's parental rights was based upon Angela's not making progress in implementing and using her parenting skills and upon safety issues, such as the ability to check the temperature of the food served to the children and whether a child's diaper needed to be changed. Angela testified that she knows when to change a diaper and knows how to check food to see if it is too hot. When the evidence is in conflict in juvenile cases, 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 Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

Padula testified that Angela would need someone with her 24 hours a day, 7 days a week, to assist with parenting. Miller testified that Angela needed prompting to attend to the children, that Angela is unable to maintain the children's safety without someone there telling her what to do, that it was not feasible to put somebody in Angela's home for every hour of every day, and that there were no services that DHHS could offer Angela to assist in reunifying with her children. Thus, the fact that the State was not seeking to terminate Greg's parental rights would be relevant, because Angela testified she was living with Greg, who is her husband and the father of the children. However, the evidence

falls short of providing significant help to Angela's case because the offer of proof did not show that Greg was ready, willing, or able to assist Angela in discharging parental duties. Moreover, Padula and Miller both alluded to domestic violence issues, and the trial court's orders found certain petitions alleging domestic violence and inappropriate parenting by Greg to be true in their entirety. We find there is no reasonable expectation that Greg would provide the assistance needed by Angela.

The termination of parental rights should be used only as a last resort. *In re Interest of M.M., C.M., and D.M.*, 234 Neb. 839, 452 N.W.2d 753 (1990). Angela's children are all still young and have spent most of their lives in foster care. A child cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000). Although there is no evidence of any harm having yet befallen the children, "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." *In re Interest of S.L.P.*, 230 Neb. 635, 639, 432 N.W.2d 826, 830 (1988). Angela has been receiving services from DHHS since 1996 in hopes that she would be reunified with her children. Miller testified that there were no further services DHHS could offer Angela to assist in reunifying with her children. The fact that Angela has persisted over so many years in trying to learn the necessary skills to care for her children makes a determination that she is unfit very difficult. However, the evidence is clear and convincing that she does not have the mental ability to do so, in spite of her admirable efforts. "When a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the children require that a final disposition be made without delay." *In re Interest of D.A.B. and J.B.*, 240 Neb. 653, 657-58, 483 N.W.2d 550, 553 (1992). We therefore conclude that the best interests of the children call for the termination of Angela's parental rights.

## CONCLUSION

Upon a de novo review, we conclude there is clear and convincing evidence that Angela's parental rights should be terminated pursuant to § 43-292(5) (Reissue 1998) and that

termination is in the best interests of the children. The judgment of the juvenile court is therefore affirmed.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. VICTOR B. PUTZ, APPELLANT.

650 N.W.2d 486

Filed August 20, 2002. No. A-01-777.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of those determinations reached by the trial court.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules and not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal premised upon 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.
5. **Sexual Assault: Lesser-Included Offenses: Minors.** Sexual assault of a child is not a lesser-included offense of first degree sexual assault.
6. **Lesser-Included Offenses: Proof: Words and Phrases.** A lesser-included offense is one which is necessarily established by proof of the greater offense.
7. **Sexual Assault: Lesser-Included Offenses: Minors.** The application of the definitions in Neb. Rev. Stat. § 28-318 (Reissue 1995) makes the offense specified in Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2000) not a lesser-included offense of that specified in Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995).
8. **Witnesses: Rules of Evidence: Prior Statements.** Inconsistent statements made by a victim are relevant and would be admissible if offered in accordance with the rules of evidence.
9. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which 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.
10. **Evidence: Witnesses: Impeachment: Prior Statements.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him or her thereon.
11. **Constitutional Law: Convictions: Due Process: Proof.** The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable

doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires.

12. **Jury Instructions: Appeal and Error.** The correctness of jury instructions must be judged as a whole.
13. **Jury Instructions: Proof: Words and Phrases.** There is no reasonable possibility that a jury could interpret an instruction on the meaning of reasonable doubt to decrease the State's burden below that of proof beyond a reasonable doubt merely because the instruction would allow conviction if the jury is "firmly convinced" of the defendant's guilt when the jury is also instructed to give the defendant the "benefit of the doubt" if there is a reasonable possibility that the defendant is not guilty.
14. ____: ____: ____. When a jury instruction defining reasonable doubt is taken as a whole, the phrases "firmly convinced" (of a defendant's guilt) and "hesitate to act" (connoting doubt sufficient to cause a person to hesitate) are essentially two ways of conveying the same definition, and in considering the instructions as a whole, the use of that language does not indicate to the jury that the prosecutor has a lesser burden.

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

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

On the basis of one event, Victor B. Putz was convicted of first degree sexual assault (count I) and sexual assault of a child (count II), and he was sentenced to concurrent terms of imprisonment of 2 to 6 years on count I and 1 to 2 years on count II. Putz appeals, alleging the court erred in allowing him to be convicted of two crimes for one act, in excluding testimony that the victim made inconsistent statements and recantations, and in instructing the jurors that proof beyond a reasonable doubt is proof that leaves them " 'firmly convinced' " of Putz' guilt, but that if they thought there was a " 'real possibility' " he was not guilty, they should give him the benefit of the doubt. We find no merit in Putz' position and affirm.

## BACKGROUND

An information filed June 12, 2000, charged Putz with first degree sexual assault, a Class II felony in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and with sexual assault of a child, a Class IIIA felony in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2000).

The evidence shows that the female victim, M.M., was 12 years old and that Putz was 56 years old in the summer of 1998, when the crimes took place. He ran a riding club, and she was among a group of children who regularly rode his horses. On the day of the crimes, the other children had left after a water-skiing event and M.M. was alone with Putz at his home. She was dressed in swimwear and shorts, and Putz assaulted her at that time. We relate only the details which are necessary to establish elements of the crimes charged. She testified that after he removed her swimsuit, he fondled and kissed her breast and her vagina. He also penetrated her vagina with his fingers. A knock on the door by his wife ended the assault. A short time later, he took M.M. home, and at that time, he told her to keep the event a secret. She did not disclose the event until April 27, 2000, when she told a therapist, Kimberly Plummer, about the assault.

The State's case in chief consisted of M.M.'s testimony of the background and events of the crimes, formal proof of the ages of Putz and M.M., and Plummer's opinion that the common reactions of minors who are victims of sexual assault are guilt, shame, self-blame, and embarrassment.

After the State rested, Putz moved for a dismissal of the charges, specifically of count II, on the grounds that the State had failed to prove a prima facie case and that there was not a touching and then a separate act of penetration, but, rather, one continuous act. The court denied the motion.

Putz called as witnesses several children and parents that were familiar with the operation of Putz' horse riding club and the water-skiing he had sponsored. This testimony appears to have been an indirect manner of demonstrating Putz' legitimate interest in children, his kindness to them, his routines which apparently did not present him with opportunities to be alone with the children he associated with, and their continued association with Putz after the crime occurred and even after it was

reported. There were also some minor differences between the children's memories of collateral events and M.M.'s testimony regarding those events.

Plummer, an independent therapist with a master's degree, was recalled during Putz' case in chief. She testified that she started her therapy sessions with M.M., M.M.'s mother, and M.M.'s brother in January 2000 because M.M. had problems getting along with her family. The first time that M.M. disclosed the sexual assault was to Plummer on the following April 27. At that time, Plummer asked M.M. whether Putz had molested her, because M.M. had made reference to this possibility in a previous session. M.M. then told Plummer about the assault. The events she related to Plummer were quite similar to those M.M. later testified to at trial. Following the above testimony by Plummer, Putz' counsel asked Plummer, "Isn't it true that [M.M.] told you about more than just this one incident on this particular day?" An objection based upon relevance was made, and at a sidebar, Putz' counsel stated that M.M. had told Plummer and another forensic interviewer that she was molested twice, on two separate occasions, which issue would go to M.M.'s credibility. The State argued that there were never any questions posed to M.M. regarding any statements that she may or may not have made and that the defense could not recall her just for credibility issues. The court sustained the objection.

A child interview specialist associated with a child protection center was called as an adverse witness. She had interviewed M.M. for the State, and she testified essentially that M.M. told her the same story as M.M. testified to at trial, with minor variations. We will not repeat the details.

Finally, a doctor testified that he had treated M.M. on September 13, 2000, and that according to his dictated office notes, M.M. told him that the molestation occurred 6 months prior to July 2000.

The defense renewed its motion to dismiss both counts for failure to make a prima facie case in that the State should not be allowed to obtain a conviction on both counts from the single event.

At the jury instructional conference, Putz' counsel objected to the court's proposed reasonable doubt instruction on the basis

that the term "firmly convinced" was used. The court overruled the objection, and the court's proposed instruction was given. The jury found Putz guilty of both counts, and he was sentenced as set forth above. Putz' motion for new trial, which raised substantially the same issues as he raises in this appeal, was denied.

## ASSIGNMENTS OF ERROR

Putz alleges that the district court erred in (1) convicting him for both an offense and a lesser-included offense based upon the same alleged act; (2) overruling his motion to dismiss, at the close of the State's case, as to the charge of sexual assault of a child by contact; (3) excluding testimony regarding prior statements and recantations made by M.M.; and (4) submitting, over his counsel's objection, a jury instruction which (a) lowered the State's burden of proof from proving each element beyond a reasonable doubt to allowing a conviction if the jury is " 'firmly convinced' " of the defendant's guilt and (b) shifted the burden of proof to the defendant to prove there was a " 'real possibility' " of his innocence.

## STANDARD OF REVIEW

[1,2] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of those determinations reached by the trial court. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[3] In proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules and not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

[4] In an appeal premised upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Id.*

## ANALYSIS

### *Can Defendant Be Convicted of Two Crimes on Basis of One Continuous Course of Conduct?*

Putz refers to sexual assault under § 28-320.01 as a lesser-included offense of § 28-319(1)(c). This is the basic fallacy of his argument on this issue. As will be explained, established case law clearly holds that neither of these statutes is a lesser-included offense of the other.

Section 28-319(1)(c) provides that first degree sexual assault of a child is committed by "[a]ny person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Subsection (1) of § 28-320.01 provides, "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." In addition to the slight differences in age for the victims of the two crimes, sexual contact is defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1995) to "include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." The definition for sexual penetration contained in subsection (6) of that statute has no similar intent requirement.

[5,6] The Nebraska Supreme Court has held that the sexual assault of a child is not a lesser-included offense of first degree sexual assault because first degree sexual assault could be proved by showing the defendant was 19 years of age and the victim was 15 years of age, whereas sexual assault of a child could not be proved where a victim was 15 because that statute requires that the victim be 14 years of age or younger. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). This holding was based upon the holding in *State v. Arthaloney*, 230 Neb. 819, 433 N.W.2d 545 (1989), that a lesser-included offense is one which is necessarily established by proof of the greater offense. Under this rule, the *Beermann* court concluded that § 28-320.01 (Reissue 1985) was not a lesser-included offense of the crime specified in § 28-319(1)(c) (Reissue 1985) in spite of the fact that the defendant was 35 years old and the victim was 10.

There is another reason why § 28-320.01 (Cum. Supp. 2000) is not a lesser-included offense of the crime specified in

§ 28-319(1)(c) (Reissue 1995), and the analysis and definitions in *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997), supply the precedent, although the statutes involved in *Schmidt* are different. In *Schmidt*, the defendant maintained that the court should have instructed that attempted sexual assault in both the second and third degrees under Neb. Rev. Stat. § 28-320(1) (Reissue 1989) was a lesser-included offense of attempted sexual assault in the first degree under § 28-319(1)(a) (Cum. Supp. 1994). Section 28-320(1) (Reissue 1995), the version applicable in the instant case, makes it a crime to subject another person to "sexual contact" without the victim's consent, and subsection (2) of that statute makes the crime a second degree offense if the assault causes serious bodily injury to the victim. The definition of the term "sexual contact" as used in § 28-320 and in § 28-320.01 (Cum. Supp. 2000) is given in § 28-318(5), and the part of that definition significant for the issue we are considering is that the sexual contact must be "for the purpose of sexual arousal or gratification." Section 28-318(6) defines sexual penetration, and that definition includes several types of penetration of the human body as sexual penetration, but it includes no intent element. The *Schmidt* court stated:

> In examining the elements of each crime, it is possible to have sexual penetration as defined [in § 28-318(6) (Reissue 1989)] without having sexual contact as defined [in § 28-318(5)]. Whereas the latter requires that the sexual contact be "for the purpose of sexual arousal or gratification," the former does not require the same.

5 Neb. App. at 675-76, 562 N.W.2d at 875-76. The *Schmidt* court cited *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), for the rule that "for an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense." 5 Neb. App. at 675, 562 N.W.2d at 875. (This is the same definition from *State v. Arthaloney, supra*, used by the court in *State v. Beermann, supra*.) The *Schmidt* court stated that " 'there may be sexual contact without sexual penetration, but, ordinarily, sexual penetration does not exist without some form of sexual contact.' " 5 Neb. App. at 676, 562 N.W.2d at 876. It reasoned that "ordinarily" (emphasis omitted) was not the test under *Williams* and that "[w]hile our conclusion is not

consistent with the idea of sexual penetration in its customary sense, it is a result mandated by our reading of *Williams*, which we are compelled to follow." *State v. Schmidt*, 5 Neb. App. at 676, 562 N.W.2d at 876.

[7] Upon the same reasoning, we conclude that the application of the definitions in § 28-318 (Reissue 1995) makes the offense specified in § 28-320.01 not a lesser-included offense of that specified in § 28-319(1)(c) (Reissue 1995). Therefore, the trial court did not err when it submitted the two separate crimes to the jury in spite of the fact that both crimes resulted from the same course of conduct. Putz argues that to convict him of two crimes as a result of one continuous course of conduct is unfair. We observe that the trial court sentenced Putz to concurrent sentences, thus considerably alleviating the effect of Putz' being convicted of two crimes.

*Did Trial Court Improperly Exclude Testimony Regarding Prior Statements and Recantations Made by Minor Victim?*

Putz alleges he was prejudiced by the trial court's exclusion of "evidence pertaining to the credibility of [M.M.'s] uncorroborated testimony." Brief for appellant at 10. This refers to a question attempted to be asked of Plummer, the therapist who counseled M.M. and the first person whom M.M. told of the sexual assault. Plummer was called as a witness by the defense. Without objection, she testified about what M.M. told her of the assault. She was asked, "Isn't it true that [M.M.] told you about more than just this one incident on this particular day?" The State objected, and in a sidebar conference, Putz' counsel stated that M.M. had separately told Plummer and another interviewer she had been molested on two separate occasions and that this evidence would go to M.M.'s credibility. In the sidebar, defense counsel stated in effect that he understood the court's ruling to be that he was to stay away from the subject. No further offer of proof was made.

[8] Putz cites *U.S. v. Demarrias*, 876 F.2d 674 (8th Cir. 1989), for the proposition that testimony regarding a minor victim of sexual abuse was admissible only with regard to the victim's credibility, and *U.S. v. Waters*, 194 F.3d 926 (8th Cir. 1999), for the proposition that courts look upon recantations with suspicion.

