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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 28, 1999 and OCTOBER 28, 1999

IN THE

Supreme Court of Nebraska

VOLUME CCLVII

PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
WESLEY C. MUES, Associate Judge[1]
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge

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

[1]Until October 25, 1999

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

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

WORKERS' COMPENSATION COURT AND JUDGES

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

ATTORNEYS
Admitted Since the Publication of Volume 256

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ROSEMARY ANTON
CHRISTINA BALL
JOHN BALL
JEFF BEATY
AMY BEEHNER ROLAND
TRAVIS BENNINGTON
JASON BENSON
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GRETCHEN F. HASTINGS
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No. S-97-818: **State v. Hatcher**. Affirmed. Gerrard, J.

No. S-97-1126: **Miller v. Miller**. Reversed and remanded for further proceedings. Connolly, J.

No. S-98-292: **Liermann v. Liermann**. Reversed and remanded with directions. Connolly, J.

No. S-98-400: **Dunn v. Department of Motor Vehicles**. Affirmed in part, and in part reversed and remanded with directions. Connolly, J.

No. S-98-482: **Heckmann v. Heckmann**. Reversed and remanded for further proceedings. Miller-Lerman, J.

No. S-98-647: **State v. Williams**. Reversed and remanded with directions. Gerrard, J.

No. S-98-721: **Remmen v. Zweiback**. Affirmed. Stephan, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-97-172: **State ex rel. NSBA v. Schatz.** Order of disbarment entered.

No. S-98-116: **State v. Braband.** Decision of Court of Appeals is summarily affirmed under rule 7A(1). See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

No. S-98-316: **State Law Enforcement Bargaining Council v. State.** Stipulation allowed; appeal dismissed.

No. S-98-439: **State ex rel. State Law Enforcement Bargaining Council v. State.** Stipulation allowed; appeal dismissed.

No. S-98-753: **Wilson v. Hopkins.** Motion of appellee for summary affirmance overruled; appeal dismissed as moot. See rule 7A(2).

No. S-98-938: **Tyler v. Norwest Bank, N.A.** Affirmed. See rule 7A(1).

No. S-98-1180: **In re Estate of Emery.** Motion of appellee for summary dismissal overruled.

No. S-98-1225: **Essen v. Gilmore.** Second motion of appellee for summary dismissal filed May 3, 1999, overruled. Order and docket entry of October 20, 1998, failed to contain notation of relief granted, as then required under Neb. Rev. Stat. § 25-1301(2) (Reissue 1995), and were not final, appealable orders.

No. S-98-1274: **In re Estate of Demuth.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-98-1311: **State ex rel. NSBA v. Reedy.** Application for reinstatement granted. Joseph B. Reedy reinstated as member of Nebraska State Bar Association.

No. S-99-098: **State v. Turner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-99-538: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-99-546: **Waite v. Dawson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-556: **State v. O'Neill**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-790: **Deprez v. Continental Western Ins. Co**. By order of the court, appeal dismissed for failure to file briefs.

No. S-99-1029: **Jensen v. Atokad Ag. & Racing Assoc**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-99-1059: **State ex rel. NSBA v. Jensen**. Judgment of suspension.

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No. A-96-880: **Pittman v. Wyant**. Petition of appellant for further review overruled on July 28, 1999.

No. A-97-855: **Tonniges v. Tonniges**. Petition of appellant for further review overruled on June 16, 1999.

No. S-97-985: **Parde v. Parde**, 8 Neb. App. 242 (1999). Petition of appellee for further review sustained on June 9, 1999.

No. S-97-1003: **State v. Narcisse**. Petition of appellant for further review sustained on June 16, 1999.

No. S-97-1003: **State v. Narcisse**. Petition of appellant pro se for further review overruled on June 16, 1999.

No. S-97-1045: **Huff v. Swartz**. Petition of appellee for further review sustained on July 28, 1999.

No. A-97-1053: **State on behalf of Erdman v. Herbert**. Petition of appellant for further review overruled on June 30, 1999.

No. A-97-1084: **Neujahr on behalf of Neujahr v. McGregor**. Petition of appellant for further review overruled on June 16, 1999.

No. A-97-1108: **Coats v. Coats**. Petition of appellee for further review overruled on August 25, 1999.

No. A-97-1117: **Pritchett v. Pohlmeier**. Petition of appellant for further review overruled on September 23, 1999.

No. A-97-1159: **Kissinger v. United Parcel Serv.**, 8 Neb. App. 260 (1999). Petition of appellee for further review overruled on July 28, 1999.

No. A-97-1179: **State v. Arias**. Petition of appellant for further review overruled on May 27, 1999.

No. A-97-1198: **State v. Bolden**. Petition of appellant for further review overruled on July 28, 1999.

No. S-97-1203: **Henton v. Nokes**. Petition of appellee for further review sustained on June 30, 1999.

No. A-97-1240: **Griffin v. Werner Enters**. Petition of appellee for further review overruled on August 25, 1999.

No. S-97-1246: **Esfahani v. Five Star Productions**. Petition of appellant for further review sustained on August 25, 1999.

No. S-97-1267: **Pratt v. Clarke**, 8 Neb. App. 199 (1999). Petition of appellant for further review sustained on June 16, 1999.

No. A-97-1276: **State v. Brown**. Petition of appellant for further review overruled on August 25, 1999.

No. S-97-1301: **Tyler v. Department of Corr. Servs.**, 8 Neb. App. 553 (1999). Petition of appellee for further review sustained on September 23, 1999.

No. A-97-1321: **Kimball v. Kimball**. Petition of appellant for further review overruled on July 28, 1999.

No. A-97-1327: **Pipe & Piling Supplies v. Betterman & Katelman**, 8 Neb. App. 475 (1999). Petition of appellant for further review overruled on July 28, 1999.

No. A-97-1350: **Sherrets v. Lund Co**. Petition of appellee for further review overruled on August 25, 1999.

No. A-97-1356: **Kaupp v. Kaupp Hereford Ranch, Inc**. Petition of appellant for further review overruled on September 23, 1999.

No. A-97-1365: **In re Estate of Thomas**. Petition of appellant for further review overruled on June 28, 1999.

No. A-98-012: **Consolidated Nutrition v. Grone**, 8 Neb. App. 404 (1999). Petition of appellee for further review overruled on August 25, 1999.

No. A-98-024: **Frohn v. Frohn**. Petition of appellee for further review overruled on June 30, 1999.

No. A-98-044: **Allen v. County of Dodge**. Petition of appellant for further review overruled on August 25, 1999.

No. A-98-076: **Kuehler v. Galloway, Wiegers & Heeney**. Petition of appellant for further review overruled on October 14, 1999.

No. A-98-090: **Yoder v. Department of Motor Vehicles**. Petition of appellant for further review overruled on July 28, 1999.

No. A-98-111: **Miller v. Transit Authority of City of Omaha**. Petition of appellant for further review overruled on July 28, 1999.

No. A-98-138: **State v. Murry**. Petition of appellant for further review overruled on May 27, 1999.

No. S-98-145: **Garnick v. Garnick**. Petition of appellee for further review sustained on July 28, 1999.

No. A-98-240: **Hanus v. State**. Petition of appellant for further review overruled on July 28, 1999.

No. A-98-253: **Insurance Consultants, Inc. v. Nyholm**. Petition of appellant for further review overruled on October 14, 1999.

No. S-98-256: **Derr v. Columbus Convention Ctr**. Petition of appellee for further review sustained on August 25, 1999.

No. A-98-298: **In re Interest of Sierra T**. Petition of appellant for further review overruled on June 16, 1999.

No. A-98-299: **State v. Orosco**. Petition of appellant for further review overruled on June 9, 1999.

No. A-98-313: **Snowdon Farms v. Jones**. Petition of appellee for further review overruled on July 7, 1999.

No. A-98-322: **Pichler v. Pichler**. Petition of appellee for further review overruled on August 25, 1999.

No. A-98-337: **Kingery v. Kingery**. Petition of appellee for further review overruled on September 15, 1999.

No. A-98-338: **Kellner v. Kellner**, 8 Neb. App. 316 (1999). Petition of appellee for further review overruled on June 16, 1999.

No. A-98-343: **In re Interest of Emily B. et al**. Petition of appellant for further review overruled on August 25, 1999.

No. A-98-422: **Taylor v. Taylor**. Petition of appellee for further review overruled on August 25, 1999.

No. S-98-471: **Preister v. Madison County**. Petition of appellant for further review sustained on August 25, 1999.

No. A-98-475: **State v. Haler**. Petition of appellant for further review overruled on June 16, 1999.

No. A-98-491: **State v. Hicks**. Petition of appellee for further review overruled on August 25, 1999. Cross-petition for further review contained in appellant's response also overruled on August 25, 1999.

No. A-98-514: **Petersen v. Farm Credit Servs**. Petition of appellees for further review overruled on October 14, 1999.

No. S-98-516: **In re Interest of Michael B. et al.**, 8 Neb. App. 411 (1999). Petition of appellee for further review sustained on July 28, 1999.

No. A-98-580: **In re Interest of Kasha B.** Petition of appellant guardian ad litem for further review overruled on October 14, 1999.

No. A-98-591: **Chambers v. Chambers.** Petition of appellant for further review overruled on July 29, 1999.

No. A-98-606: **State v. Jeanneret.** Petition of appellant for further review overruled on June 9, 1999.

No. A-98-625: **State v. Nava.** Petition of appellant for further review overruled on August 25, 1999.

No. S-98-650: **State v. Dreimanis**, 8 Neb. App. 362 (1999). Petition of appellant for further review sustained on June 23, 1999.

No. A-98-689: **State v. Hall.** Petition of appellant for further review overruled on July 28, 1999.

No. A-98-703: **State v. Mullis.** Petition of appellant for further review overruled on June 30, 1999.

No. A-98-733: **State v. Parks**, 8 Neb. App. 491 (1999). Petition of appellant for further review overruled on July 28, 1999.

Nos. A-98-735 through A-98-745: **Kuhns v. Seward Cty. Bd. of Equal.** Petition of appellant for further review overruled on June 16, 1999.

No. A-98-747: **State v. Mason.** Petition of appellant for further review overruled on September 15, 1999.

No. A-98-757: **In re Interest of Bethany M.** Petition of appellant for further review overruled on June 9, 1999.

No. A-98-786: **State v. Adkins.** Petition of appellant for further review overruled on May 27, 1999.

No. A-98-810: **State v. Conover.** Petition of appellant for further review overruled on June 16, 1999.

No. A-98-814: **In re Interest of Bryant W.** Petition of appellant for further review overruled on June 23, 1999.

Nos. A-98-840, A-98-841: **State v. Scarlett.** Petition of appellant for further review overruled on June 16, 1999.

No. A-98-842: **State v. Gatto.** Petition of appellant for further review overruled on June 16, 1999.

No. S-98-851: **State v. Keithley**. Petition of appellant for further review sustained on September 15, 1999.

No. A-98-865: **Cole v. Clarke**, 8 Neb. App. 614 (1999). Petition of appellant for further review overruled on October 14, 1999.

No. A-98-871: **Llanes v. T-L Irrigation Co**. Petition of appellant for further review overruled on May 27, 1999.

No. A-98-894: **Parisien v. Parisien**. Petition of appellee for further review overruled on August 25, 1999.

No. A-98-936: **State v. Mason**. Petition of appellant for further review overruled on July 20, 1999.

No. A-98-964: **State v. McSwine**. Petition of appellant for further review overruled on May 27, 1999.

No. A-98-981: **State v. Fletcher**, 8 Neb. App. 498 (1999). Petition of appellant for further review overruled on September 23, 1999.

Nos. A-98-1028, A-98-1029: **State v. Jackson**. Petition of appellant for further review overruled on June 16, 1999.

No. A-98-1064: **Cole v. Truck Ins. Exch**. Petition of appellant for further review overruled on October 14, 1999.

No. A-98-1068: **State v. Montin**. Petition of appellant for further review overruled on July 28, 1999.

No. A-98-1130: **State v. Ozmun**. Petition of appellant for further review overruled on October 14, 1999.

No. A-98-1142: **State v. Rhodes**. Petition of appellant for further review overruled on July 28, 1999.

No. A-98-1167: **State v. Heil**. Petition of appellant for further review overruled on June 16, 1999.

No. A- 98-1185: **State v. Aude**. Petition of appellant for further review overruled on October 14, 1999.

No. A-98-1192: **In re Interest of Joseph L.**, 8 Neb. App. 539 (1999). Petition of appellee for further review overruled on September 9, 1999.

No. A-98-1197: **Pacha v. Sarpy Cty. Neb**. Petition of appellant for further review overruled on June 16, 1999.

No. A-98-1204: **State v. Stites**. Petition of appellant for further review overruled on May 27, 1999.

No. A-98-1242: **State v. Mickles**. Petition of appellant for further review overruled on June 16, 1999.

No. A-98-1244: **State v. Yoder**. Petition of appellant for further review overruled on June 9, 1999.

No. A-98-1286: **State v. Critel**. Petition of appellant for further review overruled on August 25, 1999.

No. A-98-1286: **State v. Critel**. Petition of appellant for further review overruled on September 15, 1999.

Nos. A-98-1290, A-98-1291: **State v. Cover**. Petition of appellant for further review overruled on August 25, 1999.

No. A-98-1306: **State v. Izara**. Petition of appellant for further review overruled on September 15, 1999.

No. A-98-1319: **State v. Trujillo**. Petition of appellant for further review overruled on May 27, 1999.

No. A-98-1332: **Nichols v. Nichols**. Petition of appellant for further review overruled on September 9, 1999.

No. A-98-1352: **State v. Brilz**. Petition of appellant for further review overruled on July 28, 1999.

No. A-99-010: **In re Interest of Dickson**. Petition of appellant for further review overruled on October 14, 1999.

No. A-99-029: **Ackerman v. Nebraska Dept. of Corr. Appeals Bd**. Petition of appellant for further review overruled on June 11, 1999.

No. A-99-035: **Belgum v. Tate & Lyle, Inc**. Petition of appellant for further review overruled on August 25, 1999.

Nos. A-99-049, A-99-050: **State v. Young**. Petition of appellant for further review overruled on July 28, 1999.

No. A-99-065: **Cox v. Douglas Cty. Civil Serv. Comm**. Petition of appellant for further review overruled on July 28, 1999.

No. A-99-070: **State v. Sheehan**. Petition of appellant for further review overruled on September 9, 1999.

Nos. A-99-071, A-99-072: **State v. Underwood**. Petition of appellant for further review overruled on August 25, 1999.

No. A-99-112: **Cato v. Department of Corr. Servs**. Petition of appellant for further review overruled on October 14, 1999.

No. A-99-117: **State v. Svoboda**. Petition of appellant for further review overruled on June 23, 1999.

No. A-99-142: **State v. Heil**. Petition of appellant for further review overruled on August 25, 1999.

No. A-99-227: **Perry v. Perry**. Petition of appellant for further review overruled on May 27, 1999.

No. A-99-241: **State v. Sanders**. Petition of appellant for further review overruled on September 9, 1999.

No. A-99-253: **State v. Yoder**. Petition of appellant for further review overruled on September 23, 1999.

No. A-99-283: **State v. Stowman**. Affirmed. See rule 7A(1); *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990); *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997).

Nos. A-99-393, A-99-394: **Milazzo v. Nebraska Dept. of Health and Human Servs**. Petitions of appellant for further review overruled on July 28, 1999.

No. A-99-425: **State v. Minshall**. Petition of appellant for further review overruled on September 23, 1999.

No. A-99-527: **Tyler v. Stennis**. Petition of appellant for further review overruled on July 20, 1999.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
LEO H. MCMANUS, APPELLANT.
594 N.W. 2d 623

Filed May 28, 1999. No. S-97-1347.

1. **Rules of Evidence: Other Acts: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence. 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 Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion.
2. **Rules of Evidence.** Evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity to commit the act is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
3. ____. It is axiomatic that only relevant evidence is admissible; if evidence is not relevant under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is inadmissible.
4. **Rules of Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Evidence.** Not all logically relevant evidence is admissible.
6. **Rules of Evidence: Other Acts.** The key inquiry under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is the basis of the relevance of the acts. The question is whether the evidence of other bad acts is relevant for a proper purpose, not merely whether the evidence is relevant.
7. **Evidence: Words and Phrases.** The term "independent relevance" is synonymous with the term "proper purpose."
8. **Rules of Evidence: Other Acts.** Even if evidence of other bad acts is relevant for a nonpropensity purpose, and thus, admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), exclusion may nonetheless be required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

9. **Evidence: Other Acts: Jury Instructions.** If evidence of other bad acts is admitted into evidence, the trial court, if requested, must give a limiting instruction.
10. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

James R. Mowbray and, on brief, Robin W. Hadfield, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and, on brief, Jennifer S. Liliedahl for appellee.

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

CONNOLLY, J.

Leo H. McManus (McManus) appeals from his convictions following a jury trial for second degree murder and the use of a weapon to commit a felony. We reverse, and remand for a new trial because the trial court erred in admitting, for an improper purpose, testimony regarding a prior uncharged "bad act."

I. BACKGROUND

McManus and Roy T. Jones were employed by C. Dennis Geiser as bricktenders. On the morning of January 2, 1997, McManus met Jones and Geiser at Geiser's house. The three men rode together in Geiser's truck to a jobsite in Stapleton, Nebraska. At about noon, they ran out of sand at the jobsite, so they went to the Wagon Wheel Bar in Stapleton for lunch. The three men spent the afternoon drinking at the bar.

Later in the evening, Geiser, the victim, accused McManus of stealing Jones' wallet. Jones' wallet had been stolen before, and Jones had suspected McManus. The police were called, and McManus was searched. It turned out that McManus had not stolen the wallet. Jones had simply left the wallet in his shirt,

which was sitting on a chair near the pool table. That night, McManus told Geiser he was going to quit working for him because of the false accusation regarding the wallet.

McManus rode home with a friend, where he picked up his .44 Magnum pistol and asked his wife to drive him to Geiser's house to get his truck and some personal property. McManus' wife drove him to Geiser's house, and she then went home, leaving McManus at Geiser's house. Geiser was not at home, so McManus spoke with Geiser's wife, who told McManus to return in the morning to pick up McManus' personal property.

McManus went to a friend's home to pick up some equipment stored there. On his way back to town from his friend's house, McManus saw Geiser's pickup. He followed Geiser home and attempted to speak with him. The two men scuffled, and Geiser was fatally shot with McManus' .44 Magnum pistol.

At trial, McManus stated that the shooting was an accident. McManus testified that when he got out of his pickup, Geiser threatened to shoot him. McManus approached Geiser, who then threw a punch at McManus and attempted to grab McManus' pistol. A struggle for the pistol ensued, and the weapon accidentally discharged, killing Geiser.

The State intended to offer evidence of two other bad acts committed by McManus using his .44 Magnum pistol. A hearing was held pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), to determine whether the alleged acts had occurred. The trial court determined by clear and convincing evidence that one of the alleged acts, involving Sherri McManus, who at the time was McManus' future sister-in-law, had occurred and was admissible at trial to show intent, the absence of mistake or accident, and to rebut whether McManus acted in self-defense.

Sherri testified that she and McManus, along with McManus' brother Thomas McManus, had been drinking at a local bar and were accompanied by McManus' son Ryan McManus. The parties left the bar and drove to Sherri and Thomas' home, where they continued to drink. They were sitting at the dining room table when McManus suddenly pulled out his .44 Magnum pistol and pointed it between Sherri's eyes. McManus stated that Sherri would not live to be a McManus.

Sherri then took the pistol away from McManus, unloaded it, and threw the shells outside. Ryan took the pistol and put it in the trunk of McManus' car. Ryan and McManus then left Sherri's residence.

II. ASSIGNMENT OF ERROR

McManus asserts, inter alia, that the trial court erred in finding by clear and convincing evidence that the bad act occurred and in admitting the bad act into evidence.

III. SCOPE OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). 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 Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and rule 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Carter, supra.*

IV. ANALYSIS

Although McManus argues that the evidence was insufficient to support a finding by clear and convincing evidence that the bad act in the instant case actually occurred, we do not address this issue, since, assuming that the act occurred, it was nonetheless inadmissible.

[2] Rule 404(2) states:

> 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.

By its plain language, rule 404(2) prohibits the admission of evidence of other bad acts for the purpose of demonstrating a person's propensity to act in a certain manner. However, as the

second sentence of the above-quoted language indicates, the admission of other bad acts evidence is prohibited only if the relevance of such evidence is dependent upon the actor's propensity to commit the act. Stated another way, evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity to commit the act is admissible under rule 404(2). Thus, rule 404(2) divides evidence of other bad acts into two categories according to the *basis of the relevance* of the acts: (1) relevant only to show propensity, which is not admissible, and (2) otherwise relevant (nonpropensity), which is admissible. Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning From Other Crime Evidence*, 17 Rev. Litig. 181 (1998).

Despite its seeming simplicity, this court and other courts have grappled with its application. Rule 404(2) is one of the most frequently litigated issues on appeal, "and the erroneous admission of such evidence is the largest cause of reversal." 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1:04 at 20 (rev. ed. 1999). The confusion surrounding rule 404(2) stems, in large part, from its close relationship with rules 401 and 403, both of which are necessary components of a complete analysis of other bad acts evidence.

This court has long stated that an appellate court reviews the admission of other bad acts evidence 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 is substantially outweighed by 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. See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). However, only one of the four prongs of this analysis, the second prong regarding proper purpose, embodies the language in rule 404(2). The first prong, relevance, is designed to satisfy the demands of rule 401, and the third prong, concerning the balance between probative value and unfair prejudice, is designed to satisfy rule 403. As for the fourth prong, it is intended to prevent the unfair prejudice that may result from the admission of such evidence if the jury considers it for an improper purpose.

1. RULE 401 (RELEVANCE) AND RULE 404(2) (PROPER PURPOSE)

Although the above analysis seems straightforward, it has proved to be difficult to apply in practice. This court has often in its analysis confused logical relevance under rule 401 and relevance for a proper purpose under rule 404(2). See, e.g., *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). An example of this confusion may be found in *State v. Ellis*, 208 Neb. at 390, 303 N.W.2d at 749, wherein we incorrectly stated that other bad acts "evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime." A review of logical relevancy under rule 401 demonstrates why this statement is false.

(a) Relevance

[3,4] It is axiomatic that only relevant evidence is admissible, *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); if evidence is not relevant under rule 401, it is inadmissible, *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Evidence is relevant when it has *any* tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence. *State v. Carter, supra*, citing rule 401. Thus, to be relevant under rule 401, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. See, R. Collin Mangrum, *Nebraska's Evidentiary Rules of Relevancy*, 29 Creighton L. Rev. 119 (1995); *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998).

As has already been stated, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. However, this does not mean that such evidence is not relevant; on the contrary, it is typically relevant for that very purpose under rule 401. See *Wynn v. State*, 351 Md. 307, 718 A.2d 588 (1998). The fact that a defendant has committed a crime on another occasion tends to show that the defendant has a propensity to commit crimes, and thus, it is (perhaps only slightly) more probable that the defendant has committed the crime at issue than a defend-

ant without such a propensity. Huey L. Golden, *Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 La. L. Rev. 179 (1994).

[5] If evidence of other bad acts is relevant to show a person's propensity, why is it excluded? The short answer: Not all logically relevant evidence is admissible. See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995). In response to the demands of particular policies, the exclusion of evidence may be required, despite its relevancy. Proposed Nebraska Rules of Evidence, rule 402, comment (1973). Rule 404 requires such a result. See *id.*

The reason evidence of other bad acts to show propensity is excluded, despite its relevancy, is that it creates the risk of a decision by the trier of fact on an improper basis. 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1:03 (rev. ed. 1999). See, also, *State v. Ellis, supra* (Brodkey, J., dissenting). First, the admission of bad acts evidence tempts the trier of fact to condemn the defendant for his or her other (and often unpunished) bad acts, rather than the defendant's guilt of the present charge. Imwinkelried, *supra*. See, also, *State v. Ellis, supra* (Brodkey, J., dissenting). Second, there is a danger that the trier of fact will overestimate the probative value of the other bad act evidence. *Id.* Thus, the exclusion of other bad acts evidence offered to show the defendant's propensity protects the presumption of innocence, and is "deeply rooted in our jurisprudence." *People v Crawford*, 458 Mich. at 383, 582 N.W.2d at 790. However, when such evidence is offered for a purpose other than to demonstrate propensity and is more probative than prejudicial and when a proper limiting instruction is given, the evidence is nonetheless admissible under rule 404(2).

(b) Proper Purpose

[6] As the foregoing discussion demonstrates, the relevance of other bad acts to the charged crime, in and of itself, satisfies only the demands of rule 401. The key inquiry under rule 404(2) is the basis of the relevance of the acts. Rule 401 asks whether the evidence is relevant, whereas rule 404(2) asks *why* the evidence is relevant. If the evidence is relevant because it tends to

show the defendant's criminal disposition or propensity to commit a certain type of crime, it is relevant for an improper purpose and is inadmissible under rule 404(2). However, if it is relevant to show something other than the defendant's character, then it is relevant for a proper purpose and is admissible under rule 404(2). Thus, the question is whether the evidence of other bad acts is relevant for a proper purpose, not merely whether the evidence is relevant.

(i) Independent Relevance

[7] Evidence that is offered for a proper purpose is often referred to as having "special relevance" or "independent relevance," which means its relevance does not depend on its tendency to show propensity. See Imwinkelried, *supra*, § 2:19. Thus, the term "independent relevance" is synonymous with the term "proper purpose."

Nonetheless, in the past, this court has on occasion erroneously equated the term "independent relevance" with logical relevance under rule 401. See, e.g., *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). For example, in *Carter*, this court addressed whether evidence of the defendant's prior sexual assaults was admissible under rule 404(2). In addressing the first prong of this court's rule 404(2) analysis, relevance under rule 401, we stated that "evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third parties." *State v. Carter*, 246 Neb. at 963-64, 524 N.W.2d at 772. Having determined that the evidence was independently relevant, we stated: "Next, we must determine whether the evidence had a proper purpose." *Id.* at 964, 524 N.W.2d at 772. Because "independent relevance" is synonymous with "proper purpose," any additional analysis on the latter point is superfluous.

2. Rule 403 (Balancing)

[8] Even if evidence of other bad acts is relevant for a nonpropensity purpose, and thus, admissible under rule 404(2), exclusion may nonetheless be required under rule 403 if the probative value of the evidence is substantially outweighed by

the danger of unfair prejudice. See, e.g., *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). Because we conclude that the evidence in the instant case was not offered for a proper purpose, we do not reach this prong of the analysis.

3. Limiting Instruction

[9] Finally, if evidence of other bad acts is admitted into evidence, the trial court, if requested, must give a limiting instruction. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). The limiting instruction is required because even though another proper purpose may exist for the admission of evidence under rule 404(2), there is always the danger that the jury will draw the forbidden inference of propensity.

> When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again."

People v Crawford, 458 Mich. 376, 398, 582 N.W.2d 785, 796 (1998), quoting *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994).

4. Summary of Rule 404(2) Analysis

[10] Based on the principles discussed in the instant case, this court's rule 404(2) analysis considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

Thus, to determine whether the other bad act evidence was admissible in the instant case, we first determine whether McManus' other bad act was relevant for some purpose other than to show McManus' propensity to engage in such activity.

5. Application of Law to Facts

At the outset, we note that the trial court properly stated the purposes for which it considered the other bad act evidence rel-

evant and instructed the jury to consider the evidence only for those purposes. However, the State's argument does not distinguish between any of the bases of admissibility relied on by the trial court. Because all of the purposes cited by the State and the trial court for admissibility of the evidence go to McManus' mens rea and because the State has not articulated a different line of reasoning for any particular purpose, we will consider the evidence generally as it relates to intent.

The State asserts that the evidence is relevant for the purpose of demonstrating McManus' intent because the other bad act is similar to the events in the instant case. The State notes that in both instances, McManus had been drinking at a bar, became intoxicated and angry, and used a gun to intimidate. However, the State does not articulate any reason as to *why* the similarity between the act involving Sherri and the act in the instant case in any way demonstrates McManus' intent concerning Geiser.

The most obvious reason why the similarity between the two acts may show the intent of McManus in the instant case is the inference that McManus is the type of person who acts with violent intent when he is angry. However, this is classic propensity reasoning, and thus, although the evidence may be relevant for that purpose, it must be excluded under rule 404(2). See *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998).

Is there another intermediate inference which may be drawn from the act involving Sherri that would tend to establish McManus' intent in the instant case? The State's argument that the other bad act was similar to the charged events and that this similarity gave rise to a permissible inference of intent is properly analyzed under the "doctrine of chances." "The only theory of logic under which evidence of other misconduct is directly relevant to prove intent . . . without relying on character inferences, is the doctrine of chances," Eric D. Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1225 (1986), also known as the "doctrine of objective improbability," *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998).

(a) Doctrine of Chances

As already indicated, rule 404(2) prohibits the admission of bad act evidence that is relevant only to show that the defendant has a propensity to act in a certain manner. The rule is designed to prevent the trier of fact from inferring the defendant's state of mind on the charged occasion from the defendant's subjective, personal character, disposition, or propensity. *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The doctrine of chances purports to avoid asking the trier of fact to infer the defendant's state of mind from the defendant's subjective, personal character by asking the trier of fact to make an "intermediate inference of *objective improbability* under the doctrine of chances and then an ultimate inference of intent based on the improbability of the conduct." (Emphasis supplied.) *State v. Sadowski*, 247 Mont. 63, 72, 805 P.2d 537, 542-43 (1991). In *Sadowski*, 247 Mont. at 72-73, 805 P.2d at 543, quoting Edward J. Imwinkelried, Uncharged Misconduct Evidence § 5:05 (1984), the Montana court stated:

> "'The doctrine teaches us that the more often the defendant performs the actus reus, the smaller is the likelihood that the defendant acted with an innocent state of mind. The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.'"

However, other commentators have harshly criticized the reasoning underlying the doctrine of chances. See, e.g., Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning From Other Crime Evidence*, 17 Rev. Litig. 181 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259 (1995). Rothstein argues that the only way to explain the supposed disparity between the chances, or probability, that an innocent person

would be charged so many times and the chances, or probability, that a guilty person would be so charged is the fact that a guilty person would have the propensity to repeat the crime. "If it were not for the propensity to repeat, the chances, or the probability, that an innocent person and a guilty person would be charged repeatedly would be identical." *Id.* at 1263. Likewise, Morris argues that the assumption underlying the "objective" probability of the doctrine of chances "necessarily depends—in a mathematically demonstrable manner—on the assumption that the defendant's character is unchanging." Morris, *supra*, at 201. Nonetheless, despite the apparently flawed reasoning underlying the doctrine of chances, the majority of courts have adopted the doctrine without question. See, e.g., *State v. Sullivan, supra*; *People v Crawford, supra*; *State v. Sadowski, supra.*

(b) Factual Disparity

Even assuming that the doctrine of chances is the law in this jurisdiction, a matter we have never specifically addressed and do not now address, the facts of the instant case do not satisfy the doctrine's requirements. See, *State v. Sullivan, supra* (holding that two acts were not sufficiently similar when one consisted of verbal threats and other resulted in physical violence); *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

In *People v. Spoto, supra*, the Colorado Supreme Court addressed a similar set of facts. The defendant was found by a jury to be guilty of first degree murder. It was undisputed that the victim's death was caused by a bullet fired from the defendant's pistol when the muzzle of the gun was in contact with the victim's neck. At trial, the defendant testified that the victim had a gun, a struggle ensued, the defendant pulled his pistol, and his pistol accidentally discharged in the course of the continuing struggle. The defendant asserted that he acted in self-defense and that the killing was accidental rather than intentional.

The prosecution introduced evidence that the defendant had brandished his pistol on another occasion, which evidence was offered to rebut the defendant's claimed lack of intent. Only a few weeks prior to the killing, the defendant had accused his roommate of theft. The roommate denied the theft, so the defendant pointed his pistol at the roommate and asked,

"'swear to God?'" *Id.* at 1317. The incident ended when the parties heard noises from another part of the house and went to investigate, discovering a burglar in the process of escaping.

The sole issue on appeal was the admissibility of the incident concerning the defendant's roommate. The court acknowledged that the evidence was logically relevant, since "[a]t minimum, the incident suggests that [the defendant] is the type of person who would pull a gun on someone when it is not necessary for self-defense." *Id.* at 1319. However, the court also recognized that this inference, although logically relevant, was based on improper propensity reasoning. The court noted that "[t]o be admissible, the prosecution must articulate a precise evidential hypothesis by which a material fact can be permissibly inferred from the prior act independent of the use forbidden by [rule 404(2)]." *Id.*

The *Spoto* court analyzed whether the doctrine of chances was sufficient to render the incident independently relevant. The court held that the application of the doctrine of chances was inappropriate for two reasons. *Id.* First, the court stated that the roommate incident was not similar enough to the charged incident to make the "objective statistical inference [because the roommate] was not shot and [the defendant] did not claim that he accidentally placed his gun to [the roommate]'s head." *Id.* at 1319-20. The doctrine of chances applies only when each of the other bad acts is similar to the charged offense and the defendant has been involved in such incidents more frequently than the typical person. *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998). "Dissimilar prior acts are not probative under the doctrine of chances." *People v. Spoto*, 795 P.2d 1314, 1320 (Colo. 1990). Although there is generally no similarity of conduct requirement concerning other bad acts evidence, "similarity is crucial when the theory of logical relevance is the doctrine of chances." *Id.*

Second, the court noted that there was only one prior incident. *People v. Spoto, supra.* Generally, courts hold that the number of similar events that are necessary to satisfy the doctrine of chances depends upon the complexity, degree of similarity, and relative frequency of the event rather than on the total number of occurrences. See, *State v. Sullivan*, 216 Wis. 2d 768,

576 N.W.2d 30 (1998); *State v. Sadowski*, 247 Mont. 63, 805 P.2d 537 (1991). In *People v. Spoto, supra*, the court concluded that one similar instance was clearly insufficient given the lack of similarity between the two events.

The facts in the instant case are nearly identical to those in *Spoto*. First, although McManus allegedly held a pistol to Sherri's head, he did not pull the trigger, nor did he further threaten Sherri once she took the pistol from his hand. In contrast, the gun was fired in the incident involving Geiser, and Geiser was killed. Thus, the acts are distinctly lacking in similarity under the doctrine of chances. Indeed, one could argue that the fact that McManus did not pull the trigger when he put the pistol to Sherri's head bolsters his testimony that the killing of Geiser was accidental. Second, as in *Spoto*, only one prior incident was presented to the jury, and neither incident was particularly unusual or complex. See *State v. Sullivan, supra*.

Thus, even if this court were to adopt the doctrine of chances, the bad act evidence in the instant case was insufficient to support the required inference of objective improbability. We conclude that the other bad act evidence was not offered for a proper purpose under rule 404(2) and, therefore, was erroneously admitted by the trial court.

6. Harmless Error

This court's having determined that the evidence was erroneously admitted, the question now becomes whether the admission of the evidence was harmless beyond a reasonable doubt. See *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). In *People v. Spoto, supra*, the court addressed whether the erroneous admission of the gun-pulling act involving the defendant's roommate was harmless error. The court noted that the defendant had told a seemingly plausible story. The court also noted that the facts concerning the incident were clearly in dispute and, therefore, whether the jury believed the defendant's account of the incident was critical to the outcome of the case. Accordingly, the court held that the potential for prejudice was "overwhelming" and that the error was not harmless. *People v. Spoto*, 795 P.2d at 1321.

Likewise, in the instant case, the evidence concerning Geiser's death was in dispute. In effect, the State's entire case against McManus was circumstantial in nature, since McManus was the only witness to the crime to testify at trial. As with the defendant in *Spoto*, whether the jury believed McManus' story was critical. By presenting evidence giving rise to the inference that McManus was the kind of person who was prone to point his pistol and make threats, the State cast grave doubt on McManus' credibility. Faced with such evidence, the jury could be tempted to infer bad character and action taken in conformity with that character and could thus reach a verdict on an improper basis.

Therefore, we conclude that the erroneous admission of the other bad act evidence in the instant case was not harmless.

V. CONCLUSION

We conclude that the trial court erroneously admitted evidence of McManus' other bad act for an improper purpose and that the admission of this evidence was not harmless error. Accordingly, we reverse, and remand for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE,
v. JUAN FRANCO, JR., APPELLANT.
594 N.W.2d 633

Filed May 28, 1999. No. S-98-645.

1. **Pleadings: Appeal and Error.** An appeal from a denial of a plea in bar involves a question of law.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
4. **Criminal Law: Statutes: Legislature: Intent.** Whether the Legislature intended Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998) to define a civil or criminal sanction is a matter of statutory construction.

5. **Criminal Law: Penalties and Forfeitures: Legislature: Intent.** The Nebraska Supreme Court has determined that the Legislature intended forfeiture actions pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998) to be criminal proceedings.
6. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
7. ____. 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 of the defendant.
8. ____. The *Blockburger*, or "same elements," test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), examines whether one offense contains an element not contained in the other.
9. **Double Jeopardy: Sentences.** If two offenses contain the same elements, then they are the same offense and double jeopardy bars additional punishment and successive prosecution.
10. ____: ____. If two offenses contain different elements, then they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution.
11. **Double Jeopardy: Legislature: Intent: Sentences.** The *Blockburger* test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is applied to prevent double punishment in a situation where the Legislature has in fact intended to provide a single punishment for the offense.
12. **Double Jeopardy: Legislature: Statutes: Trial: Sentences.** Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), a court's task of statutory construction is at an end and the prosecutor may seek, and the trial court or jury may impose, cumulative punishment under such statutes in a single trial.
13. **Double Jeopardy: Legislature: Intent: Sentences.** Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding.
14. **Double Jeopardy.** When the Double Jeopardy Clause applies, it is the second proceeding that is constitutionally endangered.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions to dismiss.

J. Malachy Sullivan, of Sodoro, Daly & Sodoro, P.C., for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

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

WRIGHT, J.

NATURE OF CASE

Juan Franco, Jr., was charged by information with one count of possession of a controlled substance with intent to deliver. Franco filed a plea in bar, alleging that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions barred his prosecution because jeopardy had attached at the forfeiture trial involving property which was owned by Franco and in his possession at the time of the arrest. The district court denied the plea in bar, and Franco timely perfected this appeal.

SCOPE OF REVIEW

[1] An appeal from a denial of a plea in bar involves a question of law. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[2] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998).

FACTS

On December 21, 1997, Franco was stopped in Lancaster County by the Nebraska State Patrol and placed under arrest for suspicion of possession of a controlled substance with intent to deliver. At the time of the arrest, the State Patrol also seized Franco's 1992 Chevrolet pickup and $2,190 in U.S. currency which Franco had in his possession.

On December 26, 1997, the State filed a forfeiture action against the pickup and the currency pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998). The petition alleged that on December 21, troopers from the Nebraska State Patrol seized $2,190 and Franco's pickup, which were in Franco's possession and used to facilitate a violation of chapter 28, article 4, of the Nebraska Revised Statutes. The petition requested that such property be forfeited to the State as provided by law.

On February 9, 1998, the State filed an information charging Franco with possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). On February 17, the forfeiture proceeding commenced, and evidence was adduced. The trial was not completed on that date, and the district court held the matter in recess until such

time as the trial could be completed. The next day, Franco filed a plea in bar, requesting the information be dismissed on the ground that prosecution of the possession case violated his double jeopardy protection as set forth in the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution.

On March 12, 1998, a hearing was held on the plea in bar, and the matter was taken under advisement. On June 3, the district court entered an order denying the plea in bar. The court stated:

> Section 28-416(1)[(a)] is designed to punish a person who possesses and delivers controlled substances illegally, with incarceration and/or a fine or probation. Section 28-431 is designed to be punitive against a person who, *inter alia*, uses money or vehicles to violate controlled substance laws, by forfeiture of his or her money and/or vehicles, as the case may be. While § 28-416(1)[(a)] and §28-431 can, and usually do, grow out of the nucleus of operative facts, they are separate offenses under the test enumerated in *Blockburger v. United States*, 284 U.S. 299 (1932). On the one hand, it is one offense to possess cocaine, with the intent to distribute, while, on the other hand, it is a separate offense to use a vehicle to illegally transport cocaine and a separate offense to use money to facilitate illegal trafficking in cocaine.
>
> The criminal case is not barred by the forfeiture case, since the two proceedings involve two separate offenses, under the *Blockburger* test.

A final disposition regarding the forfeiture action had not been rendered at the time the district court denied the plea in bar.

ASSIGNMENT OF ERROR

Franco asserts that the district court erred in denying his plea in bar because the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions prohibited the State from bringing a criminal proceeding against him after jeopardy had already attached in a forfeiture action arising from the same set of facts.

ANALYSIS

The issue is whether the prior forfeiture action barred the subsequent criminal proceeding against Franco. We begin our

analysis with *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). In *United States v. Ursery, supra*, two cases were consolidated for purposes of the opinion, and a brief factual background is as follows:

In case No. 95-345, the government instituted civil forfeiture proceedings under 21 U.S.C. § 881(a)(7) against Ursery's house, alleging that it had been used to facilitate illegal drug transactions. Ursery settled that claim, but he was later convicted of manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1).