Upon that authority, Putz' counsel argues the inconsistencies in the instant case could lead to a reasonable doubt. The State answers this argument by pointing out that the record does not show that M.M. recanted her story. At the time the question was asked of Plummer, her testimony was consistent with the testimony that M.M. had given when she testified. If Plummer testified that M.M. had told her of other assaults or had recanted something she had testified to, there would be an inconsistency which would go to M.M.'s credibility as a witness. We agree that inconsistent statements made by a victim such as M.M. are relevant and would be admissible if offered in accordance with the rules of evidence. We conclude that this alleged error cannot be considered, for two reasons. First, the record does not contain enough information for the trial court or this court to judge whether M.M. did in fact make an inconsistent statement. Second, Putz did not seek to produce the evidence in the required manner.

[9] If an offer of proof had been made, we could then judge whether M.M. had made inconsistent statements or recanted her story so as to put her credibility at issue. The controlling rule on this question is Neb. Rev. Stat. § 27-103(1) (Reissue 1995), which provides:

> Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Since this rule was not followed at least to the extent of informing this court of the evidence that would have been produced if the objection had not been sustained, we cannot consider this issue.

[10] Even if we assume that Putz' counsel's statement was a satisfactory offer of proof, such inconsistent statements of a witness must be offered in the manner legal experience teaches is fair. The controlling rule is Neb. Rev. Stat. § 27-613(2) (Reissue 1995), which provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the

opposite party is afforded an opportunity to interrogate him [or her] thereon."

The subject of inconsistent statements was not touched upon in the examination of M.M., and she was therefore not given an opportunity to explain or deny any prior inconsistent statements. Consequently, any extrinsic evidence, such as Plummer's testimony, of prior inconsistent statements was not admissible. The quoted rules do not give the judge discretion in applying them, and therefore, the rules control admissibility of the evidence. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). This assignment of error is without merit.

*Was Trial Court's Instruction to Jury on Reasonable Doubt Erroneous?*

Putz claims that jury instruction No. 6 both lowered the State's burden of proof from that of beyond a reasonable doubt, by allowing a conviction if the jury is " 'firmly convinced' " of his guilt, brief for appellant at 6, and shifted the burden to him to prove there was a " 'real possibility' " of his innocence, *id.* at 7.

In instruction No. 3, the trial court instructed the jury that the State must prove each of the material elements of the crimes beyond a reasonable doubt and then listed those elements. In instruction No. 5, it instructed the jury that the State's burden to prove the material elements beyond a reasonable doubt never shifts. The court then defined reasonable doubt in instruction No. 6, as follows:

> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, but, in criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you *firmly convinced of the defendant's guilt.* There are very few things in this world that we know with absolute certainty, and, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, *you are firmly convinced that the Defendant is guilty* of the crime charged, you must find the Defendant guilty. If, on the other hand,

> you think there is a *real possibility that the defendant is not guilty*, you must give the Defendant the benefit of the doubt and find the Defendant not guilty.

(Emphasis supplied.) The emphasis added is to point out the phrases Putz claims made the instruction erroneous.

During the past decade, defendants have questioned several instructions that have been previously used to define reasonable doubt. In *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court considered the jury instruction defining reasonable doubt. The instruction in *Morley* defined reasonable doubt as

> "such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

239 Neb. at 154-55, 474 N.W.2d at 669-70.

That instruction was further considered by the Eighth Circuit Court of Appeals in *Morley v. Stenberg*, 25 F.3d 687 (8th Cir. 1994) (affirming instruction on basis of decision in *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), which came down during consideration of *Morley v. Stenberg* appeal).

*Victor* involved an instruction on reasonable doubt that was identical to the instruction given in *Morley v. Stenberg* except

that it substituted the word "person" for "man" at one point, "you" for "jury" at another, and "facts or circumstances" for "facts and circumstances" at a third. In *Victor*, the U.S. Supreme Court upheld the conviction, but it did state, "Though we reiterate that we do not countenance its use, the inclusion of the 'moral certainty' phrase did not render the instruction given in [the plaintiff's] case unconstitutional." 511 U.S. at 22. That opinion would convince anyone that the instruction, although approved, should be changed to pass Constitutional muster in the future. Apparently, the questioned jury instruction here was the trial judge's attempt to use a new one that would pass muster.

[11] The wording of the jury instructions in the *Morley* and *Victor* cases is considerably different from that in the case at hand, but these cases certainly give clear authority on the standard we should use in considering whether a given instruction purporting to define reasonable doubt meets the requirement: "The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Victor v. Nebraska*, 511 U.S. at 22. In *Victor*, it was concluded that " 'taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.' " *Id.* It also concluded there was no reasonable likelihood that the jurors who determined Victor's guilt applied the instruction in a way that violated the Constitution.

[12,13] Putz cites and discusses cases which hold in various ways that instructions which misdefine the State's burden of proof or the defendant's presumption of innocence are prejudicial. As the above-cited authorities hold, this is clearly correct. Putz asserts that the phrases " 'firmly convinced' " and " 'real possibility' " make the instruction at issue erroneous. Brief for appellant at 9. The above authority teaches that the correctness of this jury instruction must be judged as a whole. The full sentence in which "firmly convinced" appears is: "If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty." This sentence follows and is clearly intended to be connected to the phrase "the law does not require proof

that overcomes every possible doubt." It is also limited by the sentence that follows it, which states, "If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the Defendant the benefit of the doubt and find the Defendant not guilty." There is no reasonable possibility that the jury could interpret an instruction on the meaning of reasonable doubt to decrease the State's burden below that of proof beyond a reasonable doubt merely because the instruction would allow conviction if the jury is "firmly convinced" of the defendant's guilt when the jury is also instructed to give the defendant the "benefit of the doubt" if there is a reasonable possibility that the defendant is not guilty.

We find we are not alone in that conclusion. The instruction the trial court used is identical in substance to that which is included in instruction No. 21 of the Federal Judicial Center's pattern criminal jury instructions. In Justice Ginsburg's concurrence in *Victor v. Nebraska*, 511 U.S. 1, 27, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), she quotes the Federal Judicial Center's pattern instruction and subsequently states:

> This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.

A number of federal courts have addressed a jury instruction substantially similar to, if not the same as, that at issue in this case. In *United States v. Hunt*, 794 F.2d 1095, 1100 (5th Cir. 1986), the court found the appellant's argument that the language " 'firmly convinced of a defendant's guilt' " provided no meaningful delineation of the concept to be without merit. The court agreed with the government that " 'firmly convinced' " seemed little different from " 'a real doubt,' " which language had earlier been approved. *Id.* The appellant also alleged that the instruction's " 'real possibility that a Defendant is not guilty, you must give that Defendant the benefit of the doubt' " language shifted

the burden of proof to him. *Id.* at 1101. The court found that interpretation to be "ridiculous" because nowhere did the court impose the duty on the defendant to show his or her innocence. The instruction discussed only the consequences should that real possibility exist.

In *United States v. McBride*, 786 F.2d 45, 51-52 (2d Cir. 1986), the court suggested caution in the use of the " 'real possibility' " language because it could cause confusion and "may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." That court, however, did not find the use of the " 'real possibility' " language to constitute reversible error. *Id.* at 52.

[14] In *U.S. v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992), the court noted that the phrase " 'firmly convinced' " in a reasonable doubt instruction had been held not to be plain error in *United States v. Bustillo*, 789 F.2d 1364 (9th Cir. 1986). The *Velasquez* court found no indication in other Ninth Circuit decisions that the circuit had any "qualms" about the " 'firmly convinced' " language. 980 F.2d at 1278. It further reasoned that the phrases " 'firmly convinced' " and " 'hesitate to act' " (connoting doubt sufficient to cause a person to hesitate) were essentially two ways of conveying the same definition of reasonable doubt and that in considering the instructions as a whole, the use of that language did not indicate to the jury that the prosecutor had a lesser burden. *Id.*

In *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir. 1984), *cert. denied* 466 U.S. 960, 104 S. Ct. 2174, 80 L. Ed. 2d 557, the court stated that although "the sentence beginning with 'If, on the other hand' might possibly engender some confusion as to the burden of proof if it stood by itself, it is clear that when the charge is read as a whole, there was no error." The court reasoned that since the district court had also instructed the jury that the burden of proving guilt beyond a reasonable doubt was upon the government, that the burden never shifts throughout trial, and that the law does not require a defendant to prove his or her innocence, the instructions as a whole were sufficient to dispel any possible confusion arising from the reasonable doubt definition. The jury in this case was similarly instructed, and we conclude that the jury instruction on reasonable doubt was without error.

## CONCLUSION

For the reasons stated, we find no error and affirm.

AFFIRMED.

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MICHAEL B., APPELLEE, V.
DONNA M., APPELLANT.
652 N.W.2d 618

Filed August 27, 2002. Nos. A-01-938, A-01-1044.

1. **Child Custody: Visitation: Appeal and Error.** 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.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
6. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
7. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
8. ____: ____. Orders which fall into the second category of Neb. Rev. Stat. § 25-1902 (Reissue 1995) must meet two requirements: a substantial right must be affected, and the court's order must be made in a special proceeding.
9. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
10. **Child Custody.** Custody determinations, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 1998), are considered special proceedings.

11. **Constitutional Law: Parental Rights.** A parent has a liberty interest in raising his or her child, a concept which encompasses the child's custody, care, and control.
12. **Constitutional Law: Parent and Child.** The relationship between parent and child is constitutionally protected.
13. **Contempt: Appeal and Error.** In determining whether contempt orders are appealable, the Nebraska Supreme Court has distinguished between civil, or coercive, sanctions and punitive sanctions.
14. **Contempt.** When a coercive sanction is imposed, the contemnor holds the keys to his or her jail cell because the sentence is conditioned upon the contemnor's continued noncompliance with the court's order.
15. ____. An order imposing a coercive sanction in a civil contempt proceeding is always subject to modification by the contemnor's conduct and thus is not a final, appealable order.
16. **Contempt: Collateral Attack.** A coercive sanction can only be attacked collaterally by habeas corpus.
17. **Contempt: Appeal and Error.** A punitive contempt sanction is like a criminal sentence, because it is not subject to mitigation should the contemnor comply with the court order. A punitive contempt sanction thus is a final, appealable order.
18. **Contempt: Costs: Attorney Fees.** In a civil contempt proceeding, costs, including a reasonable attorney fee, may be assessed against a contemnor.
19. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
20. **Child Custody.** Ordinarily, legal custody of children should not be placed in the court unless both parents are unfit or the best interests of the children, in regard to custody, are not clear.
21. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained.

Appeals from the District Court for Sherman County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part dismissed.

Charles R. Maser, of Truell, Murray & Maser, P.C., for appellant.

Mark L. Eurek, of Law Office of Mark L. Eurek, P.C., for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

CARLSON, Judge.

## INTRODUCTION

This case involves two appeals that have been consolidated for our review. In case No. A-01-938, Donna M. appeals from an

order of the district court for Sherman County, in which order the court took legal custody of her daughter, Taylor M. In case No. A-01-1044, Donna appeals from the same order of the district court, again challenging the court's taking legal custody of Taylor, but also challenging the court's finding that Donna was in contempt for failing to allow Michael B., Taylor's biological father, his court-ordered visitation.

## BACKGROUND

Taylor was born May 12, 1995, and was the result of an extramarital affair between Donna and Michael. At the time of Taylor's birth, Donna was married, and still is, to Richard M. On March 5, 1998, the district court for Sherman County found Michael to be the biological father of Taylor. After such finding, Michael moved for an order granting him temporary visitation. The court appointed Alana Anderson as guardian ad litem to investigate and negotiate a visitation schedule.

At the request of Donna, the parties and Anderson consulted with Dr. Michael Kelley, a psychologist, in order to establish a visitation plan in Taylor's best interests. In Kelley's report, he stated that Taylor exhibited mixed evidence of excessive separation anxiety from Donna, and he found

> strong evidence that Taylor has a significant behavior problem, related to the lack of limits placed on her behavior, which if untreated, will lead to significant adjustment problems for Taylor as she gets older. . . . This behavior problem, if left untreated, will also interfere with the implementation of a reasonable visitation arrangement between Taylor and her biological father.

Kelley recommended that Taylor, and those responsible for her care, be treated by a mental health professional to address Taylor's behavior disorder and that the focus of the treatment would be for the parents to learn limit-setting skills that are firm and nonabusive. Kelley's report also included a recommended visitation arrangement.

On September 11, 1998, following a hearing on visitation, the trial court ordered a specific visitation schedule in accordance with the recommendations of Kelley. The visitation plan consisted of frequent visits of increasing duration. The trial

court further ordered, based on Kelley's recommendation, that Taylor was to begin counseling immediately and that all parties were to participate.

On December 30, 1998, Michael filed a motion for contempt alleging that Donna failed to abide by the visitation schedule set forth in the court's order of September 11. On January 22, 1999, the trial court found that Donna was not in willful contempt.

On April 11, 1999, at the end of a visit, Michael returned Taylor to Donna's son, who took Taylor to her maternal grandparents' home. Shortly thereafter, emergency medical personnel were called to the grandparents' home due to a report that Taylor was not physically responding. Taylor was not taken to the hospital by the emergency personnel at that time because they did not feel that Taylor was in any immediate danger. Subsequently, Donna's son took Taylor to the emergency room, where he reported that Taylor had been unconscious and possibly had had a seizure. The emergency room notes state that "there has been some allegation that there may be some abuse from [Taylor's] biological father as there was some visitation this afternoon and this evening." Taylor was examined at the hospital, wherein no specific abnormalities or indications of abuse were found. Hospital personnel referred Taylor to a pediatric neurologist, who examined Taylor and found normal brainwave activity.

On July 15, 1999, Taylor had her first counseling session pursuant to the trial court's order of September 11, 1998. Taylor met with Doris Harman, a professional counselor, and continued counseling with her until December 1999. Harman testified that before Taylor started her sessions, Donna told her about the visitations with Michael and about behavior problems that were occurring with Taylor, such as Taylor's wetting the bed and not wanting to sleep by herself. Donna also told Harman that Donna was concerned about possible abuse. Harman testified that while counseling Taylor between July and December 1999, Harman saw no signs of physical or sexual abuse.

On March 16, 2000, Taylor began seeing Dr. Cynthia Topf, a clinical psychologist. Donna testified that Taylor started counseling with Topf due to some financial issues and because it was more convenient, since Topf was already counseling the foster

children living in Donna and Richard's home. Topf testified that prior to Taylor's session with her on March 16, Donna told her that Taylor does not want to go on visits with Michael and that Taylor exhibits certain behaviors after visits, such as wetting the bed, having nightmares, and not wanting to take a bath. Taylor met with Topf for the second time on March 17.

Also on March 17, 2000, after Taylor met with Topf, Donna took Taylor to meet Michael for a weekend visitation exchange. Donna had someone with her who videotaped the exchange, pursuant to Topf's recommendation. The videotape shows that Donna did not directly prevent or discourage the visitation, but she allowed Taylor to repeatedly refuse to put her shoes on and to remain inside Donna's vehicle for an hour after Michael arrived. The videotape clearly shows Donna's failure to place limits on the child.