In case No. 95-346, Charles Arlt and James Wren were convicted of conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. § 846; conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 371; and other counts of money laundering, in violation of 18 U.S.C. § 1956. The government filed a civil in rem complaint against various property seized from, or titled to, Arlt and Wren, or Arlt's corporation, alleging that each item was subject to forfeiture under 18 U.S.C. § 981(a)(1)(A) because it was involved in money laundering violative of 18 U.S.C. § 1956 and 21 U.S.C. § 881(a)(6) as the proceeds of felonious drug transactions. Litigation of the forfeiture action was deferred, and following the criminal convictions, the district court granted the government's motion for summary judgment in the forfeiture proceeding.

Relying upon *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), and *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the U.S. Court of Appeals for the Sixth Circuit reversed Ursery's conviction, and the U.S. Court of Appeals for the Ninth Circuit reversed the forfeiture judgment against Arlt and Wren on the basis that the Double Jeopardy Clause prohibited the government from both punishing a defendant for a criminal offense and seeking forfeiture of his property for that same offense in a separate civil proceeding. The U.S. Supreme Court reversed the courts of appeals' judgment, concluding that the forfeiture actions were civil proceedings and that the Double Jeopardy Clause was not implicated.

The Court noted in *United States v. Ursery, supra*, that Congress has long authorized the government to bring parallel

criminal actions and in rem civil forfeiture actions based on the same underlying events. Relying on its opinion in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), the Court stated that for double jeopardy purposes, an in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties, such as fines, and thus does not constitute a punishment. The Court proceeded to apply a two-part test to determine whether any of the forfeitures at issue were civil proceedings.

The test in *United States v. Ursery, supra*, inquired as to (1) whether Congress intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See, also, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

[3] We recently utilized this test to determine whether an administrative license revocation proceeding was civil or criminal in nature for purposes of the Double Jeopardy Clause. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *Id.*

[4] Whether the Legislature intended § 28-431 to define a civil or criminal sanction is a matter of statutory construction. Interpretation of a statute presents a question of law. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998). Thus, we are obligated to reach a conclusion independent of the determination reached by the trial court. See *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998).

Section 28-431 provides in relevant part:

> (1) The following shall be seized without warrant . . . and the same shall be subject to forfeiture: . . . (f) all conveyances including, but not limited to, aircraft, vehicles, or vessels which are used, or intended for use, in transporting any controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance in violation of the act; and (g) all money used, or intended to be used, to facilitate a violation of the act.
>
> . . . .

> (4) When any property described in subdivision (1)(f) or (g) of this section is seized, the person seizing the same shall cause to be filed, within ten days thereafter, in the district court of the county in which seizure was made, petition for disposition of such property. . . . The petition shall describe the property, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and conclude with a prayer for disposition. . . . If the owner is unknown or there is a reasonable probability that there are unknown persons with interests in the property, the county attorney shall provide notice of the seizure and petition for disposition by publication . . . .
>
> At any time after seizure and prior to court disposition, the owner of record of such property may petition the district court of the county in which seizure was made to release such property, and the court shall order the release of the property upon a showing by the owner that he or she had no knowledge that such property was being used in violation of the Uniform Controlled Substances Act.
>
> . . . If the claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of the act, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant.

In *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), the Court evaluated 21 U.S.C. § 881 and 18 U.S.C. § 981 to determine whether forfeitures pursuant to these statutes violated the Double Jeopardy Clause. The Court concluded that there was little doubt that Congress intended forfeitures pursuant to 21 U.S.C. § 881 and 18 U.S.C. § 981 to be civil in nature. As support for this conclusion, the Court noted that 18 U.S.C. § 981 was entitled "Civil forfeiture," 518 U.S. at 288, and that both of the statutes were considered

"*in rem*," 518 U.S. at 289, and did not require notice to the owner of the property, allowed unclaimed property to be summarily forfeited, and placed the burden of proof on the property owner.

In contrast to 18 U.S.C. § 981, § 28-431 is not entitled "Civil forfeiture." Rather, it is found in chapter 28 of the Nebraska Revised Statutes, which is entitled "Crimes and Punishments." The placement of § 28-431 under this caption is some evidence but is not decisive of legislative intent to make the statute criminal in nature.

Unlike the federal courts, we have never directly addressed whether a forfeiture pursuant to § 28-431 is a civil in rem proceeding. In *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991), we began that analysis with the statement that we considered a forfeiture pursuant to § 28-431 to be in rem. However, we offered no explanation why we did not address the issue of legislative intent to treat forfeitures as civil or criminal in nature. On numerous occasions, we have concluded that § 28-431 was criminal in nature, a conclusion which undermines the claim that § 28-431 forfeitures are in rem. See, *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995) (holding that review for sufficiency of evidence in forfeiture proceeding pursuant to § 28-431 is same as in criminal case); *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992) (noting that § 28-431(4) requires State to prove beyond reasonable doubt that property was used in violation of chapter 28); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989) (suggesting that Double Jeopardy Clause applied to forfeiture proceeding pursuant to § 28-431); *State v. $3,067.65 in U.S. Currency*, 4 Neb. App. 443, 545 N.W.2d 129 (1996) (holding that sufficiency of evidence review is same in criminal cases and in forfeiture cases); *State v. One 1986 Toyota 4-Runner*, 1 Neb. App. 1138, 510 N.W.2d 556 (1993) (holding that forfeiture actions under § 28-431 are criminal actions and, therefore, State's right to appeal is limited to terms of Neb. Rev. Stat. §§ 29-2315.01 through 29-2316 (Reissue 1995)). Contra, see, *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991) (holding that actions pursuant to Neb. Rev. Stat. § 28-1111

(Reissue 1995) for forfeiture of property are generally considered to be in rem, to sound in equity, and to apply a burden of proof of less than beyond a reasonable doubt).

Section 28-431 provides that at any time after seizure and prior to court disposition, the owner of record of the property may petition the district court of the county in which seizure was made to release such property and that the court shall order release of the property upon a showing by the owner that he or she had no knowledge that the property was being used in violation of chapter 28. Specifically, a claimant must show that he or she has not used or intended to use the property to facilitate an offense in violation of chapter 28; has an interest in the property as owner, lienor, or otherwise; acquired the property in good faith; and at no time had any knowledge that the property was being or would be used in, or to facilitate, a violation of chapter 28.

Section 28-431 then provides in relevant part:

> If there are no claims, if all claims are denied, or if the value of the property exceeds all claims granted *and it is shown beyond a reasonable doubt* that such property was used in violation of the act, the court shall order disposition of such property at such time as the property is no longer required as evidence in any criminal proceeding.

(Emphasis supplied.) Thus, the State must show beyond a reasonable doubt that the property seized was used in violation of chapter 28, article 4. This indicates the Legislature intended that § 28-431 should be considered criminal in nature.

[5] Since *State v. One 1987 Toyota Pickup, supra*, this court has determined that the Legislature intended forfeiture actions pursuant to § 28-431 to be criminal proceedings. That interpretation was reinforced in *State v. 1987 Jeep Wagoneer, supra*, and *State v. One 1986 Toyota 4-Runner, supra*. The Legislature, having not attempted to modify the forfeiture proceeding under chapter 28, article 4, has acquiesced in our determination that actions pursuant to § 28-431 are criminal proceedings. In the absence of a legislative amendment to § 28-431, we cannot now say that the Legislature's intent has changed. *State v. One 1987 Toyota Pickup, supra*, still sets forth our interpretation of the legislative intent of § 28-431—that the statute is criminal in nature.

Since we have historically treated forfeiture actions pursuant to § 28-431 as being criminal, we need not address the second part of the test announced in *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), which inquires as to whether a civil sanction is so punitive in purpose that it transforms the civil sanction into a criminal sanction.

[6] We next consider whether Franco's conviction was barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution or Neb. Const. art. I, § 12. The 5th Amendment, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[7] It is well established in Nebraska that 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 of the defendant. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). A petition for the disposition of property seized from Franco during his arrest was filed by the State on December 26, 1997. The petition alleged that Franco's currency and pickup should be forfeited pursuant to § 28-431. We conclude that in forfeiture proceedings, jeopardy attaches when evidence is first presented to the trier of fact. On February 17, 1998, the forfeiture proceeding began. The parties filed a joint stipulation to some of the facts, and then the trial court noted in its journal that after adducing evidence, it recessed the proceeding. Therefore, jeopardy attached in the forfeiture proceeding. Franco asserts that to now prosecute him for a crime subjects him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause.

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court announced a rule of statutory construction. The Court held that where the same act or transaction constitutes a violation of two distinct statu-

tory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

[8-10] In other words, the *Blockburger*, or "same elements," test examines whether one offense contains an element not contained in the other. See *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). If the two offenses contain the same elements, then they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.*; *Blockburger v. United States, supra.* If the two offenses contain different elements, then they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution. *United States v. Dixon, supra.*

Other jurisdictions that have characterized forfeiture actions as criminal proceedings have also relied upon the *Blockburger* test to decide whether double jeopardy is violated. See, *Chacon-Sanchez v. U.S.*, No. C-94-20768-JW, 1996 WL 341115 (N.D. Cal. June 13, 1996) (holding that punishment arising from civil forfeiture and imposition of separate criminal punishment do not constitute double jeopardy if punishments are not based upon same offense); *Valencia Lucena v. U.S.*, 933 F. Supp. 129 (D. Puerto Rico 1996) (holding that when forfeiture required proof of criminal offense, *Blockburger* prohibited subsequent prosecution); *State v. Cole*, 128 Wash. 2d 262, 906 P.2d 925 (1995) (dissent concluded forfeitures were punishment and held that under *Blockburger* test, forfeiture was barred, since it required proof of criminal violation).

In the case at bar, the district court, using *Blockburger*, analyzed §§ 28-416(1)(a) and 28-431. The court stated that violations of §§ 28-416(1)(a) and 28-431 can and usually do arise out of the same factual circumstances. The court found, however, that §§ 28-416(1)(a) and 28-431 define separate offenses because § 28-416(1)(a) addressed possession and delivery of a controlled substance, while in this case, § 28-431 addressed the use of a vehicle to illegally transport a controlled substance or the use of money to facilitate illegal trafficking of controlled substances.

We conclude, as did the district court, that the use of money or the use of a vehicle under § 28-431 is not an element of the

violation under § 28-416(1)(a) and that such use need not be proved to establish a possession with intent to distribute. However, *Blockburger* requires the court to consider whether § 28-431 requires proof of any element that is not an element of proof of possession with intent to distribute under § 28-416(1)(a). See, also, *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). Upon examination, we are unable to find any element within § 28-431 that is not a part of § 28-416(1)(a). A violation of § 28-431 necessarily requires proof of a violation of § 28-416(1)(a).

Prior to the U.S. Supreme Court's decision in *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), a similar situation was analyzed by the U.S. District Court in *Valencia Lucena v. U.S., supra*. There, a defendant had been charged on May 10, 1989, with conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. The defendant was subsequently convicted and sentenced, and in parallel proceedings, the government sought forfeiture of property belonging to the defendant which was allegedly used to commit or facilitate the commission of the underlying drug offenses, in violation of 21 U.S.C. § 881(a)(7). In that proceeding, the government sought forfeiture of the defendant's residence. Since this case was decided prior to *Ursery*, the court analyzed the two charges as punishment imposed by the government under the analysis in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In analyzing the two punishments, the U.S. District Court in *Valencia Lucena v. U.S., supra*, stated that while the forfeiture action required proof of an element not contained in the criminal charge, i.e., that the property was used to facilitate a drug trafficking crime, the criminal charge did not contain an element not included in the forfeiture action. This was so because the forfeiture action required proof of the criminal offense, as demonstrated by the fact that the court relied on the defendant's criminal conviction in finding that he was collaterally estopped from asserting a claim to the property. Any forfeiture under the statute required a preceding violation of the controlled sub-

stance statutes. The court noted that the criminal offense was, in essence, subsumed by the forfeiture statute and thus did not require an element of proof that was not required by the forfeiture action. In the case at bar, § 28-416(1)(a) is subsumed by § 28-431.

There may be situations where a defendant is not charged pursuant to § 28-416(1)(a) but is subject to forfeiture of property under § 28-431; for example, if the defendant knew that someone else was using the defendant's vehicle to facilitate a violation of chapter 28, article 4. However, that situation is not before us.

[11] The *Blockburger* test is applied to prevent double punishment in a situation where the Legislature has in fact intended to provide a single punishment for the offense. Double jeopardy is inapplicable to those cases where the Legislature has intended to punish cumulatively in the same proceeding.

[12] In *State v. Detweiler*, 249 Neb. 485, 496, 544 N.W.2d 83, 91 (1996), we noted:

> "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. . . .
>
> "Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."

Quoting *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

[13] We conclude that the Legislature intended that a defendant could be subject to cumulative punishments under §§ 28-416(1)(a) and 28-431. Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding. *State v. Detweiler, supra.*

CONCLUSION

[14] In the case at bar, Franco seeks to vacate his criminal conviction by showing that jeopardy first attached in the forfeiture proceeding. When the Double Jeopardy Clause applies, it is the second proceeding that is constitutionally endangered. *U.S. v. Pierce*, 60 F.3d 886 (1st Cir. 1995). Here, as the district court correctly determined, jeopardy attached when the judge began to hear the evidence on the forfeiture issue. See *State v. Detweiler, supra*. Since jeopardy attached as to the forfeiture, the district court erred in denying Franco's plea in bar to the possession charge. We therefore reverse the judgment of the district court and remand the cause with directions to sustain the plea in bar and dismiss the charge brought pursuant to § 28-416(1)(a).

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

MATTHEW R. WINTER, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

594 N.W.2d 642

Filed May 28, 1999. No. S-98-704.

1. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A statute is open for construction to determine its meaning when the language used requires interpretation or may reasonably be considered ambiguous.
3. **Statutes: Legislature: Intent.** To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question, and reference may be had to earlier legislation upon the same subject.
4. **Prosecuting Attorneys: Statutes.** Although the county attorney has a duty to represent the state in all matters arising under the laws of the state in which the state is a party or is interested, this duty is not an ordinary duty of the county attorney. Rather, the ordinary duties of the county attorney are limited to the representation of the county in such matters and, as the language of Neb. Rev. Stat. § 23-1201(1) (Reissue 1997) explicitly indicates, of the state in the prosecution of criminal matters.
5. **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. However, to determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the

time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

6. **Attorney Fees.** The party opposing an application for attorney fees must be given an opportunity to present evidence against the application.

Appeal from the District Court for Gosper County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Don Stenberg, Attorney General, and Terri M. Weeks for appellant.

Todd D. Wilson, Deputy Gosper County Attorney, for appellee.

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

CONNOLLY, J.

We granted the petition to bypass of the appellant, Department of Motor Vehicles (Department), to determine whether the district court had the authority to order an award of attorney fees to the Gosper County Attorney. We conclude that the representation of the Department in appeals from administrative license revocation hearings is not an ordinary duty of the Gosper County Attorney and, thus, that the district court was authorized to award attorney fees under Neb. Rev. Stat. § 23-1201(2) (Reissue 1997). Nonetheless, because the record contains no evidence that an application for fees was made, we reverse, and remand with directions for the trial court to hold a hearing concerning the proper amount of fees owed.

BACKGROUND

The Department administratively revoked the motor vehicle operator's license of the appellee, Matthew R. Winter. See Neb. Rev. Stat. §§ 60-6,205 to 60-6,208 (Reissue 1993, Cum. Supp. 1996 & Supp. 1997). Winter sought judicial review in the district court for Gosper County under the Administrative Procedure Act. See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1994 & Cum. Supp. 1998). A hearing was held by the district

court, wherein the Department was represented by the Deputy Gosper County Attorney. The district court affirmed the Department's revocation decision and ordered the Department to pay $250 in attorney fees to the Gosper County Attorney. The record does not indicate how the district court determined the amount owed.

ASSIGNMENT OF ERROR

The Department asserts that the district court erred in awarding attorney fees to the Gosper County Attorney in the amount of $250.

SCOPE OF REVIEW

[1] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999).

ANALYSIS

The Department argues that the district court lacked the authority, statutory or otherwise, to award fees to the Gosper County Attorney. See *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998) (holding that attorney fees and expenses may be recovered only where provided for by statute, or when recognized and accepted uniform course of procedure allows recovery of attorney fees). The Gosper County Attorney contends that § 23-1201 provided the district court with such authority in the instant case. Therefore, the question is whether § 23-1201 provided the district court with the authority to award fees to the Gosper County Attorney.

1. Section 23-1201

Section 23-1201 states:

> (1) . . . [I]t shall be the duty of the county attorney, when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person and to appear in the several courts of the county and prosecute the appro-

> priate criminal proceeding on behalf of the state and county. . . .
>
> (2) It shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested. The county attorney may be directed by the Attorney General to represent the state in any action or matter in which the state is interested or a party. When such services require the performance of duties which are in addition to the ordinary duties of the county attorney, he or she shall receive such fee for his or her services, in addition to the salary as county attorney, as (a) the court shall order in any action involving court appearance or (b) the Attorney General shall authorize in other matters, with the amount of such additional fee to be paid by the state.

By its plain language, the first sentence of § 23-1201(2) clearly requires county attorneys to represent both the state and the county in all actions involving Nebraska law in which the state or the county is a party or is interested. In the instant case, the state was a party in Winter's appeal from the decision of the Department, which appeal arose under the laws of this state. See *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), and *Pointer v. State*, 219 Neb. 315, 363 N.W.2d 164 (1985). So, the Gosper County Attorney clearly had a duty to represent the state. However, that fact does not end our inquiry concerning *attorney fees*. That the Gosper County Attorney was required to represent the state says nothing as to whether the state was required to pay the Gosper County Attorney for those services. Who pays is a separate question.

The answer to that question is found in the second and third sentences of § 23-1201(2). The second sentence authorizes the Attorney General to direct the county attorney to represent the state in any action in which the state is either interested or a party. Although the plain language of this sentence seems clear, its meaning is ambiguous. If the county attorney is *required* by the first sentence of § 23-1201(2) to represent the state in *all*

such actions, under what circumstances would the Attorney General have reason to direct the county attorney to undertake such representation? One ordinarily has no need to direct another to do something that the other is already required to do. Not only would one ordinarily have no need to direct another to perform such a duty, one certainly would not expect to have to pay for its performance. Nonetheless, that is exactly what the third sentence of § 23-1201(2) requires.

Specifically, the third sentence of § 23-1201(2) requires the payment of attorney fees to the county attorney when the county attorney acts under the direction of the Attorney General, and such action requires the performance of duties which are *in addition* to the *ordinary* duties of the county attorney. By its plain language, this sentence implies that there are duties relating to the representation of the state that are not within the county attorney's "ordinary" duties. Consequently, the duties of the county attorney, as broadly described in the first sentence of § 23-1201(2), are subdivided by the second and third sentences into those duties that are ordinary and those duties that are extraordinary. The question is, What does "ordinary" mean? The dictionary provides little guidance, but the legislative and amendatory history of § 23-1201(2) is illuminating.

[2,3] A statute is open for construction to determine its meaning when the language used requires interpretation or may reasonably be considered ambiguous. *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999). To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question, *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996), and reference may be had to earlier legislation upon the same subject, *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

Prior to 1885, the "district attorney" of each "judicial district" had the "duty . . . to appear in the district court . . . in each county in the judicial district for which he was elected, and prosecute and defend all actions, civil and criminal, and all matters whatsoever in which the state or county may be interested." Comp. Stat. ch. 7, § 15 (1881). However, in 1885, the sections describing "district attorneys" were repealed by Comp. Stat. ch. 7, §§ 15 through 28 (1885). "AN ACT to provide for the elec-

tion of county attorneys, to define their duties and fix their salaries, and to repeal sections fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20) and twenty-one (21), of chapter seven (7), of the Compiled Statutes." 1885 Neb. Laws, ch. 40, p. 215. Chapter 7, § 16, described the duties of the newly-created position of "county attorney," and was substantively identical to the first sentence of the current version of § 23-1201(2):

> It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested.

Thus, the duties of the county attorney have changed very little since the office was created. However, no arrangement was made for the payment of attorney fees by the Attorney General to the county attorney until 1959, when § 23-1201 was amended to provide for such fees. See § 23-1201 (Cum. Supp. 1959). This language was substantially identical to that of the second and third sentences of the current version of § 23-1201(2). An examination of the legislative history of the 1959 amendment is instructive.

The introducer's statement to 1959 Neb. Laws, ch. 87, § 1, p. 395, which bill resulted in the 1959 amendment to § 23-1201, clearly states the purpose behind the amendments:

> This bill is recommended by the Attorney General. County attorneys are presently required to represent the state in any matter to which the state is a party or in which the state is interested. There is no provision for any compensation for extra work. . . .
>
> The Attorney General believes that the county attorneys should be paid some compensation for their additional work in representing the state.
>
> This bill provides that if a county attorney is directed by the Attorney General to appear for the state in any action in which the state is interested or a party, he may receive a fee in addition to his county attorney's salary as the Attorney General may authorize.

Floor Debate, L.B. 82, 69th Sess. (Jan. 30, 1959). Therefore, although it has been the duty of the county attorneys to represent the state since 1885, as of 1959, there was no provision in place to compensate the county attorneys for performing such duties. The introducer's statement clearly indicates that the Legislature intended to resolve this problem by amending § 23-1201 to provide for attorney fees when the county attorney represents the state.

[4] The legislative and amendatory history of § 23-1201(2) indicates that, although the county attorney has a duty to represent the state in all matters arising under the laws of the state in which the state is a party or is interested, this duty is not an "ordinary" duty of the county attorney. Rather, the "ordinary" duties of the county attorney are limited to the representation of the county in such matters and, as the language of § 23-1201(1) explicitly indicates, of the state in the prosecution of criminal matters. *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984) (stating that affirmative duty to prosecute all criminal matters is specifically placed upon county attorney); *Dinsmore v. State*, 61 Neb. 418, 85 N.W. 445 (1901). Accordingly, it was not an ordinary duty of the Gosper County Attorney to represent the Department in the instant case, since it was an action involving the state, and did not involve the prosecution of a criminal matter. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

We conclude that the district court was authorized to award fees to the Gosper County Attorney under § 23-1201(2).

(a) Amount Awarded

However, the Department argues that even if the Gosper County Attorney was authorized to receive fees, the Department was not given an opportunity to appear and oppose the amount of fees awarded.

[5] 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. However, to determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised,

the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998). Such an inquiry necessarily contemplates that some evidentiary showing will be made.

In *Schirber*, we addressed whether an award of attorney fees made under Neb. Rev. Stat. § 23-1204.01 (Reissue 1997) was appropriate. The attorney in *Schirber* filed an application with the trial court for the recovery of attorney fees, which application detailed the time and expenses upon which the fee request was based. An evidentiary hearing was held and the trial court granted in part the request for attorney fees. On appeal, this court stated that an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable, and there is no evidence or indication otherwise that the amount is unreasonable. We noted that the amount requested in the application was reasonable and that no evidence was offered or existed disproving the reasonableness of the attorney's application and, thus, that the application should have been granted.

[6] It is implicit in this holding that the party opposing an application for attorney fees must be given an opportunity to present evidence against the application. The record in the instant case does not contain any evidence or otherwise indicate that the Gosper County Attorney made any formal application for attorney fees or that the Attorney General was notified of any such request. Based on this record, we can only conclude that the Attorney General was not given an opportunity to oppose the "application."

Because the Attorney General was not given an opportunity to oppose the fee award, we conclude that the trial court abused its discretion in awarding the Gosper County Attorney $250 in attorney fees.

CONCLUSION

The Gosper County Attorney was authorized an award of attorney fees under § 23-1201. Nonetheless, we reverse, and remand with directions for the trial court to hold a hearing con-

cerning the proper amount of fees owed so that the Attorney General may be given an opportunity to contest the amount granted.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

RAY D. NUSS AND SANDRA FOX, SPECIAL ADMINISTRATORS FOR AND ON BEHALF OF THE ESTATE OF CURTIS M. NUSS, DECEASED, APPELLANTS, V. EUGENE M. ALEXANDER, APPELLEE.

595 N.W.2d 263

Filed June 4, 1999. No. S-97-800.

1. **Motions to Strike: Pleadings.** Whether a motion to strike a petition should be sustained and whether a petition should be dismissed are questions of law.
2. **Actions: Pleadings.** A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
3. **Motions to Strike: Statutes.** Two Nebraska statutes permit the filing of a motion to strike: Neb. Rev. Stat. §§ 25-833 and 25-913 (Reissue 1995).
4. **Motions to Strike: Demurrer.** Motions to strike pursuant to Neb. Rev. Stat. § 25-833 (Reissue 1995) are not a proper means by which to dismiss a party's petition. They do not replace a demurrer or motion which tests the sufficiency of the petition's allegations and which may lead to the termination of a lawsuit.

Appeal from the District Court for Adams County: WILLIAM H. NORTON, District Judge, Retired. Reversed and remanded for further proceedings.

Darrell K. Stock, of Snyder & Stock, and, on brief, Lyle Joseph Koenig, of Koenig & Stover, P.C., for appellants.

Jeffrey L. Stoehr, of Biggs & Stoehr, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Ray D. Nuss and Sandra Fox, special administrators of the estate of Curtis M. Nuss (the Estate), their late father,

appeal an order of the district court for Adams County granting the motion to strike of appellee, Eugene M. Alexander, and dismissing appellants' second amended petition against Alexander. We reverse, and remand for further proceedings consistent with this opinion.

ALLEGATIONS IN SECOND AMENDED PETITION

There is no evidentiary record in this case, and therefore, we summarize the background based on the allegations in the second amended petition as supplemented by the transcript. Nuss died testate on March 14, 1993. Nuss was a retired farmer living in a nursing home in Blue Hill, Nebraska. Nuss' will was submitted for probate in the county court for Webster County. Alexander, an attorney in Hastings, Nebraska, was appointed personal representative of the Estate pursuant to the terms of Nuss' will.

It is alleged that Nuss had granted Alexander a durable power of attorney in 1987. In the 20 years preceding Nuss' death, it is alleged that Alexander had provided various legal services to Nuss, including defending Nuss on several alcohol-related misdemeanor charges, preparing tax returns, and handling some minor real estate matters. It is further alleged that Alexander also performed some personal, nonlegal services for Nuss, including occasionally taking him to the doctor or dentist, preparing checks, and simply visiting with Nuss.

Nuss' will devised all of his property to his five adult children. Appellants, as two of those children, requested the probate court to appoint them special administrators of the Estate. The court did so on May 2, 1995. As special administrators, appellants challenged the fee application submitted by Alexander and a second attorney, hereinafter referred to as "Probate counsel," for their services in administering the Estate. After a contested hearing, on February 16, 1996, the probate court awarded Alexander $1,500 in fees, and the court ordered the Estate to pay Probate counsel $6,000, plus $577.76 in costs. Based on the record, it appears that appellants did not request a review of this judgment by the Nebraska Court of Appeals.

Appellants thereafter petitioned the probate court to remove Alexander as the Estate's personal representative because,

although more than 2 years had passed since Nuss' death, Alexander had failed to pay the Estate's taxes and had failed to timely complete and close the Estate. The probate court removed Alexander and appointed appellants as copersonal representatives of the Estate on May 9, 1996.

On March 13, 1996, appellants filed a petition, as special administrators of the Estate, against Alexander. The instant appeal arises from the case initiated by appellants' filing of this petition in the district court for Adams County. In general, the allegations in the petition challenged the value of professional services Alexander had delivered to Nuss in his lifetime and purported to challenge the fees and costs the probate court had allowed in connection with the administration of the Estate. The petition has been amended twice.

With respect to their claim regarding the legal services that Alexander performed for Nuss, appellants alleged in their second amended petition that Alexander had charged and collected excessive fees from Nuss totaling more than $190,000. Appellants also alleged that in August 1991, Alexander induced Nuss to sign a promissory note for $65,000 for legal fees which Alexander claimed Nuss owed him. Appellants alleged that Alexander accepted $75,400 from Nuss on the note, thereby receiving an overpayment of $10,400, which Alexander did not refund to Nuss. Appellants alleged that they did not and could not have discovered the allegedly excessive fees Alexander charged and collected from Nuss until after appellants' appointments as the Estate's special administrators in May 1995. As noted above, appellants commenced this action against Alexander in March 1996, within 1 year of the date they claimed to have discovered the excessive fees Alexander allegedly charged and collected from Nuss.

In their second amended petition, appellants also asked the district court to modify or reverse the probate court's order allowing aggregate fees and costs to Alexander and Probate counsel of $8,077.76.

In response to appellants' second amended petition, Alexander filed a pleading entitled "Motion to Strike From and to Make Plaintiffs' Second Amended Petition at Law More Definite and Certain." This pleading states that it is brought

under Neb. Rev. Stat. § 25-833 (Reissue 1995). In this motion, Alexander requested the district court to strike appellants' allegation pertaining to their discovery of the allegedly excessive fees, claiming that this allegation was "irrelevant and immaterial and conclusory in nature." Similarly, Alexander asked the court to strike appellants' allegations that Alexander collected excessive fees at the sale of Nuss' farm and that Alexander kept no records which documented the services he actually performed for Nuss. In this regard, for the sake of completeness, we note that in a copy of his deposition testimony appended to the second amended petition, Alexander admitted he maintained no such records. Alexander also sought to strike appellants' three purported "theories of recovery" which were denominated "Excessive Fees," "Recoupment," and "Damages" for the reason that these allegations and their reference to alleged damages sustained on February 16, 1996, as a result of the fees and costs awarded to Alexander and Probate counsel in the probate proceedings, were "irrelevant and immaterial and contain conclusory opinions."

In his motion to strike, Alexander further requested the district court to strike all allegations in appellants' second amended petition regarding the services Alexander had performed for Nuss and the fees he had collected therefor, because such events occurred beyond the 2-year statute of limitations for professional negligence actions provided for in Neb. Rev. Stat. § 25-222 (Reissue 1995) and were, therefore, time barred. In his motion to strike, Alexander further requested the court to order appellants to make their allegations more definite and certain regarding the nature and terms of the relationship between Alexander and Nuss, the basis upon which appellants claimed Alexander's fees were excessive, and the precise amount of fees which appellants alleged were excessive.

On June 13, 1997, the district court entered an order sustaining Alexander's motion to strike "in its entirety" and ordered appellants' second amended petition dismissed. The court neither referenced nor ruled upon Alexander's motion to make the second amended petition more definite and certain. In its June 13 order, the trial court interpreted appellants' allegations with respect to the fees charged Nuss to be a claim against Alexander

for professional negligence governed by the 2-year statute of limitations found in § 25-222. The court concluded in its order that the statute of limitations had expired before appellants filed their petition. The trial court ordered that every allegation pertaining to services provided by Alexander to Nuss, and the fees collected therefor, be stricken. With respect to the allegations challenging the probate court's award of fees and costs to Alexander and Probate counsel, the trial court made no specific finding. With respect to the portions of Alexander's motion asking the court to direct appellants to make their second amended petition more definite and certain, the trial court made no ruling. The trial court's June 13 order dismissed appellants' petition without leave to replead because "they [appellants] cannot amend to correct their allegations."

From this order, appellants filed this timely appeal.

ASSIGNMENT OF ERROR

Appellants claim that the trial court erred in granting Alexander's motion to strike portions of appellants' second amended petition and thereby dismissing the second amended petition.

STANDARD OF REVIEW

[1] Whether a motion to strike a petition should be sustained and whether a petition should be dismissed are questions of law. *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

ANALYSIS

Dismissal Based on Motion to Strike as Error.

[2] In Nebraska, pleading practice is controlled by statute. *Kramer v. Miskell, supra*, citing *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983). Nebraska's system of code pleading requires, inter alia, a statement of the facts constituting a party's cause of action in ordinary and concise language without repetition and a demand for the relief which the party requests. Neb. Rev. Stat. § 25-804 (Reissue 1995). A petition need not state a cause of action or defense in any par-

ticular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. "It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action." *McCurry v. School Dist. of Valley*, 242 Neb. 504, 511, 496 N.W.2d 433, 438 (1993).

[3] Two Nebraska statutes permit the filing of a motion to strike: § 25-833 and Neb. Rev. Stat. § 25-913 (Reissue 1995). Section 25-833 provides that "redundant, scandalous or irrelevant matter" may be stricken from a pleading on a motion of the party prejudiced thereby. For purposes of § 25-833, we have defined "redundancy" as the needless repetition of material allegations or the inclusion of irrelevant matter. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956). Irrelevant matter prohibited by § 25-833 is matter that has no bearing upon the subject matter of the controversy, and it cannot affect the court's decision. *State ex rel. Beck v. Associates Discount Corp., supra.* Section 25-833 also provides that where a pleading's allegations are "so indefinite and uncertain that the precise nature of the charge or defense is not apparent," the court may order the pleading to be made more definite and certain by amendment. Alexander's motion to strike and make more definite and certain was filed under § 25-833.

An additional statute, § 25-913, authorizes the filing of a motion to strike pleadings from the court's files. Motions to strike filed pursuant to § 25-913 are aimed at petitions filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed. *Kramer v. Miskell, supra*; *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). Motions to strike pursuant to § 25-913 may also be filed where a party declines to amend the petition or refuses to follow the court's orders. *Kramer v. Miskell, supra*; *Hecker v. Ravenna Bank, supra.*

In the instant case, Alexander expressly invoked § 25-833 in his motion to strike portions of appellants' second amended petition and to make other portions of the petition more definite and certain. The trial court granted Alexander's motion to strike "in its entirety," finding that the 2-year statute of limitations for

professional negligence claims applied to the second amended petition and that the statute of limitations had expired on all of Alexander's transactions with Nuss described in appellants' second amended petition. The trial court dismissed appellants' second amended petition without specifically addressing the allegations regarding the award of fees and costs in the probate court and without ruling on Alexander's request to make the claims more definite and certain.

[4] The trial court's order dismissing appellants' second amended petition based on Alexander's motion to strike was error. Motions to strike pursuant to § 25-833 are not a proper means by which to dismiss a party's petition. They do not replace a demurrer or motion which tests the sufficiency of the petition's allegations and which may lead to the termination of a lawsuit. *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996); *Hecker v. Ravenna Bank, supra.* Accordingly, the trial court's order dismissing the second amended petition based on a motion to strike is reversed, and the cause is remanded in accordance with our further determinations presented later in this opinion.

Allegations of Excessive Fees.

In their second amended petition appellants alleged that before their appointment as special administrators of the estate, they had no ability to act on the estate's behalf or to discover Alexander's alleged excessive fees. Appellants argue to this court that the allegation of excessive fees relates to "professional malpractice," supplemental brief for appellants at 6, and that a cause of action for "professional malpractice" may be tolled under certain circumstances. Section 25-222 specifies that actions for professional negligence must be brought within 2 years of the date the negligence occurred, unless the negligence was not discovered and could not have been discovered within that 2-year period. In such cases, the action may be commenced within 1 year from the date of discovery of the negligence or of facts which would reasonably lead to discovery. Whether a claim for professional negligence could have been discovered within 2 years of the occurrence of the alleged negligence is a question of fact. *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414,

432 N.W.2d 18 (1988); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

As noted above, Alexander sought to strike the allegations pertaining to tolling and discovery of alleged excessive attorney fees and to make such allegations more definite and certain. Further, as noted above, in their supplemental brief, appellants argue that the second amended petition can be corrected to allege professional negligence and provide the reason why the controlling statute of limitations should be tolled. The trial court concluded that the allegations regarding tolling and discovery were "immaterial and irrelevant and conclusory in nature" and ordered them stricken. Based on the state of the pleadings before it, this ruling by the trial court was correct. At the time of the order striking the tolling and discovery allegations, there was no allegation or purported cause of action to which such allegations were relevant. We express no opinion as to whether such allegations would be relevant were appellants to replead a cause of action based on, inter alia, professional negligence.

In the instant appeal, we observe that appellants' second amended petition is somewhat unclear. In this regard, we note that in his motion to strike, Alexander requested the trial court to order appellants to state their claims with more definiteness and certainty. The trial court did not rule upon Alexander's motion to make the pleadings more definite and certain. Given the obliqueness of the allegations in the second amended petition pertaining to the legal significance of the allegedly excessive fees, the trial court should have granted the portion of Alexander's motion asking that this portion of the second amended petition be made more definite and certain.

In this case, the trial court's order dismissing appellants' second amended petition was error, requiring a reversal and remand. We specifically determine that given the facts alleged in the second amended petition, the allegations pertaining to tolling and discovery of allegedly excessive attorney fees were not relevant and were properly stricken. We further conclude that given the lack of particularity surrounding the allegations regarding the claim of excessive attorney fees, the trial court should not have ignored Alexander's motion to make more definite and certain, but, on the contrary, should have granted this relief. Having

determined that the trial court correctly struck certain of the allegations in the second amended petition but that appellants ought to have been ordered to make their allegation regarding excessive fees more definite and certain, we do not here consider the merits or likelihood of success of appellants' claims upon remand, for it is not the office of this court to render advisory opinions. See *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996). The judgment is reversed, and the cause is remanded for treatment of the matter consistent with this opinion.

Allegations Challenging Award of Fees and Costs in Probate Court.

In their second amended petition, appellants asked the district court to modify or reverse the probate court's order awarding $8,077.76 in fees and costs to Alexander and Probate counsel. At oral argument, appellants conceded that the district court lacked jurisdiction over such issue. See, *Kerrigan & Line v. Foote*, 5 Neb. App. 397, 558 N.W.2d 837 (1997), *aff'd, In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76 (1997). Accordingly, we make no further comment regarding these allegations.

CONCLUSION

The dismissal of the second amended petition alleging excessive fees based on a motion to strike was error. Accordingly, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT,
V. BRIAN ERNEST SPOTTS, APPELLEE.
595 N.W.2d 259

Filed June 4, 1999. No. S-98-228.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
3. **Criminal Law: Legislature: Intent.** The Nebraska Supreme Court has determined that the Legislature intended forfeiture actions pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998) to be criminal proceedings.

4. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Double Jeopardy: Legislature: Intent.** Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Kent D. Turnbull, Lincoln County Attorney, for appellant.

R. Bradley Dawson and David T. Schroeder for appellee.

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

WRIGHT, J.

NATURE OF CASE

Brian Ernest Spotts was charged by information with possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416 (Reissue 1995). The State also filed a petition for disposition of seized moneys, seeking forfeiture of $14,177 found on Spotts' person at the time of his arrest. Following a trial on the forfeiture action, pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 1998), the district court found in favor of the State, and Spotts forfeited the $14,177. Spotts filed a plea in bar to the information, alleging that subsequent prosecution would expose him to double jeopardy, contrary to the U.S. and Nebraska Constitutions. The plea in bar was sustained by the district court, and following the procedures set forth in Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), the State timely perfected this appeal.

SCOPE OF REVIEW

[1] Issues regarding the grant or denial of a plea in bar are questions of law. See *State v. Belmarez*, 254 Neb. 467, 577 N.W.2d 264 (1998).

[2] On questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Id.*

FACTS

In the first week of October 1997, the Nebraska State Patrol obtained a search warrant for property located at 210 West First Street in North Platte, Nebraska. It was suspected that a methamphetamine lab was being operated from the garage located at that residence. At approximately 7:20 p.m. on October 2, the warrant was executed. Around 9 p.m., Spotts was driving a vehicle on a public street past the residence. The State Patrol contacted a nearby sheriff's deputy and requested that he stop Spotts' vehicle because it had allegedly been seen in the garage where the methamphetamine lab was located.

Spotts' vehicle was stopped, and upon his arrival at the scene, Sgt. Dan Doggett of the State Patrol approached the vehicle. While standing by the passenger door, Doggett saw a substance on the floor of the car which he believed to be methamphetamine. According to the sheriff's deputy, Spotts consented to a pat-down search for weapons, and during the search, $14,177 was found on Spotts' person.

Spotts was then given the *Miranda* warnings and placed under arrest. During an interview with the police, Spotts admitted that he was unemployed, that he had received 2 ounces of methamphetamine for resale, and that he had sold 1 pound of methamphetamine in the prior 2 months.

On October 9, 1997, a petition for disposition of seized moneys was filed by the State, seeking forfeiture of the $14,177 found on Spotts' person at the time of his arrest. On December 18, Spotts was charged by information with possession with intent to distribute a controlled substance (methamphetamine), a Class III felony. Spotts stood mute to the criminal charge, and the district court entered a plea of not guilty on Spotts' behalf. The criminal prosecution was set for jury trial in March 1998. In December 1997, the $14,177 found on Spotts' person at the time of his arrest was forfeited pursuant to § 28-431.

On December 15, 1997, Spotts filed a plea in bar, alleging in pertinent part that the conduct which exposed Spotts to forfeiture of the $14,177 was the same conduct which exposed him to liability and punishment for the possession of methamphetamine. Spotts alleged that in order to forfeit the money found on his person, he would have had to commit one and the

same offense as charged in the information. Spotts asserted that the prosecution for possession of methamphetamine was barred because said prosecution would expose him to double jeopardy.

On January 26, 1998, the district court sustained Spotts' plea in bar and dismissed the information with prejudice. The State filed an application for leave to docket an appeal, pursuant to § 29-2315.01, and subsequently filed its notice of appeal.