On March 20, 2000, the day after the weekend visitation ended, Taylor met with Topf again. Topf testified that at this session, Taylor acted differently than she did at the first two sessions, and that Taylor "said something like 'he touched me down here' 'down there,' and she grabbed her crotch and she wet herself." Topf testified that at that point, she terminated the session and told Richard, who had brought Taylor to the session, to take Taylor to the hospital to have her examined. Donna and Richard took Taylor to the hospital, where she was referred to "Project Harmony" and was examined. The examination results were inconclusive. Based on the possibility of abuse, the hospital called the police, and the Nebraska State Patrol and the office of the Attorney General began an investigation regarding allegations that Michael had abused Taylor. In May, the Sherman County Attorney and the office of the Attorney General concluded that there was insufficient evidence to charge Michael with a crime relating to sexual abuse of Taylor.

In March 2000, after the sexual abuse investigation began, a criminal complaint against Michael was filed in the county court for Douglas County, based on Donna's assertion that Michael had assaulted her by grabbing her arm. In August, following a hearing, the trial court dismissed the charge.

Also in March 2000, in the district court for Douglas County, Donna filed and was granted a protection order against Michael

on behalf of herself and Taylor. After a hearing in April, the protection order was dismissed.

On April 17, 2000, Michael filed a motion for contempt alleging that Donna had failed to abide by the court's order regarding visitation. His affidavit stated that he was denied visitation on March 4 and 5, March 31 through April 2, and April 14 through April 16. A hearing on the motion was set for May 19, but pursuant to a continuance granted at the request of Donna, the hearing was rescheduled for June 12. The continuance was granted contingent upon Donna's allowing Michael to have his scheduled visitations until the hearing date. Michael's next visitation was scheduled for the weekend of May 19.

At the May 19, 2000, visitation exchange, Donna was not present and the relatives who brought Taylor would not get her out of the car or hand her to Michael. Michael called the police, and when they arrived, Michael was handcuffed and taken to jail on a warrant for his arrest based on Donna's assault allegations.

On June 2, 2000, a juvenile petition was filed by the Douglas County Attorney's office based on affidavits of Topf and Donna stating that Taylor should be placed in the custody of the Department of Health and Human Services (Department) in order to protect her from Michael. Taylor was removed from Donna and Richard's home and taken into custody by the Department and placed in foster care. Donna testified that Taylor was voluntarily placed in the custody of the Department. Michael was granted rights of supervised visitation while Taylor was in foster care.

On June 5, 2000, the hearing on Michael's motion for contempt was continued on the court's own motion, and Anderson was reappointed as guardian ad litem to investigate the circumstances regarding the contempt motion. Anderson was given the authority to order Michael, Donna, Richard, and Taylor to undergo psychological evaluations. Dr. Patricia Sullivan was appointed by the trial court to perform the psychological evaluations. The evaluations took place from July through September.

In July 2000, Anderson terminated Topf as Taylor's therapist. Taylor returned to Harman in August for therapy and was still counseling with her at the time of trial.

The Douglas County Attorney's office moved the court to dismiss the pending juvenile case regarding Taylor, and on November

29, 2000, the case was dismissed. The dismissal was based on affidavits of Topf and Harman, in which each stated that it is in Taylor's best interests to be returned to Donna's custody.

On December 6, 2000, Michael filed a petition for change of custody of Taylor. On January 11, 2001, the Douglas County Attorney's office filed another juvenile petition regarding Taylor. The petition was filed based on affidavits of Topf and Donna asking the court to file another petition. The hearing for Michael's contempt and custody motions was continued, and the district court determined that it should abate all further action concerning the custody and visitation of Taylor awaiting completion of the action pending in the juvenile court. The Douglas County Attorney's office subsequently filed a motion to dismiss the second juvenile case, and the court dismissed it.

In May and June 2001, a trial was held on Michael's motion for contempt, which had been filed on April 17, 2000, and his motion for change of custody, which had been filed on December 6. At the time of trial, Michael had not had a court-ordered visitation since March 17, 2000, and he had not had any visitation with Taylor, including supervised visitation, since November.

Donna testified that Michael had asked for visitation on numerous occasions since March 20, 2000, and that she had denied him visitation. She admitted that the only visitation Michael had had since March 2000 was when Taylor was in foster care and he got supervised visitations. She testified that she had denied Michael visitations based on the recommendations of Topf and Harman.

Michael testified that when Donna was allowing him visitations, she would call his home late at night to check on Taylor, and that she had the sheriff's office go to his house on two occasions in 1999 to see if Taylor was okay. One of these occurrences took place at 2:30 a.m. Michael testified that his last visitation pursuant to the court order was the weekend of March 17, 2000. He testified that he had tried to get visitation with Taylor after the determination that the abuse allegations were unfounded, but that Donna had denied him visitation. He testified that he had had supervised visits when Taylor was in foster care, but that he had not seen Taylor since November.

Sullivan testified regarding the results of the psychological evaluations she performed on Michael, Donna, Richard, and Taylor. In regard to Taylor's interaction with Michael, Sullivan testified that Taylor enjoyed being with him, that they played well together, and that Taylor had no fear of him. Sullivan testified that an attachment exists between Taylor and Michael. Sullivan testified that when all four parties were together, Taylor looked to Donna and Richard for approval to have a good time with Michael.

Sullivan diagnosed Taylor with oppositional defiant disorder. She testified that at times, Taylor can be noncompliant and ill-mannered and have an aggressive posture. Sullivan testified that Taylor is a child "who desperately needs parenting." Sullivan testified that Taylor is attached to all three parental figures in her life, but that she needs to spend significantly more time with Michael because he is the most psychologically adjusted of the three parental figures, has the least rancor toward the other parental figures, and is very focused on Taylor's developmental needs. In Sullivan's opinion, it would be in Taylor's best interests for Michael to have custody of Taylor.

Anderson testified that she was first appointed as guardian ad litem in 1998 and that her involvement ended in January 2001. She testified that she believes that Donna and Richard provided Topf, Harman, and the juvenile court with distorted and inaccurate information regarding Taylor's behaviors following visitations with Michael. Anderson testified that many of the behaviors reported to Topf and Harman existed before visitations with Michael began. Anderson testified that she has more confidence in Michael than in Donna regarding the recognition of Taylor's needs and the ability to permit the other parent to have a relationship with Taylor.

Topf testified that in her opinion, Taylor needs to remain in Donna's custody and have either supervised or therapeutic visitations with Michael. Topf further testified that if custody was granted to Michael, Taylor would regress, be traumatized, and likely require hospitalization.

Harman testified that it was apparent to her Donna did not want Michael's visitations to occur and that Harman was sure there were legal maneuvers done to prevent visitation. Harman

was of the opinion that it would be detrimental to Taylor to have custody changed to Michael and that his visitations should be supervised.

In a July 10, 2001, order, the trial court found that Donna was in willful contempt for failing to allow Michael visitation as ordered. The trial court further ordered that a hearing would be held on August 17 to determine the appropriate sanctions for contempt. Regarding the motion for change of custody, the trial court granted it to the extent that the court took legal custody of Taylor "in order to immediately change custody to [Michael] if [Donna] continues to thwart [Michael's] visitation rights." The trial court allowed Donna to keep physical custody of Taylor. Michael's visitation, as previously ordered, was to commence immediately. On August 9, Donna filed a notice of appeal from the trial court's July 10 order (case No. A-01-938). In Donna's appellate brief, she challenges the trial court's decision to take legal custody of Taylor and argues that the trial court should have ordered Michael's visitations to be supervised or that the court should have ordered no visitations at all.

On September 12, 2001, following the August 17 hearing to determine Donna's contempt sanctions, the trial court filed its order sentencing Donna to 90 days in the county jail, but allowed her to purge her contempt by letting Michael have visitation as previously ordered. She was also ordered to pay costs of the matter in the amount of $5,969.67 and Michael's attorney fees in the amount of $7,000. On September 18, Donna filed a notice of appeal from the September 12 order (case No. A-01-1044). In Donna's appellate brief, she assigns the same errors as in the first appeal and raises two additional assignments of error, challenging the trial court's finding of contempt and its assessment of attorney fees and costs. We consolidated the two appeals for our review.

## ASSIGNMENTS OF ERROR

Donna assigns that the trial court erred in (1) taking legal custody of Taylor, (2) not ordering visitations with Michael to be supervised and in ordering visitations at all, (3) finding that Donna was in willful contempt of a court order, and (4) assessing her $7,000 in Michael's attorney fees and $5,969.67 in costs.

## SCOPE OF REVIEW

[1,2] 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. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

[3] Where credible evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

## ANALYSIS

*Jurisdiction.*

[4-6] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Scottsdale Ins. Co. v. City of Lincoln, supra*; *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Scottsdale Ins. Co. v. City of Lincoln, supra.*

Donna filed her first appeal, case No. A-01-938, after the trial court filed its order taking legal custody of Taylor and finding Donna in contempt, but before the trial court held the hearing to determine the contempt sanctions. Donna's first appeal challenges only the trial court's taking legal custody and ordering

visitation, but it does not challenge the court's finding of contempt. Therefore, we must determine whether the court's order taking legal custody of Taylor, in and of itself, constitutes a final, appealable order.

[7-12] The three types of final orders which may be reviewed on appeal under Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001). Orders which fall into the second category of § 25-1902 must meet two requirements: a substantial right must be affected, and the court's order must be made in a special proceeding. *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999); *Jacobson v. Jacobson, supra*. The Nebraska Supreme Court has construed the phrase "special proceeding" to mean civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. See, *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Under this definition, custody determinations, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 1998), are considered special proceedings. *State ex rel. Reitz v. Ringer, supra*. Accordingly, if the trial court's order affected a substantial right of Donna, it would be considered a final order. The Nebraska Supreme Court has stated that a parent " 'has a liberty interest in raising her or his child, a concept which encompasses the child's custody, care, and control.' " *Id.* at 980, 510 N.W.2d at 299, quoting *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). " '[T]he relationship between parent and child is constitutionally protected.' " *State ex rel. Reitz v. Ringer*, 244 Neb. at 980-81, 510 N.W.2d at 299, quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978). It is thus clear that the trial court's order regarding custody affected a substantial right of Donna and is a final order.

The fact that the trial court scheduled a hearing to determine the contempt sanctions for a later date, thus making the contempt portion of the order not final, is of no consequence under the circumstances of this case. The court was presented with two separate issues, a motion for contempt and a motion for change of custody. The court simply chose to address the two motions at the same trial. The court's order that took legal custody of Taylor decided all of the issues before it regarding custody and visitation and did not reserve ruling on any issues related to custody or visitation. The court's order taking legal custody of Taylor was an order affecting a substantial right made during a special proceeding and thus was a final, appealable order. Therefore, in case No. A-01-938, we have jurisdiction to address Donna's appeal.

Donna's second appeal, case No. A-01-1044, raises the same issues concerning custody and visitation as the first appeal and also challenges the court's finding of contempt and its assessment of attorney fees and costs. The custody and visitation issues are already before us as previously determined. In addition, we determine that the court's finding of contempt is not appealable.

[13-17] In determining whether contempt orders are appealable, the Nebraska Supreme Court has distinguished between civil, or coercive, sanctions and punitive sanctions. See, e.g., *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995). When a coercive sanction is imposed, the contemnor holds the keys to his or her jail cell because the sentence is conditioned upon the contemnor's continued noncompliance with the court's order. *Id.* An order imposing a coercive sanction in a civil contempt proceeding is always subject to modification by the contemnor's conduct and thus is not a final, appealable order. *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *Hammond v. Hammond, supra*. Rather, a coercive sanction can only be attacked collaterally by habeas corpus. *Maddux v. Maddux, supra*; *Hammond v. Hammond, supra*. On the other hand, a punitive contempt sanction is like a criminal sentence, because it is not subject to mitigation should the contemnor comply with the court order. A punitive contempt sanction thus is a final, appealable order. *Id.*

In the present case, the trial court found that Donna was in contempt and sentenced her to 90 days in jail, but allowed her to avoid the contempt sanction of jail time by letting Michael have visitation as previously ordered by the court. Donna's sentence was conditioned upon her continued noncompliance with the court's visitation order. Therefore, the nature of the imposed sanction was coercive and is not an appealable order.

*Attorney Fees and Costs.*

[18,19] Donna also argues in case No. A-01-1044 that the trial court erred in assessing her $7,000 in Michael's attorney fees and $5,969.67 in costs for the action. In a civil contempt proceeding, costs, including a reasonable attorney fee, may be assessed against a contemnor. *Dunning v. Tallman, supra.* See *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963). " 'When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.' " *Dunning v. Tallman*, 244 Neb. at 13-14, 504 N.W.2d at 94, quoting *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). At the contempt sanction hearing, Michael presented evidence to show that he has incurred nearly $20,000 in attorney fees since March 2000 as a result of preparing for the contempt hearing, challenging the protection order, defending against the criminal complaint, and defending against the first juvenile action. The record also shows that Sherman County has paid costs in the amount of $5,969.67 during the time period of June 2000 to February 2001. Therefore, the amount of attorney fees and costs awarded by the trial court are supported by sufficient evidence, and the trial court's ruling was not an abuse of discretion. As such, we affirm the trial court's judgment assessing Michael's attorney fees and costs in the matter to Donna.

*Legal Custody.*

[20] Donna assigns that the trial court abused its discretion in taking legal custody of Taylor. Ordinarily, legal custody of children should not be placed in the court unless both parents are unfit or the best interests of the children, in regard to custody, are not clear. *Petrashek v. Petrashek*, 232 Neb. 212, 440 N.W.2d 220 (1989).

In *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), the Nebraska Supreme Court found that § 42-364 authorizes a court, in proceedings to dissolve a marriage, to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. Although the present case does not involve a marriage dissolution, it does involve the custody determination of a minor child between the biological parents, and therefore, § 42-364 and the relevant case law is applicable. The *Ensrud* court stated:

> "When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. . . .
>
> "It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing."

230 Neb. at 725, 433 N.W.2d at 196, quoting *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

The holding in *Ensrud* was somewhat refined by the Nebraska Supreme Court's decision in *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 982-83, 510 N.W.2d 294, 300 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999), when it held:

> Although in *Ensrud* we suggested that a court must always, prior to acquiring custody of a minor, make a preliminary determination as to parental fitness, there can be no such requirement when the court wishes to take custody so that it can acquire further information on parental fitness. Here, the trial court acknowledged that it needed more information in order to make an informed decision regarding

parental fitness. Requiring the trial court to rule on parental fitness before that information is obtained would put the "cart before the horse." *Ensrud* is, therefore, inapplicable.

We conclude that the trial court did not abuse its discretion in taking legal custody of Taylor. At the time of the trial court's order, the best interests of Taylor in regard to custody were unclear. The trial court took legal custody so it could acquire further information before making a decision regarding the permanent custody of Taylor. The evidence at trial showed that Donna had been denying Michael visitations with Taylor and that she did not want Michael to have visitations. Following trial, the court's order taking legal custody of Taylor was concurrent with its finding that Donna was in contempt for failing to abide by the court-ordered visitation schedule. The finding of contempt provided a method to enforce visitation. If Donna continued to deny Michael visitation going forward, she would go to jail. The trial court took legal custody so it could wait and see what effect the finding of contempt would have on Donna in regard to Michael's visitation. If Donna were to allow visitations going forward, Taylor and Michael could restart building the relationship they had begun to establish and Taylor could remain living in the home she has always known. If this occurs, it may be in Taylor's best interests to continue custody with Donna. However, if Donna continues to deny Michael visitation, thereby denying Taylor a relationship with her father, it may be in Taylor's best interests to change custody to Michael and allow Donna visitation, so that Taylor would have both parents in her life. The trial court took legal custody temporarily so it could see what effect the finding of contempt would have on Donna and could then make a final determination as to what is in Taylor's best interests as far as custody. Accordingly, the trial court did not abuse its discretion in taking legal custody of Taylor, and Donna's assignment of error is without merit.

*Visitation.*

Next, Donna assigns that the trial court erred in not ordering that Michael's visitations be supervised and in ordering visitations at all. Her argument is based on Topf's and Harman's testimonies that visitations with Michael should be supervised.

However, these opinions were based on the belief shared by Topf and Harman that Michael has abused Taylor. The opinions of Topf and Harman must also be considered in light of the fact that they were both of the opinion that it was in Taylor's best interests that custody remain with Donna. The opinions of Topf and Harman must also be weighed against the opinions of Anderson and Sullivan, who believed that it would be in Taylor's best interests to give custody to Michael. The record also demonstrates that the sexual abuse allegations against Michael are no longer being pursued by the authorities, and all other legal maneuvers against Michael have been dismissed. Based on the evidence presented, we conclude that the trial court did not abuse its discretion in not ordering that visitations be supervised and in ordering visitations to commence immediately as previously ordered.

*Cross-Appeal.*

The last section of Michael's brief is entitled "CROSS APPEAL," in which he asserts that the trial court should have given him custody of Taylor. Regarding cross-appeals, Neb. Ct. R. of Prac. 9D(4) (rev. 2000) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

[21] The appellate courts of this state have repeatedly indicated that a cross-appeal must be properly designated, pursuant to rule 9D(4), if affirmative relief is to be obtained. See, *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999); *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996); *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995), *affirmed* 249 Neb. 656, 545 N.W.2d 90 (1996). Michael has failed to fulfill the requirements of rule 9D(4), and thus, he has failed to properly cross-appeal. Therefore, we do not address his argument.

## CONCLUSION

We conclude that the trial court did not abuse its discretion in taking legal custody of Taylor and in ordering that Michael's visitations with Taylor were to commence as previously ordered. We also conclude that the trial court did not abuse its discretion in

assessing Donna $7,000 in Michael's attorney fees and $5,969.67 in costs.

AFFIRMED IN PART, AND IN PART DISMISSED.

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JANET L. PAULSEN, APPELLEE, V.
RICHARD S. PAULSEN, APPELLANT.
650 N.W.2d 497

Filed September 3, 2002. No. A-00-1246.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Divorce: Judgments: Waiver: Appeal and Error.** In a dissolution of marriage action, one who accepts any part of a judgment in his or her favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved.
5. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
6. **Alimony.** In considering the specific criteria of Neb. Rev. Stat. § 42-365 (Reissue 1998) concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case.
7. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness.
8. ____. In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1998), the income and earning capacity of each party as well as the general equities of each situation.
9. **Alimony: Appeal and Error.** An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Bernard J. Glaser, Jr., for appellant.

Mark J. Krieger, of Bowman & Krieger, for appellee.

HANNON, SIEVERS, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

The marriage of Janet L. Paulsen and Richard S. Paulsen was dissolved by a decree of dissolution in the district court for Lancaster County, Nebraska, on November 15, 2000. Richard has appealed, alleging error only with respect to the award of alimony to Janet. Finding no abuse of discretion, we affirm.

## BACKGROUND

Janet and Richard were married on March 26, 1972. Three children were born during the course of the marriage, all of whom had reached the age of majority prior to this action. At the time of the marriage, Janet had obtained her cosmetology license; however, she was not employed for approximately 1 year after the marriage. The parties moved to Lincoln, Nebraska, in 1973, and Richard began his employment with the city of Lincoln as a firefighter on January 2, 1974. Richard has been continuously employed by the Lincoln Fire Department, with his current position being fire apparatus operator. Although Richard had had various additional part-time jobs in the past, he had not engaged in such employment for the last few years. After moving to Lincoln, Janet became employed as a hairdresser, which profession she maintained throughout the marriage, with the exception of an interruption after the birth of their third child. While the children were young, Janet worked on a part-time basis in order to be available to meet the needs of the children. Janet's employment alternated between working for others and being self-employed. Both parties participated in the upbringing of the children, although Janet described herself as the primary caretaker. In approximately 1986, Janet opened her present beauty salon, which is located in one-half of a duplex purchased by the parties; the other one-half of the duplex is rented to one of the parties' sons for $300 per month.

At the time of trial, Richard earned $16.27 per hour and averaged 56 hours per week. Richard's gross income in 1999 was $48,598; and in 2000, through October 11, he had earned $41,331 in gross income, having received a 4-percent raise for the year 2000. Janet works 4 days a week, averaging 10 to 12 hours per day. In 1999, Janet's gross income from her self-employment was $21,631, with a net profit, before taxes, of $15,522. Janet's annual earnings for 2000 were expected to reach approximately $18,000. Richard submitted a list of monthly expenses totaling $4,540, and Janet's personal monthly expenses submitted into evidence were $2,952, which did not include her expenses for operating the salon, such as the mortgage payment on the duplex, utilities, and supplies. Janet will be required to obtain her own health insurance following the dissolution at the approximate monthly cost of $300. Janet has experienced medical problems, including a recent hysterectomy and a bleeding ulcer, and she suffers from depression. She was on medication for the bleeding ulcer and depression at the time of the trial and may require surgery in the future for the bleeding ulcer. Janet had been hospitalized on more than one occasion in the past for the bleeding ulcer.

The parties have been separated since 1994, except for a 1½-year period between August 1996 and February 1998, when they were reconciled. Several dissolution actions had been previously filed and dismissed, with Janet filing the operative petition on April 1, 1999. During the period of separation, Richard voluntarily paid $450 per month toward the mortgage on the family home in which Janet resided.

The parties were able to reach a property settlement agreement for approval by the court, whereby the marital estate was divided. Janet was awarded the marital home and duplex, together with a vehicle, savings bonds, and an annuity. Richard was awarded real estate owned by the parties in Franklin, Nebraska, together with three older vehicles, a boat, and his entire pension from the city of Lincoln. In order to equalize the division, Richard was required to pay Janet the sum of $35,000, although the schedule of payment was left for the court to determine. The parties were unable to agree on alimony, which issue was also submitted to the court for determination. In the decree of dissolution, the district court ordered that the equalization

payment be made in the following manner: $25,000 payable within 60 days and the balance payable at $2,000 per year for 5 years, with interest as set by the court. The court further awarded Janet alimony in the sum of $400 per month for 120 months. It is from the award of alimony that Richard appeals.

After Richard filed his notice of appeal, Janet executed and delivered to Richard a quitclaim deed involving the Franklin real estate awarded to Richard in the decree. Thereafter, the Franklin State Bank took a mortgage from Richard on the real estate in the sum of $15,000. On January 10, 2001, Richard paid into the district court the sum of $25,000, pursuant to the decree. Janet filed a motion for summary dismissal, asserting that Richard had accepted the benefit of the judgment and had therefore waived his right to appeal. We overruled Janet's motion for summary dismissal, indicating that we would consider the issue of the acceptance of benefits at oral argument.

## ASSIGNMENT OF ERROR

Richard alleges error in the award of alimony to Janet in the amount of $400 per month for 120 months.

## STANDARD OF REVIEW

[1-3] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). 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. *Id.* A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

## ANALYSIS

*Acceptance of Benefits.*

[4] Janet argues that Richard's refinancing of the Franklin property and treatment of the property as his exclusive property amounts to a waiver of his appeal, citing *Giese v. Giese*, 243 Neb.

60, 497 N.W.2d 369 (1993). In *Giese*, a cleaning business was owned jointly by the parties, and the husband was awarded the entire asset upon the dissolution of marriage. The husband thereafter paid personal debts and made other personal expenditures with funds or assets of the business. In holding that the husband had accepted the benefit of the property awarded to him and thus forfeited his right to appeal that judgment, the *Giese* court followed the general rule that in a dissolution of marriage action, one who accepts any part of a judgment in his or her favor forfeits the right to challenge by appeal any issue but those affecting the interests and welfare of such children as may be involved. *Id.*

One exception to the general rule stated in *Giese* was set forth by the Nebraska Supreme Court in *Kassebaum v. Kassebaum*, 178 Neb. 812, 135 N.W.2d 704 (1965). The *Kassebaum* case involved a situation where the husband had paid the court costs, attorney fees, and all amounts of child support required by the decree. He had also withdrawn the sum of $200 from a joint savings account awarded to him in the decree. In denying the wife's motion to dismiss, the court stated that " '[i]f the outcome of the appeal could have no effect on the appellant's right to the benefit accepted, its acceptance does not preclude the appeal.' " *Id.* at 815, 135 N.W.2d at 706, quoting 4 Am. Jur. 2d *Appeal and Error* § 253 (1962). As stated in *Shiers v. Shiers*, 240 Neb. 856, 485 N.W.2d 574 (1992), there was no judgment in favor of the *Kassebaum* appellant; he had accepted no benefit conferred upon him, but, rather, had merely discharged, pending the outcome of the appeal, the obligations imposed upon him.

In the instant case, while Richard accepted receipt of the quitclaim deed to the Franklin property and refinanced the same, this property was not at issue in the appeal. Rather, the only issue relative to property division at trial was the timing of the receipt of the property judgment by Janet, with Janet urging payment of the entire $35,000 immediately and suggesting that the Franklin real estate could provide Richard with substantial funds to contribute toward the payment. The only issue raised by Richard on appeal is the award of alimony to Janet. Therefore, the outcome of this appeal relative to the only assigned error, namely, alimony, could have no effect on Richard's right to the benefits accepted, namely, the Franklin real estate. Under these

circumstances, we find that Richard has not forfeited his right to appeal the issue of alimony.

*Alimony.*

Richard asserts that the district court abused its discretion in awarding Janet alimony in the amount of $400 per month for 120 months.

[5] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

Neb. Rev. Stat. 42-365 (Reissue 1998) states:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

[6,7] In considering the specific criteria of § 42-365 concerning an award of alimony, a court's " 'polestar' " must be " 'fairness and reasonableness as determined by the facts of each case.' " *Bauerle v. Bauerle*, 263 Neb. at 889, 644 N.W.2d at 135, quoting *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Stated another way, in determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness. *Bauerle, supra.*

Janet and Richard's marriage was one of long duration, having lasted approximately 28 years. While the parties were separated

for approximately 3½ of the 5 years preceding the filing of the petition for dissolution, Richard voluntarily paid $450 per month toward the residential mortgage, for Janet's benefit, during the separation. Neither party has a degree beyond high school, although each took college courses at various times during the marriage. Both parties were involved in caring for the children during their minorities; however, Janet made employment adjustments following the birth of each of the children and worked part time while the children were young. At the time of the trial, Janet was 47 years old; however, Richard's age is not provided in the record. Both parties were fully employed at the time of trial, although Richard claims that Janet is not realizing her earning capacity in that she does not advertise her business and does not rent space to or employ other hairdressers. Janet has experienced various medical problems prior to the dissolution action, which problems have required her to miss work a couple of times a year for approximately 2 weeks at a time.

[8] Richard asserts that Janet's earning capacity actually exceeds his and that therefore, the award of alimony was inappropriate. In awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Bauerle, supra.* However, there must be some evidence of a party's earning capacity before it may be considered. See *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000) (when earning capacity is used as basis for initial determination of child support, there must be some evidence that parent is capable of realizing such capacity through reasonable effort). Richard argues that Janet's earning capacity is approximately $60,000 per year, which he computes using the price she charges per haircut ($12), the length of time each haircut takes (15 to 30 minutes), and the total number of hours she works each week (40 to 48). There was no evidence presented to indicate that Janet works in such a continuous fashion. Further, there is no evidence that Janet has ever realized an earning capacity as suggested by Richard. The tax returns in the record reveal that Janet's net profit from her self-employment between the years 1993 and 1999 never exceeded $20,000. We reject Richard's argument concerning Janet's earning capacity.

The record reveals that for the last full tax year, 1999, Richard's gross income was $48,598 and Janet's was $21,631. In 2000, Richard's projected gross income was approximately $47,370 and Janet's was approximately $18,000. "'"Disparity of income or potential income may partially justify an award of alimony."'" *Bauerle v. Bauerle*, 263 Neb. 881, 891, 644 N.W.2d 128, 136 (2002), quoting *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996). Both parties claim monthly expenses which exceed their respective net monthly incomes. Richard claims further hardship by virtue of having refinanced the Franklin real estate in order to pay the property judgment. However, Richard was awarded his entire pension with the city of Lincoln, valued by him at $65,000 at the time of the filing of the petition, which award presumably necessitated the equalization payment. Richard also argues that Janet was awarded all of the income-producing assets; however, this consisted only of the duplex, out of which she operated her business and received rent from their son.

[9] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Furthermore, an appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). Considering the circumstances and the disparity in income in this case, we determine that the award of alimony by the district court was not an abuse of discretion. Richard's assignment of error is without merit.

## CONCLUSION

For the foregoing reasons, the district court's award of alimony in the decree of dissolution is affirmed.

AFFIRMED.

# THE FIVE J'S, INC., A NEBRASKA CORPORATION, APPELLEE, V. B & S PROPERTIES, INC., A NEBRASKA CORPORATION, APPELLANT.

650 N.W.2d 257

Filed September 3, 2002. No. A-01-357.

1. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted will not be considered.
2. ____. Errors argued but not assigned will not be considered on appeal.
3. **Judgments: Appeal and Error.** In a bench trial of an action at law, the trial court's findings of fact have the effect of a jury verdict and will not be set aside unless clearly wrong.
4. **Damages.** The cost of repair or replacement is a fair representation of damages under the benefit of the bargain rule and is a proper method for measuring damages.
5. **Damages: Property: Evidence: Proof.** The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact.
6. **Damages: Property: Evidence: Presumptions.** Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage.

Appeal from the District Court for Douglas County, MARY G. LIKES, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed.

Jay A. Ferguson for appellant.

Dennis P. Lee, of Lee, Bucchino & Jones, for appellee.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

This case involves an action for damages brought by The Five J's, Inc. (Purchaser), who purchased real estate and improvements thereon from B & S Properties, Inc. (Seller), on account of alleged misrepresentations made by Seller or its agent, Multi-Vest Realty Company (Agent), that the real estate was free of water seepage problems. Following a bench trial,

the county court entered judgment in favor of Purchaser, and the district court affirmed. Seller's only issue properly raised for consideration by this court is the sufficiency of the evidence in view of the fact that Purchaser introduced evidence only of the cost of repairs but not on the value of the real estate with and without the seepage problems. We conclude that under the facts in this case, Purchaser's proof of the cost of repair was sufficient. We therefore affirm.

## BACKGROUND

On or about August 1, 1997, Seller sold a nine-plex located in Omaha, Nebraska, to Purchaser for $144,000. In April 1999, Purchaser filed a petition in county court seeking damages for the cost of repair made necessary by reason of water seeping into the lower-level apartments of the nine-plex. The suit was based upon the allegations of latent defects, of misrepresentations made by Agent in representing Seller in the sale, and that Purchaser bought the property in reliance on those representations. Damages were sought from Seller and Agent. Agent was dismissed upon a demurrer and is no longer a party to this action. The case ultimately went to a bench trial, and Purchaser obtained a judgment of $7,285.