ASSIGNMENTS OF ERROR

The State assigns as error that the district court erred (1) in determining that *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989), created or extended double jeopardy protection from multiple prosecution or multiple punishment on forfeiture proceedings; (2) in determining that a separate forfeiture action and a criminal proceeding constitute prosecution for the same offense, in violation of the Double Jeopardy Clause; and (3) in determining that forfeiture proceedings are so punitive as to constitute multiple punishment under the Double Jeopardy Clause.

ANALYSIS

[3] This case is controlled by our decision in *State v. Franco, ante* p. 15, 594 N.W.2d 633 (1999). In *Franco*, we acknowledged that since *One 1987 Toyota Pickup, supra*, we have determined that the Legislature intended forfeiture actions pursuant to § 28-431 to be criminal proceedings.

[4] The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

In *Franco, supra*, a criminal defendant was charged with a crime and faced the forfeiture of personal property seized during his arrest. The district court concluded that the crime and the actions leading to forfeiture constituted separate criminal offenses, so that the prosecution of both was not barred by double jeopardy. On appeal, we disagreed and stated that a forfeiture action pursuant to § 28-431 necessarily required the proof of a violation of chapter 28 of the criminal code. In Franco's case, the violation of § 28-416(1)(a), the statute which charged him

with possession of a controlled substance, had to be proved. We deduced that § 28-416(1)(a) was subsumed within § 28-431 and that, thus, the two statutes were not defining separate offenses. In short, we held that the State could not seek forfeiture of property and then proceed in a criminal prosecution arising from the same set of facts without offending double jeopardy.

[5] However, we then noted that the *Blockburger* test, enumerated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which is applied to prevent double punishment in situations where the Legislature intended to provide only for a single punishment, did not prevent the State from seeking a criminal prosecution and a forfeiture in the same proceeding if there was legislative intent to do so. We concluded that the Nebraska Legislature intended for punishments pursuant to §§ 28-416(1)(a) and 28-431 to be imposed cumulatively. Where the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the cumulative punishments are imposed in a single proceeding. *Franco, supra.*

The present appeal was docketed and briefed prior to our ruling in *Franco*. Although many of the issues raised by the State were addressed in *Franco*, some deserve further explanation. For example, the State argues that if forfeiture proceedings do in fact bar subsequent prosecution arising out of the same facts, then the court in *One 1987 Toyota Pickup, supra*, would not have allowed the forfeiture action in that case to be retried. In *One 1987 Toyota Pickup*, the defendant was found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. Subsequently, the defendant's 1987 Toyota pickup was condemned in a forfeiture action brought pursuant to § 28-431 (Reissue 1985). On appeal, we sustained the criminal convictions, but reversed the judgment in the forfeiture action and remanded the cause for a new trial. We held that the trial court had committed reversible error when it overruled the motion to suppress the defendant's pickup as evidence in the forfeiture action, on the grounds that the stop of the vehicle violated the Fourth Amendment to the U.S. Constitution.

In conjunction with this conclusion, we asserted that forfeiture actions pursuant to § 28-431 were criminal in character and that, therefore, double jeopardy principles applied. However, we stated that the trial court's error of admitting evidence obtained in violation of the defendant's constitutional rights was properly characterized as trial error and, thus, did not bar retrial of the forfeiture determination after a reversal. To the extent this analysis in *One 1987 Toyota Pickup* is in conflict with our reasoning in *State v. Franco, ante* p. 15, 594 N.W.2d 633 (1999), it is overruled.

In sustaining Spotts' plea in bar, the district court stated: "[I]f the forfeiture action arises out of the underlying criminal case, the State is placed in the position of having to decide whether to pursue the forfeiture proceeding or whether to pursue the criminal proceeding." We agree with that part of the district court's determination that the forfeiture action against Spotts' property and the criminal proceedings against Spotts were not prosecutions of separate offenses. We affirm the district court's judgment to the extent that it sustained the plea in bar on the basis that the Double Jeopardy Clause barred a second prosecution. Thus, the State's first and second assignments of error are without merit.

The State also claims the district court erred in determining that forfeiture proceedings are so punitive as to constitute multiple punishment under the Double Jeopardy Clause. Having concluded that forfeiture proceedings are in fact criminal proceedings, we do not engage in the multiple punishment analysis set forth in *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). This assignment of error is also without merit.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court sustaining Spotts' plea in bar.

AFFIRMED.

NEBRASKA PUBLIC EMPLOYEES LOCAL UNION 251 AFFILIATED WITH THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AN INTERNATIONAL UNION, APPELLANT, V. OTOE COUNTY, NEBRASKA, APPELLEE.

595 N.W.2d 237

Filed June 4, 1999. No. S-98-427.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers; if the order was procured by fraud or is contrary to law; if the facts found by the commission do not support the order; and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Supreme Court: Evidence: Appeal and Error.** In an appeal from a Commission of Industrial Relations order regarding prohibited practices stated in Neb. Rev. Stat. § 48-824 (Reissue 1998), the Nebraska Supreme Court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. The Supreme Court will consider the fact that the commission, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the commission's judgment as to credibility.
3. **Administrative Law: Due Process: Waiver: Appeal and Error.** Procedural due process defenses should not be waived if timely raised in the first judicial tribunal to review an administrative action.
4. **Constitutional Law: Administrative Law: Supreme Court: Appeal and Error.** It is the practice of the Nebraska Supreme Court to consider constitutional questions in reviewing the orders of administrative agencies when those questions are raised in the Supreme Court on direct review.
5. **Commission of Industrial Relations: Constitutional Law.** The Commission of Industrial Relations has no authority to vindicate constitutional rights.
6. **Employer and Employee: Due Process.** A discharged employee's claim that an employer denied him or her due process depends on the discharged employee's having had a property right in continued employment.
7. **Constitutional Law: Employer and Employee: Claims.** The existence of a legitimate claim of entitlement to a property interest in continued employment is to be determined in accordance with state law.
8. **Termination of Employment: Public Officers and Employees.** When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability. This maxim applies equally to public employees.
9. **Employer and Employee.** If no evidence is submitted indicating the employment relationship status, a court will find that the relationship was at will.

10. **Pleadings.** Proper pleading requires a petition to state in logical and legal form the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
11. **Trial: Pleadings: Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. The Nebraska Supreme Court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
12. **Labor and Labor Relations: Statutes.** Decisions under the National Labor Relations Board are helpful where there are similar provisions under the Nebraska statutes.
13. **Labor and Labor Relations: Discrimination: Intent.** A violation of Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998), similarly to a violation of § 8(a)(3) of the National Labor Relations Act (29 U.S.C. § 158(a)(3) (1994)), normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.
14. ____: ____: ____. A violation of Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998), similarly to a violation of § 8(a)(3) of the National Labor Relations Act (29 U.S.C. § 158(a)(3) (1994)), can be found where an employer acted out of antiunion bias, whether or not the employer may have had some other lawful motive.
15. **Labor and Labor Relations: Discrimination: Intent: Proof.** The party asserting a Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998) violation has the burden to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.
16. **Labor and Labor Relations: Discrimination: Proof.** The elements commonly required to make a prima facie case of a Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998) violation are (1) union activity, (2) employer knowledge of that activity, (3) timing between the employees' union activity and the employer's discriminatory conduct, and (4) employer hostility or animus toward employees' union activity.
17. ____: ____: ____. The inference that protected conduct was a motivating factor in a violation of Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998) must be shown by a preponderance of the evidence, and the party asserting the violation carries this burden throughout the proceedings.
18. ____: ____: ____. Regarding an asserted violation of Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998), upon a prima facie showing, the defendant employer may attempt to directly rebut the evidence supporting the prima facie case. If the employer elects not to do so or fails in the attempt to do so, the burden of proof shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected union activity. Proof that the discharge would have occurred in any event and for valid reasons amounts to an affirmative defense on which the employer carries the burden of proof by a preponderance of the evidence.
19. ____: ____: ____. A party asserting a Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998) violation must show that the particular supervisor responsible for the discriminatory action knew about the employee's union activities. While circumstantial evidence may be relied upon to infer that the knowledge of one supervisor has been communicated to another supervisor, knowledge of a lower-level supervisor may not simply be imputed to the decisionmaking supervisor.
20. **Principal and Agent: Presumptions.** It is the duty of an agent to communicate to his or her principal all the facts concerning the service in which the agent is engaged that come to the agent's knowledge in the course of his or her employment, and this duty,

in a subsequent action between the principal and a third person, the agent is conclusively presumed to have performed. However, if knowledge, as distinguished from reason to know, is the important element in a transaction, and the agent who has the knowledge is not one acting for the principal in the transaction, the principal is not affected by the fact that the agent has the knowledge.

21. **Labor and Labor Relations: Discrimination: Intent.** A discharge cannot stem from an improper motivation where an employer is ignorant of an employee's union activity.
22. **Labor and Labor Relations: Discrimination: Proof.** Under the "animus" element of the prima facie case for a Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998) violation, the party asserting the violation has the burden to produce evidence of union hostility. The evidence indicating hostility may arise from events not directly related to the discriminatory actions at issue and may arise from events far predating the action at issue, but the evidence must nonetheless reasonably infer a causal connection between antiunion animus and the discriminatory act.
23. ____: ____: ____. Statements of antiunion bias may be considered with the qualification that the expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, is not evidence of any unfair labor practice under any of the provisions of the Industrial Relations Act if such expression contains no threat of reprisal or force or promise of benefit.
24. ____: ____: ____. Under certain circumstances, antiunion animus will be inferred in the absence of direct evidence in determining elements of a prima facie case under Neb. Rev. Stat. § 48-824(2)(c) (Reissue 1998).
25. **Labor and Labor Relations.** An employer is free to communicate to his or her employees any of the employer's general views about unionism and may even make a prediction as to the precise effects the employer believes unionization will have on his or her company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his or her control. If there is any implication that an employer may or may not take action solely on his or her own initiative for reasons unrelated to economic necessities and known only to the employer, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion.
26. **Labor and Labor Relations: Discrimination.** A violation of Neb. Rev. Stat. § 48-824(2)(d) (Reissue 1998), similarly to a violation of § 8(a)(4) of the National Labor Relations Act (29 U.S.C. § 158(a)(4) (1994)), turns on the motivation of the employer.
27. ___: ___. Neb. Rev. Stat. § 48-824(2)(d) (Reissue 1998), like § 48-824(2)(c), requires the court to distinguish an employer's pretextual and retaliatory conduct from conduct motivated by legitimate business purposes.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellant.

Max J. Kelch, Otoe County Attorney, for appellee.

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

CONNOLLY, J.

Appellant, Nebraska Public Employees Local Union 251 affiliated with the American Federation of State, County, and Municipal Employees (Union), on behalf of three Union members, filed a petition with the Nebraska Commission of Industrial Relations (CIR). The petition alleged that the termination of the three Union members' employment by appellee, Otoe County (County), shortly after a collective bargaining agreement was signed was a prohibited practice, in violation of Neb. Rev. Stat. § 48-824(2)(a) through (d) (Reissue 1998) of the Industrial Relations Act. The CIR determined that the employment terminations were not in violation of any of the asserted subsections of § 48-824(2). The Union appeals the CIR findings regarding § 48-824(2)(a), (c), and (d). In addition, the Union asserts that the County violated the discharged Union members' federal constitutional due process rights. We granted the Union's petition to bypass and now affirm the CIR's order.

I. ASSIGNMENTS OF ERROR

The Union assigns, reorganized, that the CIR erred (1) in failing to find that the County violated the discharged employees' constitutional due process rights as described in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); (2) in "failing to find that a unilateral change in the terms and conditions of employment contained in the collective bargaining agreement" was a prohibited practice under § 48-824(2)(a); (3) in failing to find that the county commissioners had actual knowledge of protected union activities; (4) in finding that the law required that the county commissioners have actual knowledge of protected union activities before there can be an unfair labor practice; (5) in holding that the organizing activities of the discharged employees were too far removed in time to provide evidence of protected union activities; and (6) considering the appropriate analysis regarding timing and the county commissioner's knowledge of union activity, in failing to find that the preponderance of competent

evidence supports a finding that the County acted in violation of § 48-824(2)(c) and (d).

II. BACKGROUND

1. Union Organization and Collective Bargaining Agreement Negotiations

In December 1994, after the road department employees voted for union representation, the CIR certified the Union as the exclusive collective bargaining representative for road department employees, a total of 27 employees, excluding the 3 foremen.

On April 21, 1995, the Union petitioned the CIR to establish wages and benefits retroactively for the pay periods from July 1994 through June 1995. The Union again petitioned the CIR in January 1996 to establish wages and benefits for the pay periods from July 1995 through June 1996.

On March 12, 1996, the CIR issued an order disposing of the Union's first wage and benefit petition. As a result of the order, the County's cost increased $56,200. County Commissioner Clyde Chester Stoll testified that after receiving the order, the county commissioners first considered layoffs.

While the second wage and benefit petition was pending before the CIR, the County and the Union negotiated a collective bargaining agreement (CBA). The record reflects that at a negotiation session, Stoll told Union representatives that the County estimated the proposed CBA would immediately cost the County an additional $100,000. Stoll testified that he told Union bargaining representatives that the County would lay off four men if the CBA was signed. On April 3, 1996, the Otoe County Attorney sent Edward E. Cox, the Union's president, a letter stating that the county commissioners agreed that if the budget authority for 1996-97 remained the same, "a total of four (4) positions may be lost due to the retroactive benefits that have to be paid."

A CBA was signed and executed on April 4, 1996. Stoll stated that on that day, he told Union representatives that the County intended to lay off four people. The CIR concluded that Stoll specifically meant four bargaining unit employees. The CBA

provided that the County had "[t]he right at any time to . . . terminate jobs" and "the right to lay off at any time."

Bargaining unit members Terry Helms, Rex Bassinger, and Ervin Meyer (the discharged employees) were subsequently terminated from employment on April 19, June 14, and June 14, 1996, respectively. The County sent each a letter providing 15 days' notice and stating that the layoff was due to "budget constraints." No other County employee, bargaining unit or otherwise, was involuntarily terminated from employment.

2. Discharged Employees' Union Activities

Cox testified that Meyer and Helms were the individuals who initially contacted the union and set up organizational meetings. Meyer served as a Union steward during its organization through April 1995. The discharged employees all obtained union authorization cards, by which employees gave their approval to hold a representation election. All attended at least two of the first three Union meetings. All spoke in favor of union representation at the second and third Union meetings, and although Bassinger and Meyer attended the first meeting, the record is silent as to whether they voiced support at that meeting.

3. Proceedings Before CIR

In its petition, the Union alleged that the County knew that the discharged employees were "union organizers and adherents" and laid them off, in violation of § 48-824(2)(a) through (d). In its answer, the County denied the allegations and responded by stating that it repeatedly informed the Union during the CBA negotiations that four positions would be eliminated and that the CBA authorized the County to lay off bargaining unit members without cause.

Otoe County Highway Superintendent Robert D. Fleming and the foremen conducted performance evaluations of all the road department employees in March 1996 and presented those evaluations, ranked by score, to the county commissioners. The County did not reveal these evaluations to the discharged employees. A road department personnel policy supplement, executed in 1993, provided for employee review of and comment on individual evaluations. The discharged employees' evaluation scores were at the low end of the ranking.

The county commissioners each recommended one employee to be laid off, citing various factors such as job evaluations, lack of skills, and complaints from taxpayers.

The CIR concluded that Fleming and the foremen did not participate in the layoff process. The record reflects that Fleming and the foremen performed the March 1996 evaluations and that Fleming tabulated the results for the county commissioners. Fleming and a foreman testified that they did not recommend any individual be discharged. Richard W. Kuenning, a road department foreman, testified that he did not recommend Meyer's termination from employment, although Kuenning later testified that after the evaluation list was submitted, he recommended Meyer and two other employees (not involved in this appeal) be terminated from employment.

4. County's Knowledge of Union Activities

The CIR determined that the County's foremen Walter Pohlman and Kuenning knew that the discharged employees supported the union organizing effort. It determined, however, that there was no evidence that Pohlman or Kuenning relayed this knowledge to either Fleming or the county commissioners. The CIR also determined that none of the foremen knew or presumed that the discharged employees were the principal organizers of the Union. The foremen testified that they believed two other bargaining unit employees, whom the County still employs, were those responsible for organizing the Union. While Helms testified that he stated in front of the foremen that he was more involved in union organizing than Meyer, the CIR concluded that while it did not disbelieve Helms, "it is possible that the foremen simply did not hear Helms' pro-union comments."

Both Pohlman and Kuenning testified that they did not communicate their knowledge of the discharged employees' union activity to Fleming or any of the county commissioners. The county commissioners testified that they did not speak with any of the foremen regarding the discharged employees' union activity. They all denied having knowledge of the discharged employees' union activity and stated that the discharged employees' union activity thus played no part in the county commissioners' decision to lay them off.

The CIR determined that the county commissioners knew Meyer had held the Union steward position.

5. County Budget Evidence

To support its contention that budgetary considerations were not a valid reason for the employment terminations, the Union offered evidence showing that there were sufficient funds to retain the discharged employees. The CIR found that Stoll made the statement that the County had the funds to continue to employ the discharged employees and also found that County Commissioner Arlen G. Ross stated twice during CBA negotiations that money was not a problem. The County submitted evidence indicating that the CBA would create budgetary problems.

The CIR determined that the County's layoffs of the discharged employees did not violate § 48-824(2)(a), as the layoffs "were consistent with the position maintained by Otoe County during negotiations" and "do not appear to be related to the union organizing effort . . . ." As to § 48-824(2)(c), the CIR concluded that the Union failed to make a prima facie case in that it did not present evidence sufficient to support an inference that the protected conduct was a motivating factor in the County's decision to lay off the discharged employees. It determined that the layoffs did not violate § 48-824(2)(c), because "the layoffs did not occur around the time of the union organizing effort, . . . the County Commissioners were unaware of much of the protected activity" of the discharged employees, and the discharged employees' evaluations indicated that their job performance was either not acceptable or marginally acceptable. The CIR followed a similar analysis in declining to find a violation of § 48-824(2)(d). The Union appeals.

III. SCOPE OF REVIEW

[1] Our scope of review of CIR orders relating to § 48-824 violations is specifically set forth in Neb. Rev. Stat. § 48-825(4) (Reissue 1998), which states:

> Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other:
>
> (a) If the commission acts without or in excess of its powers;

(b) If the order was procured by fraud or is contrary to law;

(c) If the facts found by the commission do not support the order; and

(d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

We have never been called upon to interpret § 48-825. We have dealt with the language set forth in clauses (a) through (c) in other contexts. However, we have never interpreted language similar to that found in clause (d).

[2] We conclude that in an appeal from a CIR order regarding § 48-824 prohibited practices, concerning a factual finding, we will affirm that finding if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. See *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (interpreting analogous National Labor Relations Act (NLRA) § 10(f), now found at 29 U.S.C. § 160(f) (1994)).

IV. ANALYSIS

1. Due Process Violation; *Loudermill*

The Union asserts that pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the County failed to provide constitutional due process to the discharged employees. It argues the County did not provide a pretermination hearing and did not provide an opportunity for the discharged employees to discuss or rebut their job evaluations prior to their discharge. The Union concludes that the CIR erred in not finding a constitutional violation, although it admits that the issue was not presented before the CIR. In *Loudermill*, the U.S. Supreme Court held that when a public employer deprives an employee of a property interest in continued employment (as first defined in *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)),

constitutional due process requires that the deprivation be preceded with notice to the employee, an explanation of the employer's evidence, and an opportunity for the employee to present his or her side of the story.

The County argues that the *Loudermill* claim is not properly before this court because the Union did not assert that claim in its petition and did not address it before the CIR. However, the Union replies that constitutional due process issues are not waived if timely raised in the first judicial tribunal to review the administrative action, citing *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992), and that thus this court may consider the due process claim.

[3,4] In *Ashby*, we stated that "procedural due process defenses should not be waived if timely raised in the first judicial tribunal to review the administrative action." *Id.* at 993, 492 N.W.2d at 853. Furthermore, we recognize that we have considered constitutional issues that were not raised until the appeal reached a court, with this court being the first forum. See *id.* We have stated that it is the practice of this court to consider constitutional questions in reviewing the orders of administrative agencies when those questions are raised in this court on direct review. *In re Appropriations D-887 and A-768*, 240 Neb. 337, 482 N.W.2d 11 (1992); *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966). In effect, the constitutional issue in *Ashby* is similar to one that the Union presents here. In *Ashby*, the discharged employee asserted that his employer violated his federal constitutional due process rights when his employment was terminated. Thus, we reach the *Loudermill* claim.