As will be explained later in the assignments of error section of this opinion, there are no properly assigned errors that were argued and preserved other than the issue of the adequacy of the evidence on damages. We shall therefore not summarize the evidence on the subject of liability.

Purchaser contacted Mark Dorner of Jerry's Basement Waterproofing, Inc., a business that waterproofs basements and structures, to secure an estimate of the cost of repair, but at the time of trial, the repairs had not been accomplished. Dorner's qualification to estimate the cost of repair is not questioned, and therefore, we will summarize neither his testimony on the work which he opined was necessary to eliminate the seepage problem nor the foundation for his testimony on the cost of the necessary repairs. He opined that the cost of repair within a reasonable time after discovery of the defect was $7,285. He also testified that since his inspection in March 1998, no work had been done by his company, and that there would be an increase in cost if the repairs

were done at the time of trial. The trial court rejected evidence on the increase in the cost of repairs due to the repairs' not having been made shortly after discovery.

The trial court's judgment was entered on January 13, 2000. In it, the court made several specific findings to support its conclusion that Seller was liable. Judgment was entered for Purchaser against Seller in the amount of $7,285.

Seller appealed to the district court, alleging that the trial court erred, abused its discretion, and acted contrary to law (1) in failing to dismiss Purchaser's action or in awarding Purchaser judgment in the amount of $7,285 plus court costs and (2) in finding that " 'the value of the real estate has been damaged by the amount of repair required' and/or that 'representations by [Agent] would have caused a reasonable individual to believe that what [Purchaser's] representative had been told were not facts at all.' " The district court affirmed and specifically found that the trial court did not err in drawing the inferences that it did. Seller timely appealed to this court.

## ASSIGNMENTS OF ERROR

Seller alleges that the district court erred in affirming the judgment of the county court and in finding that the county court did not (1) abuse its discretion, (2) err in failing to dismiss the action, (3) enter a judgment contrary to law, and (4) err in drawing inferences in its decisionmaking process.

[1,2] A generalized and vague assignment of error that does not advise an appellate court of the issue submitted will not be considered. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). We find that all of Seller's assignments of error are too broad to inform anyone of the issues it is contesting. The argument contained in Seller's brief spoke only of proof of damages and inquiry notice. Errors argued but not assigned will not be considered on appeal. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Furthermore, only issues properly presented to and passed upon by the district court may be raised on appeal to a higher court. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). In the argument in its brief, Seller raised the issue of the sufficiency of the evidence on damages to support the verdict in one respect, that is, whether the failure of Purchaser to prove

the decrease in the value of the apartment complex due to the seepage problem made Purchaser's evidence on damages inadequate as a matter of law.

## STANDARD OF REVIEW

[3] In a bench trial of an action at law, the trial court's findings of fact have the effect of a jury verdict and will not be set aside unless clearly wrong. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). An appellate court does not reweigh the evidence and considers the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party and giving that party every reasonable inference deducible from the evidence. *Id.*

On appeal, the fact finder's determination of damages is given great deference, and its action in this respect will not be disturbed if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Eledge v. Farmers Mut. Home Ins.*, 6 Neb. App. 140, 571 N.W.2d 105 (1997).

## ANALYSIS

Seller cites *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), for the proposition that where there has been a misrepresentation in the sale of real estate, the measure of damages is the costs of repair not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented. The *Flakus* court stated:

> [P]erhaps a clearer statement of the rule is that where there has been a misrepresentation in the sale of real estate, the measure of damages is the cost of placing the property conveyed in the condition represented, not exceeding the difference in value of the property conveyed and the value of the property if it had been as represented.

213 Neb. at 497, 329 N.W.2d at 864.

The *Flakus* case concerned the correctness of a jury instruction on the issue of damages, where the court instructed that the measure of damages was the difference between the value of the property purchased and its actual value but did not limit recovery to the lesser of the cost of repair or the diminished value. There was

testimony by the purchaser that the property was worth $10,000 less than if it had been as represented. An expert testified that he could not be sure a draintile system would solve the problem, but that such a system would cost $3,458. Other evidence showed the cost of repairing the water damage resulting from the problem to be $1,018. A jury verdict of $3,500 was affirmed because the *Flakus* court concluded that the faulty jury instruction was not prejudicial. Although *Flakus* set forth a rule on the measure of damages in a case involving a misrepresentation in the sale of real estate, its holding does not supply precedent relative to the issue in the instant case.

In this case, the apartment complex sold for $144,000 and the undisputed evidence is that it will cost Purchaser $7,285 to correct the problems for which Seller was legally responsible. Someone is going to have to pay $7,285 to repair the water damage. It is difficult to understand why property such as this apartment complex would not decrease in value by at least as much as it would cost to repair it. In the *Flakus* case, the need for evidence on the decrease in value was solved in the traditional manner, that is, the owner gave his opinion. Such testimony is not always readily available and is often a guess by the owner. It takes no great insight to realize that nonowner testimony of the decrease in the value of such property could be expensive when the property to be valued is an apartment complex. It seems unfair to impose that burden on a purchaser who has been injured by someone's fraud or misrepresentation. We find that cases in other jurisdictions have found a fair solution to the problem, that one Nebraska case adopted a sensible rule in the case of a negligent injury to real estate improvements, and that a similar rule should be applied to this case.

[4] In *Noble v. Mandalin*, 104 Ohio App. 3d 11, 660 N.E.2d 1231 (1995), the seller was legally responsible for a wet basement. To establish damages, the purchaser offered two written estimates to repair the basement and testified that it would cost between $4,800 and $6,500 to fix that area. The trial court ruled against the purchaser because the purchaser did not offer any testimony as to the value of the property with a dry basement as opposed to its value with a wet basement. The *Noble* court quoted *Brewer v. Brothers*, 82 Ohio App. 3d 148, 154, 611 N.E.2d 492,

496 (1992), where that court recognized that Ohio courts have held that the proper measure of damages where there is fraud inducing the purchase of real estate is known as the " 'benefit of the bargain' " rule. The *Brewer* court further stated:

> Courts have also held that the cost of repair or replacement is a fair representation of damages under the benefit of the bargain rule and is a proper method for measuring damages. . . . Given the practical difficulties of establishing the value of the property with and without the defects in these types of cases, we accept the proposition that repair or replacement cost is an adequate measure of damages, particularly given that the goal is to compensate the owner for the loss sustained.

*Id.* The *Noble* court applied the above-stated rule and held that the purchaser was not required to present " 'testimony as to the value of the property with a dry basement as opposed to the value of the property with a wet basement.' " 104 Ohio App. 3d at 14, 660 N.E.2d at 1233.

The Nebraska Supreme Court has applied a similar judicious approach to the cost of repair for negligent damage to real estate. In *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 322 N.W.2d 651 (1982), the defendant had struck a building with an automobile. The owner of the building sued to recover the cost of repair, and the trial court had based its decision on the cost of repair. Upon appeal to the district court, that court concluded that the applicable measure of damages was the cost of repair, if less than the diminution in value of the real estate measured by the difference in value of the premises before the accident and immediately after the accident. Since there was no evidence on the diminution of value, the district court reversed the judgment in favor of the plaintiff and dismissed the case. The Nebraska Supreme Court reversed the district court's decision and remanded the cause with a provision allowing the defendant 20 days to introduce evidence that damages determined in the trial exceeded the pretort value of the property.

[5,6] The *"L" Investments, Ltd.* court recognized that existing case law seemed to support the district court's decision, and it reexamined the reasons for the rule in light of the purpose for recovery in tort. It recognized the situation where an automobile

may damage a building and the building would still have the same value after the tort as before, but stated that the owner of the building should still be entitled to have the damage done by the automobile repaired. It also recognized that an owner of a tortiously damaged building should not be able to recover more when a building is damaged than what that owner could have recovered if that property had been destroyed. After discussing the problems in that area, the court held:

> The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage.

212 Neb. at 328-29, 322 N.W.2d at 657.

We realize that *"L" Investments, Ltd.* is distinguishable from the instant case in that it involved a negligent tort, but we see no reason why the same reasoning with respect to damages should not be applied to a case where it has been determined that a seller's misrepresentation entitled a buyer to recover the cost of placing the property purchased into the condition it would have been in if it were as the seller represented it. In such a situation, both buyer and seller have the right to the benefit of their bargain, and therefore, the value of the property if it were as represented is clearly, if not conclusively, established. In the instant case, evidence was adduced that the cost of repairing the nine-plex was $7,285, and it was purchased for $144,000. This is not a situation where the cost of repair was nearly as much as the value of the property. We adopt the reasoning of *"L" Investments, Ltd.* and hold that absent contrary evidence, it can be presumed in this case that the cost of repair does not exceed the property's value. We therefore affirm the court's award of damages representing the cost of repair in the amount of $7,285.

## CONCLUSION

We conclude that under the facts of this case, Purchaser's evidence of the cost to repair the apartment complex, so as to place it in the condition it would have been in absent any misrepresentations, was sufficient to support the court's award of damages.

AFFIRMED.

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WASHINGTON COUNTY BOARD OF EQUALIZATION, APPELLANT, V. RUSHMORE BORGLUM MINISTRIES, INC., APPELLEE.

650 N.W.2d 504

Filed September 10, 2002. No. A-01-771.

1. **Taxation: Appeal and Error.** A decision of the Tax Equalization and Review Commission is reviewed for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
4. **Administrative Law: Judgments: Time: Appeal and Error.** An administrative agency has the power to reconsider its decisions until the aggrieved party files an appeal or the statutory appeal period has expired.
5. **Motions for New Trial: Time: Appeal and Error.** In some cases, a motion to reconsider may be treated as a motion for new trial that would toll the time for filing a notice of appeal.

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

Edmond E. Talbot III, Washington County Attorney, for appellant.

Jim R. Titus, of Morris & Titus Law Firm, P.C., L.L.O., for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

## I. INTRODUCTION

Rushmore Borglum Ministries, Inc. (Rushmore), applied for tax-exempt status with the Washington County Board of Equalization (Board), claiming that status as a religious organization under Neb. Rev. Stat. § 77-202(d) (Cum. Supp. 1998). Rushmore's application was denied by the Board. Thereafter, Rushmore appealed to the Nebraska Tax Equalization and Review Commission (the TERC). After a hearing, the TERC held that Rushmore's application should have been granted, and it reversed the determination of the Board and vacated its order. The Board appealed the decision of the TERC.

An administrative agency has the power to reconsider its decisions until the aggrieved party files an appeal or the statutory appeal period has expired. The Board reconsidered its decision beyond this timeframe and issued an order, and Rushmore appealed from this order. We find that the Board did not have jurisdiction to reconsider the matter and issue a subsequent order. As such, Rushmore did not have the power to appeal from the Board's order following its reconsideration. For the reasons stated herein, we find that Rushmore's appeal must be dismissed for lack of jurisdiction.

## II. BACKGROUND

The property at issue is a residence and a partially completed garage built on approximately 10 acres located in Fort Calhoun, Nebraska. Rushmore purchased the property in 1998. The residence was built in 2000, but as of the time of the hearings, the garage was not finished. Rushmore applied for tax-exempt status in 1998 for tax year 1999. This application was granted. Rushmore then reapplied in 1999 for tax year 2000. Rushmore's 1999 application is the subject of this appeal.

On May 23, 2000, the Board denied Rushmore's application. It is undisputed that Rushmore was not given notice prior to May 23 that the Board was reviewing Rushmore's application, and as such, Rushmore was not present on May 23 when the Board denied its application. Rushmore was informed of the Board's decision by letter dated May 26, 2000. In this letter, the Board notified Rushmore that its application was denied and

that Rushmore had 30 days from the final order to appeal the matter to the TERC. This matter was "reconsidered" on June 27, and the Board again denied Rushmore's application. Dr. Lonnie Hofer, the minister for Rushmore, testified at the hearing on June 27 that he received the letter from the Board denying his application on May 26. The record also contains a certified mail receipt signed by Hofer's wife on May 27 indicating she received the May 26 letter. We note the record does not reflect that any written or oral motion for reconsideration was ever made by Rushmore. On July 25, Rushmore appealed the determination resulting from the June 27 proceedings of the Board to the TERC.

A hearing was held before the TERC on January 11, 2001. At this hearing, the TERC questioned whether it had subject matter jurisdiction to decide this matter. The TERC's concern involved the timeliness of the appeal. In its March 14 order, the TERC determined that it had subject matter jurisdiction and allowed the case to proceed.

The TERC held a hearing on June 6, 2001, to decide the merits of this case. In a written order, the TERC reversed the determination of the Board and vacated its order. Thereafter, the Board filed a petition on appeal with this court.

## III. ASSIGNMENT OF ERROR

For its assigned errors, the Board generally contends that the TERC erred in vacating and reversing the Board's denial of Rushmore's application.

## IV. ANALYSIS

### 1. Standard of Review

[1,2] We review the decision of the TERC for errors appearing on the record. See Neb. Rev. Stat. § 77-5019(5) (Supp. 1999). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

2. JURISDICTIONAL QUESTION

[3] Whether a question is raised by the parties concerning jurisdiction, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995); *State v. Grant*, 9 Neb. App. 919, 623 N.W.2d 337 (2001). As such, we are compelled to address whether this appeal is properly before us.

On May 23, 2000, the Board entered its order denying Rushmore's application for an exemption for being a religious organization. On June 27, the Board conducted a hearing where it "reconsidered" Rushmore's application. In its June 27 order, the Board again denied Rushmore's application. Rushmore filed its notice of appeal to the TERC on July 25.

A hearing was held before the TERC on January 11, 2001. The TERC raised, on its own motion, the question of subject matter jurisdiction. In its order, the TERC noted that there is "'no "presumption" that the [TERC] has jurisdiction.'" See *Arcadian Fertilizer v. Sarpy Cty. Bd. of Equal.*, 7 Neb. App. 499, 583 N.W.2d 353 (1998). After the hearing, the parties submitted briefs on the issue of jurisdiction. The parties also entered into a stipulation regarding jurisdiction. In this stipulation, the parties agreed that no notice was given by the Board to Rushmore that a hearing would be held on May 23, 2000. The parties stipulated that Rushmore had notice of the June 27 hearing. The parties agreed their stipulation could be "used as evidence in determining subject matter jurisdiction." On March 14, 2001, the TERC entered an order finding it had jurisdiction and allowed the case to proceed on the merits. In so finding, the TERC stated, "[B]ased on the Stipulation and the Briefs filed by the Parties the [TERC] finds that it has subject matter jurisdiction in this appeal."

Based on the above facts, we must decide whether the Board had jurisdiction to reconsider its May 23, 2000, order on June 27, and subsequently whether the TERC had jurisdiction to hear Rushmore's appeal.

Before we decide the jurisdictional question, we note that the Board did not comply with the statute requiring Rushmore to be given at least 10 days' notice before a hearing is held. See Neb.

Rev. Stat. § 77-202.02 (Cum. Supp. 1998). In the parties' stipulation, the Board agreed that Rushmore was not given notice that a hearing would be held on May 23, 2000. We do not condone the actions of the Board in this opinion. The Board should have complied with § 77-202.02 and given Rushmore the proper notice. Even so, in deciding this case, we are required to adhere to the strict construction of the jurisdictional statutes. See *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[4] Case law provides that an administrative agency has the power to reconsider its decisions until the " 'aggrieved party files an appeal or the statutory appeal period has expired.' " *City of Omaha v. Wade*, 1 Neb. App. 1168, 1172, 510 N.W.2d 564, 567 (1993). This provision applies to the Board because it is an administrative agency. See *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993) (stating that county board of equalization is administrative agency).

[5] To perfect an appeal to the TERC, one must file his or her notice of appeal within 30 days of the Board's final order. See Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000). Case law has held that in some cases, a motion to reconsider may be treated as a motion for new trial that would toll the time for filing a notice of appeal. See, *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); Neb. Rev. Stat. § 25-1912 (Supp. 1999). However, the record in the instant case contains no motion to reconsider. See *Jackson v. Board of Equal. of City of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001). Thus, the time to file an appeal was not tolled. See *id.*

Rushmore should have filed its notice of appeal by June 22, 2000. Rushmore did not file its notice of appeal by June 22, that is, within 30 days of the May 23 decision. The Board had jurisdiction only until that day to reconsider its decision. See *City of Omaha v. Wade, supra*. Therefore, the Board did not have jurisdiction to reconsider its May 23 order on June 27. Even so, the Board held a hearing and entered a decision on June 27.

The only valid order that existed was the May 23, 2000, order, and Rushmore's notice of appeal was filed on July 25, well beyond the 30-day time limit set out in § 77-1510. Therefore, the TERC did not have jurisdiction to hear Rushmore's appeal, since

the appeal was untimely. Because the TERC was without jurisdiction, we likewise do not have jurisdiction to decide the merits of this case. See *Jackson v. Board of Equal. of City of Omaha, supra*. Because Rushmore did not comply with the jurisdictional requirements, this appeal must be dismissed for lack of jurisdiction. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

## V. CONCLUSION

The Board did not have jurisdiction to enter its order of June 27, 2000. Rushmore did not perfect its appeal within 30 days of the Board's May 23 order, not filing its notice of appeal until July 25. Therefore, this appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

CARLSON, Judge, dissenting.

I respectfully dissent from the majority's determination that we do not have jurisdiction in this matter and the conclusion that this appeal should be dismissed.

*Jurisdiction.*

The rationale of the majority's opinion that this court does not have jurisdiction is based on the incorrect premise that the key date in any analysis is the first Board "hearing" of May 23, 2000. The gravamen of the jurisdictional question in this case is the stipulated and agreed-upon fact that Rushmore was not given notice that a hearing would be held on May 23. This notice requirement is clearly spelled out and mandated in § 77-202.02 ("county board of equalization . . . after a hearing on ten days' notice to the applicant . . . shall certify its decision to the applicant"). The failure to comply with this notice requirement to the taxpayer-applicant, Rushmore, violates Rushmore's due process rights.

The effect of the majority decision is to deny Rushmore a hearing. As stated, this lack of notice and a hearing to challenge Rushmore's tax assessment constitutes a denial of due process. "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. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The central meaning of

"procedural due process" is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). The majority's result is untenable when the facts and the intent of the parties clearly dictate June 27, 2000, as the operative hearing date.

Case law provides that an administrative agency has the power to reconsider its decisions until the " 'aggrieved party files an appeal or the statutory appeal period has expired.' " *City of Omaha v. Wade*, 1 Neb. App. 1168, 1172, 510 N.W.2d 564, 567 (1993). This provision applies to the Board because it is an administrative agency. See *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993) (stating that county board of equalization is administrative agency). It is clear that when the Board agreed to reconsider Rushmore's application, it implicitly vacated its May 23, 2000, order. As such, there was no order in effect and the Board retained jurisdiction to reconsider the matter on June 27 and subsequently enter its order.

To perfect an appeal to the TERC, one must file his or her notice of appeal within 30 days of the Board's final order. See § 77-1510. Rushmore filed its notice of appeal to the TERC on July 25, 2000. Rushmore's appeal to the TERC was timely, and the TERC had jurisdiction to hear Rushmore's appeal. Therefore, this court had jurisdiction to hear the Board's appeal and the case should be decided on its merits.

*Merits.*

The TERC held a hearing on June 6, 2001, to decide the merits of this case. At the hearing, Hofer testified and offered exhibits containing information about Rushmore and its ministries. Hofer testified that he has worked for Rushmore for 23 years. Hofer stated that he has traveled for 17 years, ministering in 20 states and several countries. Hofer testified that the residence at issue was built because Rushmore needed more space to entertain guests for fundraising and ministry. Hofer stated that the garage was being built to provide a place for the ministry's van, recreational vehicle, and other equipment. The garage would also contain office space where Hofer would prepare his ministry. Hofer

testified that Rushmore requires him to live in the residence and provide security for the equipment mentioned above.

Hofer provided detailed information about how the residence is used to promote Rushmore's ministry. Specifically, Hofer said that in 2000, he had about 75 people at the residence for Bible study, 15 people for counseling, and about 84 people for "evangelism and fellowship." Hofer stated that he had 140 overnight guests during 2000. These people were supporters, potential supporters, and people he was ministering to.

Hofer testified that there was no sale of alcohol on the premises. Hofer also testified that Rushmore did not discriminate on the basis of race, color, or national origin. Hofer stated that there is a mortgage on the residence, which Rushmore pays. The warranty deed entered into evidence named Rushmore as the grantee of the property that is the subject of this lawsuit. Hofer also stated that no rent is received from this property. Hofer further testified that all money received from "love offerings" or other contributions goes through the secretary-treasurer of Rushmore.

Sidney Penke, a Washington County assessor, testified regarding why she denied Rushmore's application. Penke stated, "[I]t was the fact that we had nothing to show us there was an actual affiliation with a church like we had [with] the other parsonages where we could see this." Penke testified that there was no evidence to show that the residence was used for church purposes. Penke reiterated several times that Rushmore could not be granted tax-exempt status because there was no affiliation with a particular church.

Two members of the Board testified on the Board's behalf. Both members testified that if there were a church with a congregation close to the residence, it would have made a difference as to their decisions. They also testified that the residence was used predominantly for a religious purpose.

After hearing the evidence, the TERC took the matter under advisement. In a written order, the TERC reversed the Board's determination and vacated its order. The TERC found that Rushmore "presented sufficient clear and convincing evidence to support its contention that the subject property satisfies the five-part test for exemption." The TERC concluded as a matter

of law that based on the record before it, the decision of the Board to deny Rushmore's application for tax-exempt status for the tax year 2000 was unreasonable and arbitrary. Thereafter, the Board appealed.

The Board's assignments of error are as follows: (1) The TERC failed to apply the proper standard of review, (2) the TERC improperly placed the burden of proof on the Board, and (3) the TERC erred in finding that the decision of the Board was unreasonable or arbitrary.

The first error addresses whether the TERC employed the proper standard of review. The Board argues that the TERC "expressly rejected the mandatory presumption" afforded to the Board. Brief for appellant at 8. The Board argues that Rushmore did not present sufficient evidence to allow the TERC to reverse the decision of the Board.

Regarding the proper standard of review, Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that the TERC

> shall hear appeals and cross appeals . . . as in equity and without a jury and determine anew all questions raised before the [Board] which relate to the liability of the property to assessment, or the amount thereof. The [TERC] shall affirm the action taken by the [B]oard unless evidence is adduced establishing that the action of the [B]oard was unreasonable or arbitrary . . . .

The Nebraska Supreme Court has dealt with whether a rebuttable presumption exists regarding the decision of a board of equalization. The court held, under a predecessor to the present § 77-1511, that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment it has acted upon sufficient competent evidence to justify its action. However, the court further held that "'[t]he presumption disappears when there is competent evidence to the contrary . . . .'" *Boss Hotels Co. v. County of Hall*, 183 Neb. 19, 21, 157 N.W.2d 868, 869 (1968).

In this case, the TERC determined that Rushmore presented evidence proving that the Board's denial of Rushmore's application was incorrect. Therefore, the presumption of correctness was rebutted, and the reasonableness of the Board's denial of Rushmore's application became a question of fact. The Board's

allegation that the TERC ignored a rebuttable presumption of correctness is without merit. It is apparent from its written order that the TERC employed the proper standard of review. In its order, the TERC specifically concluded, as a matter of law based on the record before it, that the decision of the Board to deny Rushmore's application for tax-exempt status for the tax year 2000 was unreasonable and arbitrary.

The Board also assigns that the TERC improperly placed the burden of proof on the Board rather than Rushmore. The Board argues that from the TERC's findings of fact, it can be inferred that the TERC shifted the burden to the Board. According to the Board, the TERC improperly required the Board to "prove a disqualifying use of the property." Brief for appellant at 8.

It is well established that the burden of proving exemption from taxation is on the party claiming such exemption. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.3d 459 (1987); *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

A review of the TERC's order and the record shows that the TERC did not place the burden of proof on the Board. Instead, after Rushmore presented evidence rebutting the presumption that the Board's denial of Rushmore's application was correct, the TERC determined the reasonableness of the Board's evaluation based on the evidence before it. This assigned error is without merit.

The Board's remaining assigned errors may be summarized as asserting that the TERC erred in determining that the Board's decision was unreasonable or arbitrary. In its argument, the Board contends that the TERC erred in finding that the residence was a parsonage. The Board also contends that the TERC ignored evidence adduced at the hearing that the use of the residence was for financial gain.

This court reviews the decision of the TERC for error appearing on the record. See § 77-5019(5). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App.

454, 574 N.W.2d 180 (1998); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

Section 77-202(1)(c) exempts property from taxation if the property is

> owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.

In this case, the Board does not dispute that the property was not used for the sale of alcoholic liquor. Nor does the Board contend that Rushmore discriminated on the basis of race, color, or national origin. The only issues in this appeal are whether Rushmore used the property exclusively for religious purposes and whether Rushmore used the property for financial gain or profit.

The Nebraska Supreme Court has held that "exclusive use" means the primary or dominant use of property, as opposed to incidental use. *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993). An exemption will not be lost if the property claimed to be exempt is used in an incidental manner that is not religious as long as the predominant or primary use of the property is one or more of the exempt uses. *Id.*

The Nebraska Supreme Court has defined religious purpose as follows:

> " 'Prayer is always worship. Reading the Bible and singing may be worship. * * * If these exercises of reading the Bible, joining in prayer and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance.' . . ."

*Id.* at 418, 499 N.W.2d at 547-48. Additionally, the Nebraska Supreme Court has found that the tax exemption for religious purposes is not restricted to property used exclusively for public

worship; rather, the exemption embraces all property primarily used for religious purposes. *Id.*

As set forth above, Hofer testified that the primary purpose of the residence is to entertain guests for fundraising and ministry. Hofer specifically testified regarding the amount of ministry performed at the residence. Hofer stated that the garage was being built to provide a place for the ministry's van, recreational vehicle, and other equipment. The garage would also contain office space where Hofer would prepare his ministry. Rushmore requires Hofer to live in the residence and provide security for the equipment mentioned above.

With regard to the Board's contention that Rushmore used the property for financial gain, this argument is without merit. Hofer testified about the financial layout of Rushmore. He stated that all money went to Rushmore's secretary-treasurer and that Rushmore did not receive any rent for the use of the property. There was no evidence presented to suggest that Rushmore was profiting financially from the construction of the residence and garage.

Given the expertise of the members of the TERC, the TERC is authorized by Neb. Rev. Stat. § 77-5016(5) (Supp. 1999) to "utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." It is apparent that Rushmore's evidence provided a basis for the TERC's conclusion that Rushmore rebutted any presumption that the Board's decision was correct. As a result, the reasonableness of the Board's decision became a question of fact. Based upon the evidence presented, the TERC did not act arbitrarily or capriciously in determining that the decision of the Board was unreasonable and arbitrary. The TERC also did not act arbitrarily or capriciously in granting Rushmore's application for tax exemption. The TERC's decision is supported by competent evidence and conforms to the law. These assigned errors are without merit.

As indicated earlier, I find that the Board had jurisdiction to enter its June 27, 2000, order and that the TERC had jurisdiction to hear Rushmore's appeal. On the merits, I find that the TERC applied the correct standard of review and did not place the burden of proof on the Board. Finally, I find that the TERC did not

err when it reversed the Board's decision denying Rushmore's application for tax exemption. Accordingly, I would affirm.

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STATE OF NEBRASKA, APPELLEE, V.
ARLO G. GRIESS, APPELLANT.
651 N.W.2d 859

Filed September 17, 2002. No. A-01-1126.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Motions to Suppress: Search and Seizure: Police Officers and Sheriffs: Probable Cause: Appeal and Error.** In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether there is an initial illegality involved in the search. If such determination involves a consideration of whether an officer acted with reasonable suspicion or probable cause, that determination will be reviewed de novo.
3. **Constitutional Law: Search and Seizure: Warrantless Searches.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions.
4. **Search and Seizure: Warrantless Searches: 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. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
6. **Search and Seizure: Motor Vehicles.** The possession of a motor home, even if the motor home is viewed as a motor vehicle, has at least a limited expectation of privacy in it.
7. **Constitutional Law: Search and Seizure: Warrantless Searches.** As a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the Fourth Amendment to the U.S. Constitution.
8. **Judgments: Property: Police Officers and Sheriffs.** A writ of execution is not a legal justification for law enforcement officers to be in someone's home.

9. **Constitutional Law: Judgments: Search and Seizure.** A writ of execution cannot justify an inventory search that is otherwise prohibited by the 4th and 14th Amendments to the U.S. Constitution.
10. **Judgments: Statutes: Attachments.** There is no justification for applying statutes on attachments to procedures for writs of execution.
11. **Judgments: Property: Police Officers and Sheriffs.** A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that the officer in express terms asserts his or her dominion over it by virtue of such writ.
12. **Judgments: Statutes: Debtors and Creditors: Notice.** Neb. Rev. Stat. § 25-1516 (Reissue 1995) provides that upon being served a writ of execution, a judgment debtor must be given notice of his or her exemptions and rights in regard thereto.
13. **Judgments: Debtors and Creditors: Police Officers and Sheriffs: Motor Vehicles: Warrantless Searches.** A sheriff may not adopt an execution procedure against a motor home which deprives a judgment debtor of the right to be free from a warrantless search of his or her home.
14. **Judgments: Property: Debtors and Creditors: Police Officers and Sheriffs.** A judicial hearing held before a sheriff takes possession of a residence would give the judgment debtor a chance to protect his or her rights and would not deprive the judgment creditor of his or her rights.
15. **Constitutional Law: Probable Cause.** Consent is an exception to the probable cause requirement of the Fourth Amendment to the U.S. Constitution.
16. **Search and Seizure.** The general rule is that mere submission to authority is insufficient to establish consent to a search.
17. **Search and Seizure: Prosecuting Attorneys: Proof.** When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he or she has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.
18. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Waiver.** Orderly submission to law enforcement officers who, in effect, represented to a defendant that they had the authority to enter and search a house, against the defendant's will if necessary, is not such consent as constitutes an understood, intentional, and voluntary waiver by the defendant of his or her fundamental rights under the Fourth Amendment to the U.S. Constitution.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed, sentences vacated, and cause remanded for a new trial.