[5] To be clear, the CIR's order is properly silent on the *Loudermill* issue. The CIR "has no authority to vindicate constitutional rights." *Wood v. Tesch*, 222 Neb. 654, 659, 386 N.W.2d 436, 441 (1986), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989). See *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995) (stating that Nebraska Constitution, through separation of powers provisions, prohibited CIR from declaring whether party acted in an unconstitutional manner). Therefore, the CIR did not err in failing to determine the *Loudermill* issue.

[6,7] The Union's claim that the County denied the discharged employees due process "depends on [the discharged employees'] having had a property right in continued employment." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Apparently, the Union presumes in making the due process argument that the discharged employees had a property interest that the federal Constitution protects. "It is well-settled that a unilateral expectation of continued employment does not create an entitlement that the due process clause protects." *Simpkins v. Sandwich Community Hosp.*, 854 F.2d 215, 218 (7th Cir. 1988). See *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). "The existence of a legitimate claim of entitlement to a property interest in continued employment is to be determined in accordance with state law." *Nicholson v. Gant*, 816 F.2d 591, 597 (11th Cir. 1987). See *Loudermill, supra.*

[8,9] " 'It is well established in Nebraska that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.' " *Blair v. Physicians Mut. Ins. Co.*, 242 Neb. 652, 656, 496 N.W.2d 483, 486 (1993). This maxim applies equally to public employees. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985). If no evidence is submitted indicating the employment relationship status, a court will find that the relationship was at will. See *Smith, supra.* Finding no statute to the contrary, in order for the Union to assert a due process violation, the employment contract (the CBA) must provide for substantive restrictions upon the right of discharge. See *Loudermill, supra.*

A review of the CBA leads us to the conclusion that the employees had no protected interest in continued employment. Article 3 of the CBA provides that the Union recognize that the County has the following rights:

> (g) The right at any time to determine, create, modify, and terminate jobs, job vacancies, departments, job classifications, and job duties;
>
> . . . .

(i) The right to discipline, suspend, and discharge employees, as set forth in this contract;

(j) The right to lay off at any time.

The procedure provided to terminate an employee's employment states, in article 16: "If it becomes necessary to decrease staff or employees for any reason, including financial reasons or for reduction of work, the Supervisor or the Otoe County Commissioners may separate any employee, without prejudice, after 15 days written notice." We conclude that the CBA did not provide the discharged employees with a property interest in continued employment. Thus, the discharged employees were not entitled to the due process procedures described in *Loudermill, supra*, and the Union's assignment of error on this issue fails.

2. Section 48-824(2)(a) Violation

Section 48-824(2) states in part: "It is a prohibited practice for any employer or the employer's negotiator to: (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act."

The CIR determined that the County's layoffs of the discharged employees did not violate § 48-824(2)(a), as the layoffs "were consistent with the position maintained by Otoe County during negotiations" and "do not appear to be related to the union organizing effort." The Union does not appeal the CIR's conclusion that the layoffs did not violate § 48-824(2)(a); rather, it argues that the County's failure to provide the discharged employees an opportunity to review their job evaluations prior to being discharged was a violation of § 48-824(2)(a) because it was a unilateral change to the CBA. The County argues that the *method* of its layoffs was not before the CIR, because the method of the layoffs was not set forth as an alleged violation in the Union's petition. The County contends that this court has no jurisdiction to consider this argument. We read the County's argument as a question of whether the Union has waived the issue. Although the CIR's order discussed the evaluations, it did not address the contention that the failure to permit review of the evaluations prior to the discharges was a violation of § 48-824(2)(a).

The petition states in pertinent part:

> That on or about June 14, 1996, the [County] laid off three (3) employees in the bargaining unit represented by the [Union] who were known by the [County] to be union organizers and adherents who were instrumental in organizing the employer in order to:
>
> (a) retaliate against said employees for the exercise of their rights under the Nebraska Industrial Relations Act in violation of N.R.S. 48-824(2)(a) . . . .

The petition does not expressly allege the failure to provide pretermination review of the evaluations as a § 48-824(2)(a) violation. Rules of the Nebraska Commission of Industrial Relations 22(K) (rev. 1996) states: "The case will be tried upon the pleadings as formalized at the time of the Pretrial Conference, and no further amendments will be allowed except in cases of undue hardship, or in the furtherance of justice." No petition other than the one quoted above is presented to us in the transcript.

[10,11] Proper pleading requires a petition to state in logical and legal form the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. See *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). "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.*

While we recognize that the Union did not know of the evaluations until after it filed the petition in this case, an amended petition could have been filed presenting the job evaluation issue as an alleged § 48-824(2)(a) violation. The Union's pleadings did not present the issue of whether the failure to provide a pretermination review of the job evaluations was a violation of § 48-824(2)(a), and the CIR did not pass on that claim, as is evident by its order. Thus, we decline to consider this assigned error.

3. Section 48-824(2)(c) Analysis

(a) Prima Facie Case and Burden of Proof for § 48-824(2)(c) Violation

The Union's remaining assignments of error all contest factual conclusions and legal analysis that the CIR made in relation to the alleged § 48-824(2)(c) and (d) violations. Because this court's review of § 48-824 violations is one of first impression, we first determine and set forth the proper legal framework for determining whether an employee has met his or her burden of proof and what defenses the employer has to defeat the employee's claim.

[12] Section 48-824(2) states: "It is a prohibited practice for any employer or the employer's negotiator to: . . . (c) Encourage or discourage membership in any employee organization, committee, or association by discrimination in hiring, tenure, or other terms or conditions of employment." As stated earlier, the NLRA has provisions similar to those found in § 48-824(2). Section 8(a) of the NLRA (29 U.S.C. § 158(a) (1994)) states in part: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." "[D]ecisions under the NLRB [National Labor Relations Board] are helpful where there are similar provisions under the Nebraska statutes." *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 12, 277 N.W.2d 529, 535 (1979). We conclude that to the extent quoted, § 8(a)(3) of the NLRA is similar to § 48-824(2)(c), and we look to federal decisions interpreting § 8(a)(3) for guidance.

[13,14] "The statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation [of § 8(a)(3) of the NLRA] normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967). In *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 311, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965), the Supreme Court stated:

> It has long been established that a finding of violation under this section will normally turn on the employer's

> motivation. . . . Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization.

(Citations omitted.) The NLRB and the federal courts do not require an employee's union activity to be the sole motive for a discharge in order for a violation of § 8(a)(3) to be found. To be sure, under § 8(a)(3), "if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). However, a violation can be found where the employer acted out of antiunion bias, " 'whether or not the [employer] may have had some other motive . . . and without regard to whether or not the [employer's] asserted motive was lawful.' " 462 U.S. at 398, quoting *Dow Chemical Co.*, 13 N.L.R.B. 993 (1939).

This interpretation of § 8(a)(3) permits a violation to be found where a " 'dual motive' " is involved, that is, where it has been shown that an unlawful motive was involved, but the employer advances a legitimate reason for the discharge and it is not shown that this reason is untrue. See *N.L.R.B. v. Thermon Heat Tracing Services*, 143 F.3d 181, 186 (5th Cir. 1998); *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981).

[15,16] In *Wright Line*, the NLRB set forth a "causation test"—the legal framework and burdens of the parties—in analyzing a § 8(a)(3) assertion where dual motives are allegedly involved. The Supreme Court approved this test in *Transportation Management Corp., supra*, and the CIR concluded that *Wright Line* provided the proper framework for its analysis of a § 48-824(2)(c) violation. First, the party asserting the violation has the burden to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 N.L.R.B. at 1089. The elements commonly required to make a prima facie case of an § 8(a)(3) violation are (1) union

activity, (2) employer knowledge of that activity, (3) timing between the employees' union activity and the employer's discriminatory conduct, and (4) employer hostility or animus toward employees' union activity. *Best Plumbing Supply*, 310 N.L.R.B. 143 (1993).

[17,18] The inference that protected conduct was a motivating factor must be shown by a preponderance of the evidence, and the party asserting the violation carries this burden "throughout the proceedings." *Transportation Management Corp.*, 462 U.S. at 401. See 29 U.S.C. § 160(c). Upon a prima facie showing, the employer may attempt to directly rebut the evidence supporting the prima facie case. If the employer elects not to do so or fails in the attempt to do so, the burden of proof shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected union activity. *Wright Line, supra*; *Transportation Management Corp., supra*. "It thus became clear, if it was not clear before, that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence." *Transportation Management Corp.*, 462 U.S. at 400.

The NLRB now applies the *Wright Line* test to all § 8(a)(3) cases regardless of whether a case involves pretextual reasons or dual motivation. See, *Frank Black Mechanical Services*, 271 N.L.R.B. 1302 (1984); *Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981), *enforced* 705 F.2d 799 (6th Cir. 1982). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the [party asserting the violation]." *Limestone Apparel Corp.*, 255 N.L.R.B. at 722.

We conclude that *Wright Line* provides a satisfactory means to analyze alleged prohibited practices under § 48-824(2)(c), and we adopt *Wright Line* for that purpose. The CIR found that the discharged employees all engaged in union organizing activity as the Union asserted; thus, the Union met the first element of its prima facie case, and we advance to the second element, knowledge.

(b) Actual Knowledge of Union Activity

The CIR made a number of factual findings regarding what knowledge of union activity the county commissioners had. Ultimately, the CIR concluded that "the County Commissioners were unaware of much of the protected activity engaged in by Bassinger, Helms and Meyer." The Union assigns this conclusion as error, asserting that direct evidence proves that the county commissioners were aware that Meyer had been a Union steward and that circumstantial evidence proves that the county commissioners knew that Helms and Bassinger were union supporters.

The CIR concluded that "all three Commissioners knew that Meyer was a union steward." That finding is supported by the record, and thus, as to Meyer, the Union has met its burden on the knowledge element of its § 48-824(2)(c) prima facie case.

The Union asserts that the county commissioners had direct knowledge of Bassinger's union activity through a conversation Bassinger had with Ross about seniority. Bassinger testified that while CBA negotiations were proceeding, he told Ross that he supported seniority protection and asked him why the county commissioners were opposed to such protection. However, Bassinger did not state that he told Ross he was a union activist. Ross testified that at no time was he aware of the extent of the discharged employees' union activities. The Union nonetheless asserts the conversation displayed Bassinger's prounion feelings. The CIR's order is silent as to this alleged conversation. With the testimony in conflict, we must presume that the CIR chose to believe Ross' testimony rather than Bassinger's. Thus, we conclude the CIR did not err in finding the county commissioners had no actual knowledge of Bassinger's union activity.

Finally, the Union asserts the County had actual knowledge of Helms' union activity because of a conversation between Helms and Ross wherein Ross stated that he had heard that attendance at the Union meetings was low and encouraged Helms to attend the meetings and vote "because that was his right as an employee." The Union asserts that the inference to be made is that Ross must have known Helms was a Union member because only Union members attend the meetings and vote. The CIR determined that this conversation took place; however,

it never concluded from that conversation that the County had knowledge of Helms' union activity. Several inferences could be made from that conversation, one of which is that Ross actually believed Helms was not a Union member and was encouraging him to join. Thus, we determine the CIR did not err in not inferring knowledge of union activity from that conversation.

(c) Knowledge of Union Activity Imputed to County Commissioners

The Union asserts that even though the CIR found that the county commissioners lacked actual knowledge of some of the discharged employees' union activity, the knowledge that the foremen had must be imputed to the county commissioners. The Union argues that the CIR erred in this regard, asserting that as a matter of law, "knowledge to a supervisor is knowledge to the employer." Brief for appellant at 32.

The CIR did not expressly state that it would refuse to or that it could not impute a supervisor's knowledge to an employer. However, it rested its conclusion that the county commissioners did not know of much of the discharged employees' activities because "there is no evidence that they relayed this information to . . . Fleming or any of the . . . Commissioners."

The Union cites *Pinkerton's Inc.*, 295 N.L.R.B. 538 (1989), to support its contention that a supervisor's knowledge is always imputed to the employer. In that case, while the NLRB affirmed the administrative law judge's imputation of a supervisor's knowledge to an employer, it did so only after concluding that the employer "did not affirmatively establish such a basis for negating the judge's imputation . . . ." *Pinkerton's Inc.*, 295 N.L.R.B. at 538. That qualification is relevant here because all of the foremen expressly testified and the CIR found that they did not pass their knowledge of union activity to Fleming or the county commissioners.

This view is reflected in other NLRB precedents. In *Dr. Phillip Megdal, D.D.S., Inc.*, 267 N.L.R.B. 82 (1983), two supervisors were found to be "well acquainted with [an employee's] union organizing efforts." The administrative law judge, however, found that both supervisors credibly testified that they did not mention anything about those activities to the employer prior to the employee's discharge. The judge, having

credited both supervisors' denials, could find "no reasonable ground" on which to impute the supervisors' knowledge to the employer and thus determined the necessary knowledge of the employee's union activity was not established. *Id.* The NLRB affirmed the judge's order, stating, "[W]e will not impute knowledge of union activities where the credited testimony establishes the contrary." *Id.*

Additionally, a number of federal cases make a distinction between supervisors who had a role in the discriminatory action (here the employment terminations), as opposed to supervisors who had no role in the discriminatory action. In *Delchamps, Inc. v. N. L. R. B.*, 585 F.2d 91, 95 (5th Cir. 1978), the court rejected "the theory that the law should mechanically impute the knowledge of others" to the individual responsible for the discharge. The court distinguished impermissible imputation from permissible scenarios where either "a supervisor with such knowledge who was not nominally responsible for the firing nevertheless played a significant role in procuring the discharge" or the NLRB "has relied on circumstantial evidence to infer that the knowledge of one supervisor has been communicated" to the individual responsible for the discharge. *Id.*

[19] The Fifth Circuit Court of Appeals reaffirmed this view in *Pioneer Natural Gas Co. v. N. L. R. B.*, 662 F.2d 408 (5th Cir. 1981), and *N.L.R.B. v. McCullough Environmental Services, Inc.*, 5 F.3d 923 (5th Cir. 1993), summarizing in *Pioneer Natural Gas Co.* that to prove a § 8(a)(3) violation, one must show that the particular supervisor responsible for the discriminatory action knew about the employee's union activities, and that while the NLRB may " 'rel[y] on circumstantial evidence to infer that the knowledge of one supervisor has been communicated' " to another supervisor, the NLRB "may not simply 'impute' the knowledge of a lower-level supervisor to the decision-making supervisor." *Pioneer National Gas Co. v. N. L. R. B.*, 662 F.2d at 412.

[20] The Union nonetheless argues that this state's common law of agency directs the result that the foremen's knowledge must be imputed to the county commissioners. The Union cites, among other cases, *Equilease Corp. v. Neff Towing Serv.*, 227 Neb. 523, 528, 418 N.W.2d 754, 757 (1988), in which we stated:

> It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed. This is the foundation of the doctrine that notice to an agent is notice to the principal.

See *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983). While § 275 of the Second Restatement of Agency sets forth the proposition stated in *Equilease Corp.* and *City of Gering*, a relevant exception to the proposition above is noted in the Restatement (Second) of Agency § 275, comment *b.* at 599 (1985):

> If knowledge, as distinguished from reason to know, is the important element in a transaction, and the agent who has the knowledge is not one acting for the principal in the transaction, the principal is not affected by the fact that the agent has the knowledge. In many situations, in order for one to be responsible, it is necessary that the act should be done with knowledge in a subjective sense, and it is not sufficient that one has means of information.

This exception is applicable in the instant case, where, as opposed to *Equilease Corp.* and *City of Gering*, it is both the principal's act *and the principal's intent* that are at issue. A violation of § 48-824(2)(c), like a violation of § 8(a)(3) of the NLRA, "turn[s] on the employer's *motivation.*" (Emphasis supplied.) *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 311, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965).

The purpose of applying the analytical exercise given in *Wright Line*, 251 N.L.R.B. 1083 (1980), is to determine whether the facts infer that union activity was a *motivating* factor in the county commissioners' decision to lay off three employees. That inquiry necessarily is concerned with the actor's subjective knowledge of union activity rather than whether the principal had reason to know because an agent to the principal knew. In short, to conclude that the rule in *Equilease Corp.* and *City of Gering* applies to the instant case would be to conclude that the foremen had a duty to inform the county commissioners of union activity—information that the law directs should not be

considered by an employer. Thus, we conclude the proposition regarding imputing an agent's knowledge to the principal found in *Equilease Corp.* and *City of Gering* is inapplicable to this case.

The CIR determined that there was no evidence that Pohlman or Kuenning communicated his knowledge of Bassinger's or Helms' union activities to either Fleming or the county commissioners. This conclusion is supported by the foremen's and the county commissioners' testimony. The CIR also concluded that the foremen did not participate in the layoff process. This conclusion is also supported by the record. However, we must qualify that finding in that Kuenning testified that upon the request of an unnamed party (presumably one of the commissioners), he selected three bargaining unit employees whom he supervised as candidates for discharge. One of them was Meyer. However, Kuenning's testimony does not alter the result, because he did not recommend Bassinger or Helms for discharge and thus played no role in their layoffs.

In conclusion, the CIR did not err in failing to impute the foremen's knowledge to the county commissioners. There was sufficient evidence to establish that the foremen did not inform the county commissioners of the discharged employees' union activities, and the record supports the CIR's finding that the foremen played no "significant role in procuring the discharge." See *Delchamps, Inc. v. N. L. R. B.*, 585 F.2d 91, 95 (5th Cir. 1978).

[21] An analysis of a § 48-824(2)(c) violation ends if the county commissioners had no knowledge of any of the discharged employees' union organizing activities. "A discharge cannot stem from an improper motivation where the employer is ignorant of the employee's union activity." *Avecor, Inc. v. N.L.R.B.*, 931 F.2d 924, 931 (D.C. Cir. 1991). Having determined that the county commissioners had knowledge only of Meyer's union organizing and leadership activity, we further consider only whether Meyer's discharge was in violation of § 48-824(2)(c).

(d) Timing of Layoffs

In concluding that the reasons related to the discharges were unrelated to union activities, the CIR determined that "the lay-

offs did not occur around the time of the union organizing effort." The Union contests this finding. While the layoffs were approximately 1½ years after the Union was organized, the Union asserts that the CIR did not take into account the fact that for most of that time the County was precluded by law from terminating the employment of any employees. The Union asserts that the proper timeframe to determine the relationship between the union organizing activity and the employment terminations did not begin until April 5, 1996, when the second wage and benefit action before the CIR was dismissed.

Beginning on April 21, 1995, when the Union filed a wage and benefit action with the CIR, the County was statutorily barred from altering the status quo regarding employee status. See Neb. Rev. Stat. § 48-811 (Reissue 1998). From April 21, 1995, until April 5, 1996, there was at least one proceeding before the CIR between the County and the Union. In addition to the statutory prohibition, a CIR status quo order was in effect for much of this time, so the County would have been in contempt had it discharged any employees during that time. The employment terminations here occurred within weeks after the County was legally permitted to terminate the employment of any employees. While the County had the power to terminate the employment of union organizers from the time the Union was organized in December 1994 until April 21, 1995, it is unclear what knowledge of union activity the County had at that time, and it was only after then that the Union won a wage and benefit dispute before the CIR and pursued a status quo violation. The CIR never considered the effect of § 48-811 in concluding that the timeframe of the layoffs was too far removed. Thus, we determine that contrary to the CIR's finding, the Union met its burden to show that the timing of the employment terminations inferred an unlawful motivation.

(e) Employer Antiunion Animus

The Union asserts that the evidence shows antiunion animus through statements that County officials made during the CBA negotiations, specifically, statements that if the CBA as proposed was signed, four bargaining unit employees would be laid off. The CIR did not expressly analyze the question of antiunion

animus, apparently relying on its findings regarding timing and knowledge to support its conclusion that the County did not violate § 48-824(2)(c). However, the CIR made specific findings regarding the conversations that the Union claims display animus. The CIR found that during CBA negotiations, Stoll stated that the County "would have to lay off four men" if the CBA was signed, and it found, which we conclude is a reasonable inference, that Stoll meant four bargaining unit employees. The Otoe County Attorney sent the Union a letter during negotiations which stated that four positions "may be lost" due to the benefits that would have to be paid.

[22] In the context of federal labor law, "animus" is used ambiguously, sometimes meaning an employer's antiunion attitude generally and sometimes referring directly to the employer's antiunion motive in a particular case. Theodore Kheel, *Labor Law* § 12.04 (1990). Here, as the ultimate objective of applying the analysis given in *Wright Line*, 251 N.L.R.B. 1083 (1980), is to determine whether the evidence circumstantially proves that the terminations were *motivated* in part by an antiunion purpose, see *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983), the Union's burden is to produce evidence of union hostility, see *W.F. Bolin Co. v. N.L.R.B.*, 70 F.3d 863 (6th Cir. 1995) (stating that express union hostility combined with knowledge of union activities may infer improper motive).

[23,24] The evidence indicating hostility may arise from events not directly related to the discriminatory actions at issue and may arise from events far predating the action at issue, but the evidence must nonetheless reasonably infer a causal connection between antiunion animus and the discriminatory act. See, *Florida Steel Corp. v. N. L. R. B.*, 587 F.2d 735 (5th Cir. 1979) (concluding that NLRB, in finding violation of NLRA, impermissibly relied solely on employer's antiunion history and general bias, which had no causal connection with employee's discharge); *Monongahela Power Co.*, 324 N.L.R.B. 214 (1997) (holding that employer statements from more than 2 years prior to discriminatory act in question could be considered in determining antiunion animus); *Best Plumbing Supply*, 310 N.L.R.B. 143 (1993) (considering evidence of animus toward employees

other than one discharged). Statements of antiunion bias may be considered with the qualification that

> [t]he expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, is not evidence of any unfair labor practice under any of the provisions of the Industrial Relations Act if such expression contains no threat of reprisal or force or promise of benefit.

§ 48-824(4). Additionally, "under certain circumstances" animus will be inferred "in the absence of direct evidence." *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991) (inferring animus where employer summarily rejected 48 job applicants and all applications indicated some form of union membership, while employer consistently hired those with experience in nonunion plants).

The CIR concluded that "Otoe County hasn't exhibited hostility to the process of collective bargaining." As to the specific statements made that four men would be laid off if the CBA was signed, the CIR found that such statements supported the conclusion that the layoffs were "unrelated to their union activities," postulating that the Union had fair notice of the potential of layoffs prior to signing the CBA. We do not agree. We conclude that the CIR could not reasonably find that a preponderance of the evidence supports the finding that the County's statements during CBA negotiations did not reflect antiunion hostility. Instead, we determine that Stoll's and other County representatives' statements that four men would be laid off if the CBA was signed were threats against the Union.

[25] "[A]n employer is free to communicate to his employees any of his general views about unionism" and "may even make a prediction as to the precise effects he believes unionization will have on his company." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). "In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences *beyond his control* . . . ." (Emphasis supplied.) *Id.*

> If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the

> statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion . . . .

Id.

The County representatives' statements in negotiations that four jobs would be lost if the CBA was signed infer that the County intended to dissuade the Union from pursuing the proposed CBA by threatening retaliation against the employees that the Union represented. Those statements are proof of antiunion animus relevant to this proceeding.

Having concluded our review of the CIR's order as to the Union's prima facie case, we determine the Union sufficiently proved that Meyer engaged in Union organizing and leadership activity of which the county commissioners knew, that the timing of his employment termination was suspect, and that the County through the county commissioners held hostility toward the Union contemporaneous to Meyer's employment termination. We conclude that contrary to the CIR's findings, the Union has made a prima facie showing sufficient to infer that Meyer's union organizing activity was a motivating factor in his employment termination.

(f) Affirmative Defense

Proof by a preponderance of the evidence that the discharge "would have occurred in any event and for valid reasons" would nonetheless preclude a finding that Meyer's employment termination was in violation of § 48-824(2)(c). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). The County's asserted justification for the employment terminations was "budget constraints."

Although the CIR did not analyze the issue in terms of the affirmative defense given in *Wright Line*, 251 N.L.R.B. 1083 (1980), it thoroughly analyzed the budget evidence presented. While it found that much of the budget evidence indicated that the County could have continued the discharged employees' employment, it gave weight to the county commissioners' budget concerns and determined that percentage increases in the budget for the bargaining unit (the largest subpart of the

County's budget) created large increases in relation to the overall County budget.

As to the specific selection of Meyer for termination of employment, the CIR determined that the selection was "not without merit" and found credible the County's use of job evaluations in choosing whom to terminate. It gave weight to the most recent job evaluation as well as job evaluations conducted prior to the union organizing effort that indicated his job performance "was either not acceptable or marginally acceptable." The CIR gave weight to evidence indicating that Meyer's performance merited no pay increase for a 2-year period. It ultimately concluded that the employment terminations were a legitimate "business decision by the Otoe County Commissioners to exercise their management prerogative in choosing the level of Otoe County's budget."

Although there is contradictory evidence that the County was not suffering from budget constraints, the CIR's findings support, by a preponderance of the evidence, the conclusion that budget concerns were a legitimate reason for the employment termination and combined with Meyer's job performance would have led to Meyer's termination of employment regardless of any unlawful motivation. Thus, we affirm the CIR's order that Meyer's employment termination was not in violation of § 48-824(2)(c).

4. Section 48-824(2)(d) Analysis

[26,27] Section 48-824(2)(d) makes it a prohibited labor practice to "[d]ischarge or discriminate against an employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony under the Industrial Relations Act . . . ." As with § 48-824(2)(c), a similar provision exists within the NLRA. Section 8(a)(4) of the NLRA (29 U.S.C. § 158(a)(4)), which makes it unlawful "to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this subchapter." A violation of § 8(a)(4), similarly to a violation of § 8(a)(3), turns on the motivation of the employer. 1 Patrick Hardin, The Developing Labor Law (3d ed. 1992). It similarly requires the court to distinguish an employer's pretextual and retaliatory

conduct from conduct motivated by legitimate business purposes, so the NLRB and the courts also apply the *Wright Line* analysis to alleged § 8(a)(4) violations. *Id.* See *Airborne Freight Corp. v. N.L.R.B.*, 728 F.2d 357 (6th Cir. 1984) (reversing NLRB finding of § 8(a)(4) violation by concluding that employer proved employee's employment would have been terminated for falsifying time records, notwithstanding evidence that employer may have also been motivated by employee's testimony to NLRB).

The Union asserts the CIR erred in finding that the County's discharge of Meyer and Bassinger did not violate § 48-824(2)(d). The CIR concluded that Meyer's employment termination was not in violation of § 48-824(2)(d) because Meyer was never asked to testify nor was he ever identified as a potential witness. Although the CIR determined that Bassinger testified in a CIR proceeding and two county commissioners knew that he did, it determined, "[F]or the reasons set forth under the analysis of § 48-824(2)(c), the Commission finds that Bassinger's testimony was not a motivating factor in Otoe County's decision to select him for layoff."

The record and the CIR's findings reflect that Bassinger testified at a CIR proceeding regarding an alleged status quo violation and that the county commissioners had direct knowledge of that activity, meeting the first two elements of the test in *Wright Line*, 251 N.L.R.B. 1083 (1980). Consistent with our determination under § 48-824(2)(c), the timing of Bassinger's employment termination was suspect, as it occurred only weeks after the County regained the ability to terminate a bargaining unit member's employment without its being in express violation of statute and a CIR status quo order. Also, the same evidence proving antiunion animus under § 48-824(2)(c) is applicable to a § 42-824(2)(d) analysis. Thus, the Union has made a prima facie showing sufficient to reasonably infer that Bassinger's act of testifying before the CIR was a motivating factor in the County's decision to terminate his employment.

However, the CIR's findings regarding the County's asserted justification for the employment terminations (budget constraints) and our analysis of those findings, set forth in our earlier § 48-824(2)(c) analysis, apply equally here as an affirmative

defense to finding a § 48-824(2)(d) violation. In addition, the County's affirmative defense argument is stronger as to Bassinger because the CIR findings reflect an additional legitimate and perhaps more compelling reason than the general budget concerns to terminate his employment. The record indicates that when the county landfill where Bassinger worked closed, rather than terminate Bassinger's position, the County created his position with the road department. Fleming testified that since that time, the County has discovered that by state law much of the work Bassinger was doing was to be the responsibility of landowners and not the County. Consistent with our conclusion under § 48-824(2)(c), the CIR's findings support the conclusion that a preponderance of the evidence shows that the County would have terminated Bassinger's employment even in the absence of his testimony before the CIR.

As to Meyer, the record does not reflect that he filed an affidavit, petition, or complaint or gave any information or testimony under the Industrial Relations Act. Thus, we agree with the CIR that, at least to the portion of § 48-824(2)(d) that the Union asserted in its petition was violated, Meyer did not engage in activity protected by that portion of § 48-824(2)(d), and thus the County did not violate § 48-824(2)(d) in terminating Meyer's employment.

V. CONCLUSION

The County did not violate the discharged employees' constitutional due process rights as described in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). We affirm the CIR's conclusion that the County did not violate § 48-824(2)(a). We conclude, contrary to the CIR's conclusion, that the Union presented a prima facie case that Meyer's employment termination was in violation of § 48-824(2)(c) and that Bassinger's employment termination was in violation of § 48-824(2)(d). However, we affirm the CIR's conclusion that the County did not violate either § 48-824(2)(c) or (d), because we conclude that the record supports the CIR's findings that the employment terminations would have occurred regardless of any unlawful motive.

AFFIRMED.

KAY A. JANTZEN, APPELLANT, V. KAREN R. JANTZEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROLLIE F. JANTZEN, DECEASED, APPELLEE.

595 N.W.2d 230

Filed June 4, 1999. No. S-98-530.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Divorce: Property Settlement Agreements: Insurance.** Where a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective.
3. **Divorce: Child Support: Insurance.** One whose child support obligation is suspended pending recovery from an illness is still required to make child support payments for purposes of a divorce decree that provides for the disposition of life insurance benefits so long as child support is required.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Order vacated, and cause remanded with directions.

Laura A. Lowe and T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

Michael A. England, of Stumpff & Guggenmos, for appellee.

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

MCCORMACK, J.

This is a domestic relations case arising from the child support provisions of a divorce decree severing the marriage of Kay A. Jantzen and Rollie F. Jantzen. At issue is the proper payment of proceeds from a life insurance policy that Rollie, now deceased, was required to maintain, with his minor children named as beneficiaries, so long as he was required to make child support payments.

BACKGROUND

Kay and Rollie were divorced by decree in 1986. As part of the divorce, the two entered into a property settlement agreement (PSA) which was approved by the trial court and incorporated into the decree. The provision of that decree relevant to this case is that "the Petitioner and Respondent shall each main-

tain their present life insurance coverage with the minor children of the parties named as beneficiaries as long as the Respondent is required to make child support payments."

The record indicates that in 1989 Rollie changed the beneficiary of his life insurance policy from his children to his then fiance Karen R. Dolph, now known as Karen R. Jantzen, the personal representative of Rollie's estate. Karen and Rollie later married.

In 1996, Rollie obtained a modification of the divorce decree due to his diagnosis of and treatment for cancer. At that time, Kay and Rollie agreed that effective September 1, 1996, his child support payments would be reduced to $50 per month so long as he remained unemployed due to his illness. At such time as Rollie became eligible for Social Security benefits for his minor children, his child support obligation was to be suspended entirely pending his resumption of gainful employment. The parties also agreed that all other terms and conditions of the original decree were to remain in effect.

Rollie died in September 1997, having paid the $50 per month until his death. In October 1997, Kay received notice that the children had become eligible for Social Security benefits as of February 1997, along with a lump-sum payment of benefits calculated from February 1, 1997.

Karen, acting as the personal representative of Rollie's estate, filed a motion for suspension of child support requesting that Rollie's child support obligation be suspended as of February 1, 1997. The trial court granted the motion. Kay then filed a motion seeking payment of the life insurance proceeds to the remaining minor children. The trial court denied the motion under the terms of the 1996 decree modification, finding that the life insurance provision of the original decree remained in effect, but that Rollie's child support obligation had ended as of February 1, 1997. The trial court found that the Social Security eligibility date, rather than the date of notice, determined the end of his obligation. Accordingly, the decree's requirement that the policy's beneficiary not be changed had been lifted at the time of Rollie's death, and the change of beneficiary from the children to Karen was effective.

Kay timely appealed.

ASSIGNMENTS OF ERROR

Kay assigns that the trial court erred in (1) granting Karen a retroactive modification and termination of Rollie's child support obligation as of February 1, 1997, (2) enforcing a conditional judgment, (3) granting equitable relief when Karen had unclean hands, and (4) refusing to enforce the original PSA and to require the distribution of life insurance proceeds to the minor children of Kay and Rollie.

STANDARD OF REVIEW

[1] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999); *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998).

ANALYSIS

[2] We held in *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 175, 493 N.W.2d 627, 631 (1993), that "[w]here . . . a property settlement agreement validly provides for the disposition of life insurance benefits, the subsequent execution of a change of beneficiary form absent consent of the other party to the agreement is ineffective." Thus, the issue in this case is whether and to what extent the proceeds of the life insurance policy were subject to the provisions of Kay and Rollie's divorce decree and PSA at the time of Rollie's death.

Much is made by the parties over the effect of the modification order regarding Social Security benefits and the delayed notification that such benefits had accrued. We find that the provisions of the decree were binding upon the policy benefits at the time of Rollie's death. The PSA, approved and ordered by the trial court in Kay and Rollie's divorce decree, states that "the Petitioner and Respondent shall each maintain their present life insurance coverage with the minor children of the parties named as beneficiaries as long as the Respondent is required to make child support payments."

The modification order reduced Rollie's child support payments to $50 per month pending his recovery from cancer, and further stated that "[a]t such time as the Petitioner shall begin receiving Social Security benefits for the benefit of the minor

children, the Respondent's child support obligation shall be *suspended* until his cancer treatment and convalescence is concluded and he shall return to gainful employment." (Emphasis supplied.)

[3] Rollie was clearly still obligated to make child support payments as of the time of his death regardless of when the Social Security benefits started. There is a distinction between termination of child support obligation and suspension of child support obligation. This distinction has been recognized both by this court in *Biesecker v. Biesecker*, 190 Neb. 808, 212 N.W.2d 576 (1973) (power of court to reduce, suspend, *or* terminate its order for child support payments), and by the Legislature in Neb. Rev. Stat. § 43-512.03(4) (Reissue 1998) (State shall be real party in interest in action brought by county attorney for purpose of securing, modifying, suspending, or terminating child support).

Because Rollie's child support obligation was merely suspended, he was still required to make child support payments as of the time of his death. Therefore, under the PSA, Rollie was required to maintain his life insurance policy for the benefit of his minor children at all times preceding his death, regardless of when Social Security benefits accrued to the children. The life insurance provision of the PSA was clearly intended to secure the children's well-being in the event of the death of either parent. The purpose of such a provision would be defeated if it were rendered meaningless by the very circumstances against which it was designed to protect.

The divorce decree also stated that Rollie was to maintain his "present" life insurance coverage for the minor children. Rollie's coverage, obtained through his employer, was determined by multiplying his hourly wage by 2,080. Rollie's wage at the time of the decree was $15.14 per hour, and therefore his "present" coverage at that time was 2,080 × $15.14 = $31,491.20. At the time of his death, his rate of pay was $19.95 per hour, and his coverage was $41,496.

Rollie was entitled to name whomever he chose as the beneficiary of any additional coverage he acquired after the date of the decree. In this case, that additional coverage is the difference between $41,496 and $31,491.20, or $10,004.80. Kay's counsel

conceded at oral argument that Kay was not seeking the payment of that portion of the policy benefits above and beyond that amount disposed of in the divorce decree, and we find the change of beneficiary to Karen effective as regards this additional amount.

CONCLUSION

We hereby vacate the order of the trial court denying payment of Rollie's life insurance benefits to his children as per the divorce decree. The children are entitled to the policy benefits in the amount that the policy provided for at the date of the decree, or $31,491.20. The amount accruing since the date of the decree, $10,004.80, is to be paid to Karen as named beneficiary of the policy.

ORDER VACATED, AND CAUSE
REMANDED WITH DIRECTIONS.

DEANN IDEEN, APPELLANT, V. AMERICAN SIGNATURE GRAPHICS, APPELLEE.

595 N.W.2d 233

Filed June 4, 1999. No. S-98-906.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), 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 the judgment of the Workers' Compensation Court review panel, the higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. Findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge.
4. **Workers' Compensation.** The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Gordon Peterson, of Orton, Thomas, Peterson and O'Connell, for appellant.

Paul F. Prentiss and Michael F. Polk, of Timmermier, Gross and Prentiss, for appellee.

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

MCCORMACK, J.

This case arises from a Workers' Compensation Court action in which Deann Ideen alleged injuries suffered through her employment at American Signature Graphics (AmSig). The parties stipulated that Ideen had permanent impairment to her right arm, but Ideen also alleged permanent damage to the muscles of the right shoulder and the thoracic and cervical spine. The compensation court found no whole body injury and awarded damages to Ideen solely for the permanent right-arm impairment. A compensation court review panel upheld this finding as not clearly wrong. We removed this case to our docket under our inherent authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We affirm.

BACKGROUND

The parties stipulated that Ideen was injured within the course and scope of her employment with AmSig. The injury arose from the repetitive motions required to feed paper and forms into a printing machine. Ideen's initial treatment was at the Bryan Memorial Hospital emergency room in May 1994, with initial follow-up by Dr. William H. Fulcher of Lincoln Bone & Joint Clinic.

In June 1994, at the request of AmSig's insurer, Ideen agreed to see Dr. Jack A. McCarthy, an orthopedic doctor in Omaha. There were apparently inconsistencies between the treatments recommended by McCarthy and Fulcher, and eventually Fulcher recommended that McCarthy become primarily responsible for the treatment of Ideen's injury. In 1995, McCarthy determined that Ideen had reached maximum medical improvement and

rated her with a 12-percent permanent partial impairment to the upper right arm.

When Ideen continued to experience neck and back pain associated with the injury, she sought further care from Fulcher. Fulcher had retired, however, and referred Ideen to Dr. Daniel Noble at Lincoln Orthopedic and Sports Medicine Clinic. Noble was the last treating doctor to see Ideen for this injury. Noble's records indicate that as of November 1997, Ideen's chief complaint was thoracic back pain, and that Noble made a diagnosis of "[c]hronic cervical and thoracic back pain without objective findings and normal MRI."

When Ideen's attorney requested that Noble rate Ideen's disability for the purposes of this workers' compensation action, counsel was informed that Noble did not do such ratings. Ideen's attorney then located a doctor who would do such a rating, Dr. D.M. Gammel of Omaha. Gammel examined Ideen and concurred with McCarthy that Ideen had a 12-percent impairment to the upper right arm. In addition, Gammel assigned a 5-percent permanent impairment to Ideen's cervical spine, stating, "Her cervical decreased range of motion and myofascitis is the result of her cumulative trauma injury and is chronic in nature." Combining the two ratings, Gammel assigned a 12-percent disability to Ideen's person as a whole.

Ideen was the only witness to testify at trial. Ideen testified that she continued to experience a burning sensation between her shoulder blades, headaches, and tightness in the right side of her neck. The compensation court received as evidence Ideen's medical records from the multiple doctors who had treated her for this injury, as well as several letters from McCarthy explaining his reasons for limiting his disability rating to the arm and deposition testimony from Noble and Gammel.

The compensation court found that Ideen had a permanent partial impairment to her right arm, stating that it had "carefully considered the extensive medical records in this case and finds as trier of fact, the opinion of Dr. McCarthy ascribing a permanent partial disability of the right arm to be the most persuasive." The review panel found that the compensation court's decision was not clearly wrong, and it accordingly upheld the decision.

ASSIGNMENTS OF ERROR

Ideen assigns that the compensation court erred in (1) failing to find that Ideen sustained a permanent injury to her thoracic and/or cervical spine and (2) failing to award Ideen a reasonable amount for loss of earning capacity.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a 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. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999); *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998).

[2] In determining whether to affirm, modify, reverse, or set aside the judgment of the review panel, the higher appellate court reviews the findings of the single judge who conducted the original hearing. *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998); *Cunningham v. Leisure Inn, supra.*

[3] Findings of fact made by a compensation court trial judge are not to be disturbed upon appeal to a review panel unless they are clearly wrong, and if the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

ANALYSIS

[4] Ideen contends that she is entitled to compensation for an injury to the body as a whole rather than for the partial loss of the use of a scheduled member, her right arm. The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury. *Snyder v. IBP, inc.*, 235 Neb. 319, 455

N.W.2d 157 (1990); *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983).

A review of the evidence in the case reveals that such evidence 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. However, the compensation court is granted a great deal of discretion in determining factual issues, and we cannot say that it was clearly wrong in choosing to credit one expert opinion over another, particularly when the expert with whom the compensation court agreed was Ideen's primary caregiver regarding this injury.