Vicky L. Johnson, of Johnson & Kalkwarf, Fillmore County Public Defender, for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

## INTRODUCTION

Arlo G. Griess appeals his convictions and sentences for possession of a controlled substance and attempted unlawful distribution of a controlled substance. The controlling issue on this appeal is whether contraband and drug paraphernalia found and seized during an "inventory search" of Griess' motor home should have been suppressed. This search was conducted without a warrant immediately after a writ of execution upon a civil judgment against Griess was levied upon a motor home owned and lived in by him. We find that the trial court improperly denied Griess' motion to suppress, because Griess had a legitimate expectation of privacy in the motor home as it was his residence, that a writ of execution does not authorize a warrantless search and seizure of a home, and that Griess did not waive his rights by not resisting a sheriff's action of taking the motor home. We therefore reverse, and remand for a new trial.

## BACKGROUND

Griess' motor home was located on farm property a mile west and 2 miles north of Fairmont, Nebraska, on land owned by Dan Softley. For some time before June 27, 2000, the Nebraska State Patrol had been conducting a surveillance of the Softley property based upon information that methamphetamine was being manufactured at that location. The State Patrol had discovered certain chemicals and items commonly used in the manufacture of methamphetamine in a ravine or ditch on the Softley property, near the location under surveillance. The State Patrol had advised the sheriff of Fillmore County of its investigation and asked the sheriff to contact it if anything suspicious occurred.

On March 27, 2000, an order of execution was issued by the clerk of the Fillmore County District Court to the sheriff to be levied upon Griess' property to enforce a civil judgment held against Griess. On June 27, the sheriff, in the company of a State Patrol officer, went to levy the execution against the motor home, which the sheriff had found was registered in Griess' name. The sheriff told Griess that he was levying the execution on the motor home. Griess asked to remove some of his things from the motor

home and was allowed to do so. At some point, Griess gave the sheriff his keys to the motor home. A tow truck was called, and the motor home was towed to the impound yard in Geneva, Nebraska, where its contents were inventoried by the State Patrol. The contraband and drug paraphernalia which support the criminal charges against Griess were found at that time.

At the hearing on the motion to suppress, the sheriff and Investigator Shane Flynn testified, and two surveillance reports and one interview report in connection with the investigation of possible drug activity on the Softley property were introduced. The relevant details of that evidence will be summarized below. After the hearing, the trial court took the matter under advisement and later made a trial docket entry in which the court stated that its reading of the law indicated that the "motive of the police is not a factor to be considered in these circumstances." The trial court also found that the police and public are entitled to be protected and that therefore, the sheriff and his agents "were entitled to look and find." The motion was overruled, and the case was set for trial. After trial before the court, Griess was found guilty and sentenced to 20 months' to 3 years' imprisonment for possession of a controlled substance and to 20 months' to 4 years' imprisonment for attempted unlawful distribution of a controlled substance. Griess appeals.

## ASSIGNMENTS OF ERROR

Griess argues that the trial court erred (1) in overruling his motion to suppress evidence; (2) in finding sufficient evidence to convict him of the offenses, because the trial court improperly considered certain evidence; and (3) in sentencing him to excessive terms of imprisonment.

## STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of

fact and takes into consideration that it observed the witnesses. *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

[2] In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether there is an initial illegality involved in the search. If such determination involves a consideration of whether an officer acted with reasonable suspicion or probable cause, that determination will be reviewed de novo. See, *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *State v. Manning, supra*; *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

## ANALYSIS

[3,4] Griess alleges that the trial court erred in overruling his motion to suppress evidence, because the search was conducted without a search warrant. He relies upon the rules which have been summarized as follows:

> Warrantless searches and seizures are per se unreasonable under the Fourth Amendment [to the U.S. Constitution,] subject only to a few "'"'specifically established and well-delineated exceptions,'"'" [citation omitted], which "must be strictly confined by the exigencies which justify [their] initiation." [Citation omitted.] "In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement."

*State v. Roberts*, 261 Neb. 403, 409-10, 623 N.W.2d 298, 304-05 (2001). That proposition must be the basis of our consideration of the issues of this case.

The State argues that Griess does not have standing to question the search, because he did not have a legitimate expectation of privacy in the motor home. It bases that assertion upon the notions that the lawful execution of the writ ended Griess' expectation of privacy; that when Griess surrendered the keys to the motor home to the sheriff, he therefore also surrendered his expectation of privacy; and that Griess must prove he had a legitimate expectation of privacy. Under this argument, a determination of the status of the motor home, that is, whether it was the place where Griess lived, is a very significant fact.

*Motor Home Was Griess' Home.*

Under our analysis, a major factual issue is whether the motor home was Griess' residence. It was located on another person's property. This record does not have an exact description of Griess' motor home or specific evidence of how it was situated at the time of the levy. The parties called it a vehicle, a motor home, or a mobile home depending upon whether they wanted to stress its mobility or its use as a home. Because its registration document calls it a "motor home," we have used that term exclusively.

In order to give the reader the clearest possible picture from the record, we will summarize the evidence adduced at the hearing on the motion to suppress describing the motor home and its situation. The motor home's registration document shows that it was registered in Griess' name and that it was designated as a 1985 Fleetwood motor home. It is shown to have had an RV (recreational vehicle) plate number and a registered weight of 11,999 pounds. After an extensive study of the record, we were unable to learn whether the motor home was or could readily be self-propelled. Resorting to statutes on the registration of motor vehicles, we note that Neb. Rev. Stat. § 60-3004 (Cum. Supp. 2000) established that some vehicles that are not self-propelled are still classified as recreational vehicles. Looking at the evidence, we conclude that the registration document does not indicate whether the motor home was or was not self-propelled. In any event, the sheriff called a tow truck to take the motor home to the impound yard.

A State Patrol surveillance report entered into evidence stated that close to 2 a.m. on April 29, 1999, the State Patrol, using a thermal imaging device, observed that "a subject" was occupying the motor home. In another report, Investigator Flynn noted that a confidential informant had told him on October 19 that Griess "stayed in his motor home." There is also evidence that the motor home had been on the Softley land for many months as the property had been under surveillance by the State Patrol. There was a "Morton" building on this property, as well as Griess' motor home. The State Patrol had information that the Morton building had construction work done on the interior which included an office, a bathroom, and a loft. Thermal surveillance did not indicate any abnormal heat signature in that

building. The surveillance report indicated that Griess helped with the construction of the interior of the Morton building while residing in his motor home.

Investigator Flynn testified that when he inventoried the inside of the motor home after the sheriff seized it, he observed a couch, a sleeping bag, pillows, a chair, a saxophone, a television, videotapes, items used for cooking, clothing, shoes, toiletries, food items in the pantry area, and personal papers.

We find no evidence to indicate that the motor home was not Griess' home, and such evidence on the subject as is contained in the record requires the conclusions that the motor home was and had been Griess' home for some time and that it had been at the same location for many months prior to June 27, 2000, the day it was seized by the sheriff. We therefore conclude that the motor home was Griess' home at the time the sheriff levied the execution on it. As it was Griess' home, he had a great expectation of privacy in the motor home.

*Effect of Writ of Execution.*

The State further argues that the sheriff acted in accordance with his statutory duties to enforce the execution and that he was required to inventory the motor home. The State argues, "'An inventory search may be reasonable under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause.'" Brief for appellee at 9, quoting *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

[5,6] The warrantless search exceptions recognized by the Nebraska Supreme Court include "(1) searches undertaken with consent or with probable cause [citations omitted]; (2) searches under exigent circumstances [citation omitted]; (3) inventory searches [citation omitted]; (4) searches of evidence in plain view [citation omitted]; and (5) searches incident to a valid arrest [citations omitted]." *State v. Roberts*, 261 Neb. 403, 410, 623 N.W.2d 298, 305 (2001). We think the State's position that Griess did not have an expectation of privacy in the motor home is an erroneous approach to any analysis on the issues of this case. The writ of execution may or may not trump Griess' expectation of privacy, or he may or may not have waived his

expectation of privacy, but he rather clearly had such an expectation before the sheriff came to his home on June 27, 2000. The possession of a motor home, even if the motor home is viewed as a motor vehicle, has at least a limited expectation of privacy in it. See *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996) (less rigorous requirements govern searches of automobiles because of diminished expectation of privacy). This court's problem with the parties' analyses is that they both ignore the legal authority of the Nebraska and U.S. Supreme Courts on the effect of a search made pursuant to civil process when that action results in a search that would otherwise be illegal under the 4th and 14th Amendments as an unreasonable search and seizure. This issue is the controlling legal issue in this case.

*Search Under Civil Process.*

[7] One of the leading cases on warrantless searches accomplished under the authority of a writ of execution is *State v. Hinchey*, 220 Neb. 825, 374 N.W.2d 14 (1985). In *Hinchey*, a deputy sheriff, armed with a writ of execution issued by the clerk of the court under Neb. Rev. Stat. § 25-1516 (Reissue 1979), entered the home of the defendant to locate personal property upon which to levy execution under the writ. The State sought to justify this warrantless entry into a home upon the basis that that statute required the deputy sheriff to seek entry into the defendant's home to search for the property upon which the execution could be levied. The *Hinchey* court stated:

> Although there are some recognized exceptions which may justify a warrantless search, [citations omitted], as a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution. [Citations omitted.] . . . "[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' [Citation omitted.] And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort."

> . . . "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

220 Neb. at 828-29, 374 N.W.2d at 17.

[8] The *Hinchey* court went on to discuss the plain view doctrine which would have applied in that case if the deputy sheriff searching for property to levy execution upon had had lawful authority to enter the defendant's home without a warrant and stated that the "legal justification for being in the [home] without a warrant is the critical issue." *Id.* at 829, 374 N.W.2d at 18. In *Hinchey*, a writ of execution was clearly held not to be a legal justification for a deputy sheriff to be in someone's home.

What the *Hinchey* court found troublesome was the fact that the writ of execution which was used as a basis for the warrantless search was not issued upon the action of any court, but "merely upon the filing of a praecipe with the clerk of the court." *Id.* at 832, 347 N.W.2d at 19. This was a ministerial function of the clerk and was held not to be the same as employing judicial process to obtain a search or arrest warrant. The *Hinchey* court, in finding that this violated the defendant's constitutional rights, stated:

> We are unable to see how an officer armed with nothing more than a writ of execution issued by a clerk of the court may enter the premises of an individual, contrary to the individual's direction and objection, on the basis that the officer has a duty to seek property upon which execution may be made. To be sure, the officer has such a duty and may take possession of property whenever possession can be obtained without violating the owner's fourth amendment rights.

220 Neb. at 833, 347 N.W.2d at 20.

*State v. Hinchey*, 220 Neb. 825, 374 N.W.2d 14 (1985), is not the only case that considers the validity of searches of homes under civil process. See, *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977) (where search during levy by U.S. Government for delinquent taxes was held to be invalid); *Dorwart v. Caraway*, 290 Mont. 196, 966 P.2d 1121 (1998) (which relied heavily on *Hinchey* to support ruling that entry by deputy sheriff into private residence to execute writ

of execution violated federal and state constitutional rights against unreasonable searches).

The *Hinchey* court concluded:

> We hold that the procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. In this manner the fourth amendment prohibition against unreasonable searches and seizures will be satisfied.

220 Neb. at 834, 374 N.W.2d at 20.

Apparently, at the time of the levy in this case, the sheriff was not aware of *Hinchey*, because we find no indication of any pretense of his having followed it.

[9] We find *Hinchey* to be controlling here in that the writ of execution cannot be the justification for entry into Griess' motor home and in that the procedure outlined in the preceding quote could be easily modified for a motor home that is a residence. In *Hinchey*, the State sought to use the writ of execution to justify the deputy sheriff's presence in the defendant's home so that the plain view doctrine could be applied. In this case, the State seeks to use the writ of execution to justify the sheriff's taking possession of the motor home and then inventorying it under the inventory exception to the rule against warrantless searches. We conclude that a writ of execution cannot justify an

inventory search that is otherwise prohibited by the 4th and 14th Amendments.

[10] The situation in *Hinchey* is distinguishable from the case at hand in that in *Hinchey*, the deputy sheriff was searching for property, whereas in this case, the sheriff had located personal property which so far as he knew was subject to levy. In its brief, the State relies upon Neb. Rev. Stat. § 25-1008 (Reissue 1995), which, in summary, provides that a writ of attachment shall be executed by a sheriff without delay and that the sheriff shall go where the defendant's property may be found, make an inventory of it, and take the same into custody. This statute applies to an order of attachment which is issued by a judge upon the plaintiff's affidavit and not by a court clerk. The attachment procedures are available against a defendant who has absconded, is hiding, or by some other means is avoiding authorized legal procedures. See Neb. Rev. Stat. § 25-1001 (Reissue 1995). There is no justification for applying statutes on attachments to procedures for writs of execution. There are, after all, several statutes regulating a levy pursuant to a writ of execution. See, generally, Neb. Rev. Stat. §§ 25-1501 to 25-1580 (Reissue 1995 & Cum. Supp. 2000).

[11] The State's argument seems to assume that the sheriff makes a levy pursuant to a writ of execution on personal property by taking possession of the property levied upon. This assumption is wrong. The Nebraska Supreme Court has held:

> " 'A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ.' " Battle Creek Valley Bank v. First Nat. Bank of Madison, 62 Neb. 825, 88 N. W. 145 (1901); Boslow v. Shenberger, 52 Neb. 164, 71 N. W. 1012 (1897). See, also, Miller v. Crosson, 131 Neb. 88, 267 N. W. 145 (1936); Meyer v. Michaels, 69 Neb. 138, 95 N. W. 63 (1903).

*Credit Bureau of Broken Bow, Inc. v. Moninger*, 204 Neb. 679, 683, 284 N.W.2d 855, 858 (1979).

In *Moninger*, a deputy sheriff received a writ of execution on a judgment, found a motor vehicle registered in the judgment

debtor's name, went to where the debtor and the vehicle were located, and attempted to levy execution upon the vehicle. The debtor told the deputy that a bank had a lien on the vehicle. The deputy gave the debtor a copy of the writ and then took " 'ahold' " of the vehicle and said he was executing upon it. *Id.* at 680, 284 N.W.2d at 857. The deputy then left the vehicle with the debtor. The *Moninger* court held this procedure to have been an effective levy at the time those things were accomplished.

The *Moninger* court cited the case law quoted above to show that the approved procedure has long been recognized as proper for the levy of the execution of a judgment. The sheriff in the case at hand did not need to take possession of the motor home to perform his duty in the process of executing the writ. It seems clear that if in *State v. Hinchey*, 220 Neb. 825, 374 N.W.2d 14 (1985), the deputy sheriff violated the defendant's constitutional rights by entering the defendant's home to find property upon which to levy execution, the sheriff in the case at hand violated Griess' constitutional rights by taking the motor home and then searching it, particularly when the sheriff had no need to take the motor home in order to levy execution upon it.

[12] Furthermore, the procedure used by the sheriff in this case violated statutory rights Griess enjoyed as a judgment debtor. Section 25-1516 provides that upon being served a writ of execution, a judgment debtor must be given notice of his or her exemptions and rights in regard thereto. The copy of the writ in evidence refers to the required notice, so we assume that notice was in accordance with the statute. Section 25-1516 provides a notice that states to the debtor, "The law of Nebraska and the law of the United States provides [sic] that certain property cannot be taken from you and sold to pay a debt." This notice gives citations to the statutes giving debtors the various exemptions, and it even tells them they may request a hearing on their exemption by checking a box on the notice and sending it to the clerk of the court within 20 days of their receipt of notice. *Id.*

Under this statutory procedure, Griess' judgment creditor's rights would still have been protected if the sheriff had levied execution upon the motor home and then left it where it was. This procedure would have had the effect of protecting Griess'

constitutional rights to be free from a warrantless search of his home as well as his rights as a judgment debtor.

[13,14] It seems clear that in view of the *Hinchey* decision, a sheriff may not adopt an execution procedure against a motor home which deprives a judgment debtor of the right to be free from a warrantless search of his or her home. The rights of the judgment creditor can be protected without depriving the judgment debtor of his or her constitutional rights. There is plenty of time for a sheriff levying execution against a debtor's home to take possession of such home and inventory it after a judicial hearing and in accord with the *Hinchey* decision. It is possible, if not quite probable, that a motor home such as Griess' would be exempt from execution, either as a homestead or as exempt property. The spirit, if not the letter, of § 25-1516 et seq. seems to require that such matters be determined before a person's home is taken, and if not then, at least before the judgment debtor's right to be free from a warrantless search of his or her home is violated. A judicial hearing held before a sheriff takes possession of a residence would give the judgment debtor a chance to protect his or her rights and would not deprive the judgment creditor of his or her rights.

*Did Griess Consent by His Action?*

[15] The State does not directly argue that Griess waived his expectation of privacy or that he consented to the sheriff's taking the motor home, but it does argue that Griess waived his right of privacy when he surrendered the motor home's keys to the sheriff. When the sheriff told Griess that he was going to levy execution on the motor home, he gave Griess a copy of the writ and Griess asked for and received permission to remove some personal items from the motor home. He then gave the sheriff the keys to the motor home. We think this action is best analyzed as a possible waiver or consent. Consent is an exception to the probable cause requirement of the Fourth Amendment. *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999). See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The best expression of this issue is whether Griess consented to the sheriff's taking the motor home, thereby consenting to the inventory search, by virtue of his actions—primarily his

not resisting lawful authority and his giving the sheriff the keys to the motor home.

In *State v. Hinchey*, 220 Neb. 825, 374 N.W.2d 14 (1985), the defendant verbally objected to the search; here, Griess did not. In *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), the resident was not present when the illegal search was made under the guise of a levy, and in *Dorwart v. Caraway*, 290 Mont. 196, 966 P.2d 1121 (1998), the defendant was in jail when his home was illegally searched as part of the levy of a writ of execution. We find no cases which consider whether submission to civil process amounted to consent or a waiver.

[16,17] We find the general rule to be that mere submission to authority is insufficient to establish consent to a search. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001); *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984). The U.S. Supreme Court has held, "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). See, e.g., *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921).

[18] The *Bumper* court, in a footnote, cited a federal case that held:

> "Orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understood, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution."

391 U.S. at 549 n.14, quoting *United States v. Elliott*, 210 F. Supp. 357 (D. Mass. 1962). We conclude that submission to civil process being served by an officer is likely not voluntary.

In this case, the sheriff and a State Patrol officer appeared and the sheriff told Griess he was levying execution on the motor home and gave him the writ of execution. He did not ask Griess'

permission to do anything. Griess asked the sheriff for permission to remove personal items from the motor home. The sheriff's actions demonstrate that he assumed the writ of execution gave him the authority to take the motor home. Griess was presented with law enforcement officers doing what they thought they had a right to do, and Griess did nothing more than should be expected of a citizen: He submitted without resistance. Such peaceful submission is to be encouraged, not discouraged. Griess gave the sheriff the keys to the motor home. We conclude that Griess' actions indicate nothing but a submission to authority and as such were insufficient to establish a waiver of his right to privacy or consent to unlock and search the motor home.

## CONCLUSION

Since *Hinchey, supra*, held that a writ of execution did not justify an entry which enabled law enforcement officers to take advantage of the plain view doctrine, we conclude that a similar writ does not authorize a seizure of a judgment debtor's home so as to justify an inventory search of the home. We also find that Griess did not consent to the sheriff's taking the motor home. We therefore find that the trial court incorrectly denied Griess' motion to suppress the physical evidence found in the motor home as a result of a warrantless search by law enforcement officers. The procedure undertaken in this case denied Griess a fundamental constitutional right. Because we find that the motion to suppress should have been granted, we need not consider the other issues argued. See *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001), which holds that an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. Under *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), we reverse Griess' convictions, vacate the sentences, and remand the cause for a new trial.

REVERSED, SENTENCES VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

# STATE OF NEBRASKA, APPELLEE, V. WILLIAM D. MILLER, APPELLANT.

651 N.W.2d 594

Filed September 17, 2002. No. A-01-1283.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
4. ____: ____. An abuse of discretion takes place when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **Rules of Evidence.** A document is authenticated when evidence is presented that is sufficient to support a finding that the matter in question is what its proponent claims.
6. **Judges: Sentences.** In imposing a sentence, a 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 and motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.
7. **Sentences: Appeal and Error.** Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying circumstantial factors as well as any applicable legal principles in determining the sentence to be imposed.

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 affirmed.

W. Randall Paragas, of Paragas Law Offices, for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

## INTRODUCTION

William D. Miller appeals from a district court order that affirmed his conviction for driving under the influence of alcohol (DUI), third offense. On appeal, Miller alleges that the trial court erred in finding that a prior DUI conviction in Iowa was a valid conviction for the purpose of enhancement under Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). For the reasons set forth herein, we affirm the judgment of the district court.

## STATEMENT OF FACTS

On October 13, 2000, Miller was charged in the county court for Sarpy County, Nebraska, with DUI, third offense, and speeding. Miller was subsequently arraigned and pled guilty to the underlying charge of DUI, and the speeding violation was dismissed. An enhancement proceeding was held on June 1, 2001, whereby the State introduced evidence of two prior convictions for DUI. Exhibit 1 consisted of numerous copies of documents in connection with a prior DUI conviction in 1993 from Polk County, Iowa, and exhibit 2 was a copy of the record of a prior DUI conviction in Otoe County, Nebraska, in 1995. The county court found Miller guilty of DUI, third offense; sentenced him to 90 days in jail; imposed a $600 fine; and revoked Miller's driving privileges for 15 years. Miller appealed to the district court for Sarpy County and alleged that (1) the trial court erred in finding that his DUI conviction was a third offense, (2) the trial court erred in finding that the evidence of the Iowa conviction was valid for enhancement purposes, (3) the trial court erred in imposing a sentence consistent with a third-offense DUI conviction, and (4) there was insufficient evidence of a prior conviction in connection with the Iowa conviction. The district court affirmed the decision of the county court. This appeal timely followed.

## ASSIGNMENTS OF ERROR

On appeal, Miller asserts that (1) the district court erred in affirming the trial court's finding that the evidence of the Iowa conviction was valid for enhancement purposes under § 60-6,196 and (2) the sentence imposed was excessive.

## STANDARD OF REVIEW

[1] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Cardona*, 10 Neb. App. 815, 639 N.W.2d 653 (2002).

[2] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

[3,4] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

## ANALYSIS

*Prior Out-of-State Conviction.*

Miller asserts that the evidence of his prior DUI conviction in Iowa was not valid for the purpose of enhancement under § 60-6,196. At the outset, it should be noted that the 2000 amendment to the enhancement provision under § 60-6,196 added convictions from other states as evidence of prior convictions.

Section 60-6,196(2)(c) now provides that a person is guilty of a Class W misdemeanor

> [i]f such person has had two convictions in the twelve years prior to the date of the current conviction (i) under this section, (ii) under a city or village ordinance enacted pursuant to this section, (iii) *under a law of another state, if at the time of the conviction under the law of such other state, the offense for which such person was convicted would have been a violation under this section* . . . .

(Emphasis supplied.)

Further, § 60-6,196(3) provides:

> For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions in the twelve years prior to the date of the current conviction (a) under this section, (b) under a city or village ordinance enacted pursuant to this section, or (c) *under a law of another state, if at the time of the conviction under the law of such other state, the offense for which the defendant was convicted would have been a violation under this section.* In any case charging a violation under this section, the prosecutor or investigating agency shall use due diligence to obtain the defendant's driving record from the Department of Motor Vehicles and the defendant's driving record from other states where he or she is known to have resided within the last twelve years. The prosecutor shall certify to the court, prior to sentencing, that such action has been taken. *The prosecutor shall present as evidence for purposes of sentence enhancement under this section an authenticated copy of a prior conviction in another state. The authenticated copy shall be prima facie evidence of such prior conviction. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.*

(Emphasis supplied.)

By its plain language, § 60-6,196(3) states that in order to present prima facie evidence of a prior out-of-state conviction for enhancement purposes, the prosecutor is required to present an "authenticated" copy of the conviction. Thus, we must first determine whether the evidence of the Iowa conviction received by the court was properly authenticated.

[5] Requirements of "authentication" are governed by Neb. Rev. Stat. § 27-901 (Reissue 1995). A document is authenticated when evidence is presented that is "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* Accord *State v. Miles*, 8 Neb. App. 844, 602 N.W.2d 666 (1999).

Under § 27-901, authentication can be accomplished in various ways, including by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

Although not directly on point for the case at hand, the Nebraska Supreme Court held in *Dugan v. Jensen*, 229 Neb. 672, 428 N.W.2d 504 (1988), that prior out-of-state traffic convictions were admissible in a proceeding to revoke a motorist's operator's license if they were authenticated in that the seal of the court appeared on the document sought to be introduced into evidence. In *Dugan*, the defendant's motor vehicle license was revoked based on prior convictions in Nebraska, Kansas, and Iowa. On appeal to the district court, the defendant argued that the Department of Motor Vehicles' reliance on the out-of-state convictions was in violation of proper procedure. The district court ruled that the out-of-state convictions had not been authenticated and should not have been received into evidence. With the Kansas conviction bearing the seal of the court, and the Iowa conviction not, the Supreme Court found that that Iowa document was inadmissible and affirmed the decision of the district court.

A review of the legislative history of the amendments allowing use of prior convictions in other states is also helpful in analyzing the proof necessary for enhancement purposes. This history reveals that if a prior conviction comes from within the state, a "certified" copy of the prior conviction from the keeper of the records, namely the clerk of the court, is sufficient proof for enhancement purposes, and that if a prior out-of-state conviction is used, the prosecution must offer an "authenticated" copy of the conviction, which requires the signature of both the keeper of the records, e.g., the clerk of the court, and the judge. Floor Debate, L.B. 1004, Committee on Transportation and Telecommunications, 96th Leg., 2d Sess. 12857 (Apr. 6, 2000) (statement of Speaker Kristensen). The legislative intent of this amendment concerning prior out-of-state convictions was summarized as follows:

> [I]f we're going to use out-of-state convictions, they merely need to be authenticated copies. . . . The other part

> is that the authenticated copy is prima facie evidence. That doesn't mean that it is 100 percent valid, that means that it will admit itself and will establish the prior conviction, unless there is other credible evidence to dispute that.

*Id.*

In the instant case, the State offered into evidence exhibit 1, which was received by the court without any "foundational objection" by Miller, to support Miller's prior Iowa DUI conviction. A review of the record indicates that exhibit 1 consists of 10 pages with the first page reflecting the seal of the court (three times) and the signatures of the clerk of the district court situated in Polk County, Iowa, and the judge of the Fifth Judicial District of Iowa. Therefore, we conclude that exhibit 1, containing evidence of the Iowa conviction, was properly authenticated and admissible.

Miller argues that the language of § 60-6,196(2)(c) requires that a comparison be made between "the law of such other state" and the law of this state. Brief for appellant at 5. Miller argues that the State failed to offer evidence of the law of Iowa that would have determined whether at the time of the Iowa conviction, the offense would have been a violation under § 60-6,196, and that therefore, the evidence of the prior Iowa conviction was invalid. A review of the legislative history regarding this provision of the statute is also helpful, with the following comment being made during the floor debate on the amendment of § 60-6,196:

> [W]e must show the law of the foreign jurisdiction, if it doesn't show right on the face of the conviction, the nature of the law in the foreign jurisdiction as to the percentage of blood alcohol. . . . [W]e cannot have a conviction enhancement if the violation was of a penalty greater than what Nebraska has. And so there would still be the necessity, not just of the record of the conviction, but also a record of what the law in that particular jurisdiction was at the time of the conviction.

Floor Debate, *supra* at 12859 (statement of Senator Pederson).

The record indicates that in addition to the first page of exhibit 1's bearing the seal of the court and the signatures of the clerk and judge, pages three and four identify the specific Iowa

statute that Miller was charged with violating and reflect the following language:

> Comes now John P. Sarcone, as County Attorney of Polk County, Iowa, and in the name and by the authority of the State of Iowa, accuses WILLIAM DOUGLAS MILLER of the crime of OPERATING WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG as defined in Section 321J.2 Code of Iowa.
>
> And charges that the above named defendant on or about MARCH 19, 1993 in the County of Polk and State of Iowa did operate a motor vehicle while under the influence of an alcoholic beverage or other drug, or a combination of such substances, or while having ten hundredths (.10) or more alcohol concentration.

In comparison, § 60-6,196, the law in effect at the time of Miller's conviction in the case at hand, provided in pertinent part:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

Based upon a review of exhibit 1, the authenticated copy of the prior Iowa DUI conviction, sufficient evidence was presented that the law which Miller was charged under and pled guilty to was similar to the applicable law in Nebraska at the time. That exhibit thus served as prima facie evidence of the conviction for the purpose of sentence enhancement. In addition, there is no evidence in the record that Miller was not given the opportunity to review the prior Iowa DUI conviction or bring any mitigating facts to the attention of the court prior to sentencing. The record further indicates that Miller made no objection to the evidence being offered or regarding the validity of the prior Iowa conviction.

Therefore, based on the foregoing, we do not find that the trial court abused its discretion in finding that the prior out-of-state

DUI conviction was valid and could be used for enhancement purposes.

*Excessive Sentence.*

Miller was sentenced to 90 days in jail, was ordered to pay a $600 fine, and had his driving privileges revoked for 15 years. The penalty for third-offense DUI, a Class W misdemeanor, is a maximum of 1 year's imprisonment and a $600 fine, with a mandatory minimum of 90 days' imprisonment and a $600 fine. In addition, § 60-6,196(2)(c) requires that as part of the judgment of conviction, the court shall order the defendant not to drive any motor vehicle in the State of Nebraska for any purpose for a period of 15 years from the date ordered by the court and shall order that the operator's license of the defendant be revoked for a like period.

[6,7] In imposing a sentence, a 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. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. As stated above, 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. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

Miller's sentence was within the statutory limits. Having reviewed the record, including the presentence investigation report, we conclude that the trial court did not abuse its discretion in the sentence imposed.

## CONCLUSION

Finding no merit to the assigned errors, we affirm.

AFFIRMED.