Ideen urges that the residual impairment test should be abandoned because its application gives different results depending on whether the injury is to the upper or lower extremity. In support of this argument, Ideen claims that Nebraska cases invariably hold that shoulder-related injuries result in findings of scheduled member disability. See, *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990) (rotator cuff tear); *Snyder v. IBP, inc., supra* (right shoulder injury); *Nordby v. Gould, Inc., supra* (rotator cuff and biceps tendon injuries). By contrast, she cites several cases in which leg or hip injuries have resulted in findings of disability to the body as a whole. See, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980) (fracture of femur); *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977) (injury to ball and socket of hip joint); *Mead v. Missouri Valley Grain, Inc.*, 178 Neb. 553, 134 N.W.2d 243 (1965) (amputation of both feet). Citing physiological similarities between the shoulder joint and the hip joint, Ideen argues that an injury to the shoulder should be classified as an injury to the body as a whole.

We decline Ideen's invitation to either abandon the residual impairment test or embroil this court in comparative anatomy. We believe that the residual impairment test is the appropriate test for determining disability, which is, after all, the source of the compensation sought in these cases. The test itself does not distinguish between leg and arm injuries, and there is no reason why an injury to an arm could not result in residual impairment to the body as a whole if such impairment was determined to exist.

In this case, the compensation court was presented with conflicting evidence as to whether Ideen suffered a disability to the body as a whole in addition to disability to a scheduled member. The compensation court was not clearly erroneous in determining that the evidence limiting Ideen's disability to a scheduled member was more persuasive, and accordingly its finding of fact will not be disturbed on appeal.

CONCLUSION

We reaffirm our previous holdings establishing that disability is to be determined by the location of the residual impairment rather than the situs of the injury. The compensation court was presented with conflicting evidence over whether Ideen suffered residual impairment to the body as a whole, and its decision to believe one expert over the other and find only a disability to a scheduled member was not clearly erroneous. Because the compensation court is not allowed to award loss of earning capacity damages for a scheduled member disability, Ideen's second assignment of error is without merit.

Ideen has filed a motion for attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1998). Since Ideen did not obtain an increase in the amount of the award of the compensation court as affirmed by the review panel, Ideen is not entitled to attorney fees pursuant to § 48-125, and said motion is hereby overruled.

AFFIRMED.

STEPHAN, J., not participating.

CLINTEN LACKMAN, APPELLEE, V. ROGER ROUSSELLE AND VIRGINIA ROUSSELLE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, AND JACK LACKMAN, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

596 N.W.2d 15

Filed June 11, 1999. No. S-97-489.

1. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.

2. **Appeal and Error.** The Nebraska Supreme Court will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief.
3. ____. In the absence of plain error, where an issue is raised for the first time in a higher 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.
4. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
5. **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.
6. **Negligence.** Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.
7. **Negligence: Tort-feasors: Liability: Damages.** Under joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.
8. ____: ____: ____: ____. Where joint tort-feasors do not act as part of a common enterprise or plan, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant.
9. **Statutes: Intent.** Statutes which effect a change in common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
10. **Actions: Parties: Words and Phrases.** Under the plain language of Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), the term "defendant" includes a third-party defendant brought into an action pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1995).
11. **Joint Ventures: Proof.** To establish a joint venture or enterprise, the burden is on the plaintiff to show its existence by clear and convincing evidence.
12. **Joint Ventures: Partnerships: Contribution.** A joint venture or enterprise is in the nature of a partnership and exists when two or more persons contribute cash, labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions.
13. **Joint Ventures.** Each of the parties in a joint venture or enterprise must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
14. ____. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case.

15. ____. A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals affirmed.

P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellants.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Clinten Lackman.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee Jack Lackman.

Maren Lynn Chaloupka and Robert P. Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for amicus curiae Nebraska Association of Trial Attorneys.

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

WRIGHT, J.

NATURE OF CASE

The plaintiff, who was riding in a vehicle operated by his father, was injured in a two-vehicle collision. The plaintiff sued the driver of the other vehicle, and the defendant impleaded the plaintiff's father as a third-party defendant. The Nebraska Court of Appeals reversed a jury verdict finding the defendant 90 percent liable and the third-party defendant 10 percent liable, and we granted further review.

SCOPE OF REVIEW

[1] As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999).

[2] The Nebraska Supreme Court will not consider errors which are not properly assigned in a petition for further review

and discussed in the supporting memorandum brief. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

[3] In the absence of plain error, where an issue is raised for the first time in a higher 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. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

[4,5] In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). 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.*

FACTS

A more detailed statement of facts is set forth in *Lackman v. Rousselle*, 7 Neb. App. 698, 585 N.W.2d 469 (1998). In summary, Clinten Lackman was a passenger in a vehicle driven by his father, Jack Lackman, when Jack's vehicle collided with a vehicle owned and driven by Roger Rousselle. The vehicles collided at low rates of speed after approaching each other on a flat field road located on property partially owned by Jack. Clinten was injured in the collision, and he brought suit against Roger, as well as Roger's wife, Virginia Rousselle. Although Virginia was not in the vehicle at the time of the collision, Clinten alleged that she was involved with Roger in the joint enterprise of family farming and that the vehicle was owned jointly and was being used in furtherance of that enterprise at the time of the collision. Clinten did not sue his father, Jack.

Roger responded, alleging that the collision was a result of Jack's deliberate attempt to force Roger's vehicle off the road. Roger alleged that Jack's negligence was the sole proximate

cause of the collision and that such negligence should be imputed to Clinten on the theories that Clinten entered Jack's vehicle aware of the plan to force Roger off the road and that Clinten was involved in the joint enterprise of farming with Jack. Roger also alleged that Clinten had voluntarily assumed the risk of his injuries. Virginia's answer reiterated the allegations made by Roger and also demurred to Clinten's petition for the reason that there were no facts alleged which would support a claim against her pursuant to the family purpose doctrine or the theory of joint enterprise.

Subsequently, Roger obtained leave to join Jack as a third-party defendant. Roger filed a third-party complaint against Jack, seeking compensation for damage to his vehicle. Roger also prayed for judgment for all or a portion of any damages that might be awarded against him in Clinten's action. Jack's answer to Roger's third-party complaint denied the allegations against him and alleged that the complaint failed to state a cause of action.

The trial court overruled Jack's motion for summary judgment, which alleged that under the guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995) (codified at the time of the accident at Neb. Rev. Stat. § 39-6,191 (Reissue 1988)), he could not be held liable for any damages to Clinten. The court explained that because Clinten's presence was of benefit to Jack in their farming operation, the guest statute did not apply.

The court also overruled Roger's motion for partial summary judgment, concluding that the facts clearly showed that Jack's negligence could not be imputed to Clinten under a joint enterprise theory and concluding that the evidence was disputed as to whether Roger's negligence could be imputed to Virginia under the same theory.

Subsequently, the trial court overruled Jack's and Clinten's motions for directed verdict and overruled Roger's motion for directed verdict except to the extent the court concluded that the evidence was deficient to show any loss of past wages. The jury returned a verdict in favor of Clinten and against both Roger and Virginia in the amount of $175,000. Under the court's instructions, the jury assessed the percentage of negligence of the parties as follows: 0 percent for Clinten; 90 percent for Roger; and

10 percent for Jack. Using the jury's findings, the trial judge entered judgment against Roger and Virginia in the amount of $175,000, plus taxable court costs, and against Jack in the amount of $17,500, plus 10 percent of the taxable court costs. Motions for new trial were filed and overruled. Roger and Virginia appealed to the Court of Appeals, and Jack cross-appealed.

Roger and Virginia asserted to the Court of Appeals that the trial court erred (1) in failing to instruct the jury on the general standard of care by which Clinten's conduct was to be judged; (2) in failing to instruct the jury to make a separate finding for the amount of economic and noneconomic damages; (3) in giving an instruction as to future loss of earning capacity where the evidence was insufficient; (4) in admitting without proper foundation hearsay evidence of a motor vehicle investigation traffic report containing inadmissible and prejudicial opinions; (5) in submitting to the jury the question of imputing the claimed negligence of Roger to Virginia under the joint enterprise doctrine or, alternatively, in failing to submit the issue of imputing Jack's negligence to Clinten under the same doctrine; and (6) in failing to grant their motions for directed verdict, judgment notwithstanding the verdict, and new trial.

Jack's cross-appeal asserted that the trial court erred (1) in concluding that Roger and Virginia were entitled to contribution, (2) in concluding that Roger and Virginia were entitled to relief based on apportionment of fault, and (3) in failing to determine that Roger and Virginia were barred from recovering any sum against Jack for the reason that Roger's negligence was greater than the total negligence of all persons against whom recovery was sought.

The Court of Appeals reversed the judgment and remanded the cause for a new trial. The Court of Appeals determined that the trial court should have granted a directed verdict in favor of Virginia, because there was inadequate proof of a joint enterprise. The Court of Appeals further held that under Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), it was plain error for the trial court to fail to instruct the jury to make separate findings for economic and noneconomic damages. In reliance on § 25-21,185.10, the Court of Appeals also found that the trial

court erred in failing to enter separate judgments against Roger and Jack which were limited to their proportional allocation of the noneconomic damages. The Court of Appeals found no merit to Jack's cross-appeal. We granted Clinten's and Jack's petitions for further review. We now affirm the judgment of the Court of Appeals.

ASSIGNMENTS OF ERROR

Clinten's petition for further review asserts that the Court of Appeals erred (1) in reversing the jury verdict by determining that the trial court failed to properly instruct the jury, (2) in determining that a common liability existed between Jack and Roger to Clinten, (3) in determining that there can be contribution between Jack and Roger, (4) in treating Jack and Roger as codefendants, (5) in determining that the failure to instruct the jury to separately determine economic and noneconomic damages required a new trial, and (6) in determining that the trial court should have granted the requested directed verdict in favor of Virginia for lack of proof as to a joint enterprise.

Jack's petition for further review asserts that the Court of Appeals erred (1) in reversing the jury verdict for failure to properly instruct, (2) in determining that a common liability existed to Clinten, (3) in determining that there should be contribution between Roger and Jack, (4) in determining that the trial court erred in failing to instruct the jury about the effect of the allocation of negligence between Roger and Jack, (5) in treating and regarding Roger and Jack as codefendants, (6) by holding that a new trial was required as a result of the trial court's failure to instruct the jury to separately determine economic and noneconomic damages, (7) in failing to find that Roger was barred by his own contributory negligence from recovering any sum against Jack, (8) in failing to find that the comparative negligence as between Roger and Jack applied independently of the negligence between Clinten and Roger, (9) in disregarding and failing to apply Nebraska's established rules and procedures involving third-party practice and failing to apply the provisions of Neb. Rev. Stat. § 25-331 (Reissue 1995), and (10) in holding that Roger was empowered through third-party practice to force all possible joint tort-feasors to be joined

and was empowered to enforce contribution among all possible joint tort-feasors, even though Clinten had elected not to join or make claim against a possible joint tort-feasor.

ANALYSIS

The Nebraska Supreme Court will not consider errors not properly assigned in a petition for further review and discussed in the supporting memorandum brief. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). In the absence of plain error, where an issue is raised for the first time in a higher 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. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

Although Clinten and Jack make several assignments of error, those errors properly preserved, assigned, and argued in their memorandum briefs can be summarized into three: (1) Clinten and Jack assert that the Court of Appeals erred in finding reversible error in the trial court's failure to advise the jury to separately determine the amount of Clinten's economic and noneconomic damages, (2) Clinten and Jack assert that the Court of Appeals erred in finding reversible error in the trial court's failure to enter separate judgments against Roger and Jack proportionate to their fault, and (3) Clinten asserts that the Court of Appeals erred in directing the trial court to dismiss the action against Virginia.

APPLICATION OF § 25-21,185.10

The first two assignments of error relate to the Court of Appeals' application of § 25-21,185.10, which states:

> In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.
>
> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount

> of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

There was no evidence that Roger and Jack acted as part of a common enterprise or plan. Thus, the Court of Appeals applied the second half of § 25-21,185.10 and correctly concluded that it was plain error for the trial court not to instruct the jury separately regarding economic and noneconomic damages. The Court of Appeals held that under § 25-21,185.10, it was error for the trial court to enter judgment against Roger for more than his proportionate share.

[6-8] Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Gergen v. The Western Union Life Ins. Co.*, 149 Neb. 203, 30 N.W.2d 558 (1948). See, also, *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994) (where two causes produce single indivisible injury, joint and several liability attaches). Under such joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages. See, *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Mazankowski v. Harders*, 206 Neb. 583, 293 N.W.2d 869 (1980). Where the joint tort-feasors do not act as part of a common enterprise or plan, § 25-21,185.10 alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an "action involving more than one defendant." See § 25-21,185.10.

Clinten and Jack assert that § 25-21,185.10 should be narrowly construed so as to apply only where there is more than one person deliberately brought into the lawsuit by the plaintiff. In other words, that the term "defendant," as used in § 25-21,185.10, does not encompass third-party defendants such as Jack. Therefore, they argue that the case should be governed by common law and not by § 25-21,185.10.

This argument overlooks Neb. Rev. Stat. § 25-323 (Reissue 1995), which provides:

> Any person whose negligence was or may have been a proximate cause of an accident or occurrence alleged by the plaintiff, other than parties who have been released by the plaintiff and are not subject to suit pursuant to section 25-21,185.11, may be brought into the suit by any defendant in the manner provided in section 25-331 . . . .

Section 25-331, which governs third-party practice, provides in part that "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

[9,10] Statutes which effect a change in common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). Other courts have held that the term "defendant" plainly includes third-party defendants. For instance, in *UMC, Inc. v. Arthur Bros., Inc.*, 626 S.W.2d 819 (Tex. App. 1981), the court held that the phrase "named defendants in the primary suit," which appeared in a statute governing venue relating to claims for contribution among joint tort-feasors, encompassed third-party defendants. Likewise, in *Kappish v. Lotsey*, 76 N.J. Super. 215, 184 A.2d 17 (1962), the court held that third-party defendants were "defendants" within the purview of the state's joint tort-feasors contribution law, which provided that service may be had on defendants in other counties where one or more defendants are served within the county in which the action is brought. See, also, *Ruddi v. Concrete Steel Co.*, 183 Misc. 1004, 54 N.Y.S.2d 790 (1944) (statute entitling "the defendant" to costs included third-party defendant). We conclude that under the plain language of § 25-21,185.10, the term "defendant" includes a third-party defendant brought into an action pursuant to § 25-331.

Clinten argues that even if the term "defendant" includes a third-party defendant, § 25-21,185.10 is inapplicable here because Jack is immune from liability under the guest statute, § 25-21,237. Similarly, Clinten argues that because he has chosen not to assert a claim against Jack, § 25-21,185.10 cannot

apply so as to limit Clinten's recovery against Roger to a proportionate share of noneconomic damages. Clinten asserts that § 25-21,185.10 can limit judgment against each defendant to that defendant's proportionate share of noneconomic damages only when an actual judgment can be granted against each defendant. We disagree.

We conclude that the Court of Appeals correctly determined the method of apportioning damages between joint tort-feasors for purposes of § 25-21,185.10. Clinten's ability to recover from Jack does not affect the application of § 25-21,185.10. The action remains an "action involving more than one defendant." The jury must be instructed to assess economic and noneconomic damages separately.

The question may arise on retrial whether Clinten, not having asserted a claim against Jack, can recover anything from Jack. Jack has been made a third-party defendant by Roger for purposes of contribution as to economic damages and for purposes of apportionment as to noneconomic damages. We conclude that unless Clinten asserts a claim directly against Jack, a named and identifiable third-party defendant, as permitted by § 25-331, no judgment could be entered against Jack in favor of Clinten. Thus, there is a limited distinction between a defendant and a third-party defendant in the context of the facts of this case.

Assuming Clinten asserts no claim against Jack, on retrial, if Jack and Roger are found to be jointly and severally liable, then, as to economic damages, a judgment must be entered in favor of Clinten and against Roger for the entire amount of such damages. A judgment would then be entered in favor of Roger and against Jack for contribution. As to noneconomic damages, a judgment would be entered in favor of Clinten and against Roger for the amount of such damages which is equal to Roger's proportionate share of liability. No recovery would be had by Clinten against Jack for either economic or noneconomic damages.

VIRGINIA ROUSSELLE

We next address whether the Court of Appeals erred in determining that a directed verdict should have been granted in favor of Virginia. Virginia was not involved in the collision, but

Clinten brought her into the action on the theory that Roger's negligence should be imputed to her under the joint enterprise doctrine.

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). 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.*

[11-13] To establish a joint venture or enterprise, the burden is on the plaintiff to show its existence by clear and convincing evidence. See *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987). A joint venture or enterprise is in the nature of a partnership and exists when two or more persons contribute cash, labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. *Carey v. Humphries*, 171 Neb. 578, 107 N.W.2d 20 (1961). Each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other. *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988).

[14,15] The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. *Id.*; *Evertson v. Cannon, supra.* A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993); *Evertson v. Cannon, supra.* Even a close relationship between two parties does not create an implied joint venture. *Global Credit Servs. v. AMISUB, supra.* In considering whether a joint venture exists, the acts and circumstances

between spouses may not have the same significance as the same acts and circumstances between strangers might have. 46 Am. Jur. 2d *Joint Ventures* § 58 (1994).

The evidence presented at trial showed that Roger farmed a piece of land owned by Virginia's mother, as well as land he jointly owned with Virginia. Virginia testified that Roger was responsible for the day-to-day farming activities on their land, as well as her mother's land. Virginia's primary responsibilities were to care for the family home and the children. She denied participating in or being specifically aware of the actual farming activities.

In arguing that there is evidence of a joint venture, Clinten points out that Virginia performed recordkeeping for the family and wrote checks to pay the bills. Clinten also notes Virginia's testimony that she has helped care for the cattle on rare occasions and has assisted Roger in irrigating by opening a headgate on a couple of occasions and in hanging tubing on one occasion. The vehicle driven by Roger at the time of the collision was titled in both Roger's and Virginia's names, as was the other farm machinery. Finally, Clinten points to the fact that farming is the primary source of income for the family, and Roger and Virginia file joint income tax returns which specify the farming operation as a business activity.

We agree with the Court of Appeals that as a matter of law, the evidence was insufficient to show a joint enterprise in farming. Rather, the evidence shows only the naturally shared interests of a husband and wife working together to raise their family. There is no evidence of an intent to enter into an agreement for a joint enterprise. Nor is there sufficient evidence of Virginia's control over the farming operation. See *Farm Bureau Service Co. of Hardin Cty. v. Bavender*, 217 N.W.2d 560 (Iowa 1974) (where court was unwilling to impute joint venture to activities associated with being farm housewife).

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals, which reversed the judgment and remanded the cause for a new trial.

AFFIRMED.

MILLER-LERMAN, J., not participating.

KEVIN MILLER, APPELLEE, V. M.F.S. YORK/STORMOR, APPELLANT.
595 N.W.2d 878

Filed June 11, 1999. No. S-97-1138.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions to dismiss.

Walter E. Zink II and Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Stephen L. Gerdes, of the Law Offices of Stephen L. Gerdes, for appellee.

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

GERRARD, J.

This case presents the question whether the Nebraska Workers' Compensation Court has jurisdiction to determine the amount of credit to which an employer is entitled on an injured employee's present and future workers' compensation benefits and expenses when the injured employee's related third-party suit has been settled in a different forum.

FACTUAL BACKGROUND

On August 23, 1990, Kevin Miller attempted to repair a punch press in the scope of his employment at M.F.S. York/Stormor (MFS). The Ward & Garrison Company, a dissolved Missouri corporation, had previously modified the punch press by installing certain safety guards. The safety equipment failed, and the punch press crushed Miller's right hand and arm.

Miller sued Ward & Garrison Company and its president, George Ward (collectively W&G), for personal injury in the U.S. District Court for the District of Nebraska. Because MFS had paid workers' compensation benefits to Miller, MFS joined Miller's suit against W&G as required by Neb. Rev. Stat. § 48-118 (Reissue 1993) of the Nebraska Workers' Compensation Act. W&G contested liability, but settled with Miller for $400,000 shortly before trial on February 17, 1995. As such, Miller and MFS asked the federal court to resolve the issue of MFS' subrogation claim.

Section 48-118, as it existed prior to amendments in 1994, would have mandated that the court award MFS a dollar-for-dollar recovery for workers' compensation benefits paid to Miller, whereas the amended version permits courts to make a "fair and equitable" allocation of the settlement proceeds. Although this court had not yet decided whether the 1994 amendments to § 48-118 effected procedural or substantive changes, the federal court ruled that the changes were procedural in nature. Applying the 1994 amendments retroactively to the subrogation dispute between Miller and MFS, the federal court opted to make a "fair and equitable" allocation of the settlement proceeds between the parties.

In deciding what a fair and equitable distribution would be, the federal court considered testimony and affidavits of counsel for the various parties concerning their estimations on Miller's potential verdict range and chances for a favorable verdict. The federal court calculated the midpoint of Miller's potential verdict range at $835,000 and found that Miller had a 50-percent chance of obtaining a favorable verdict on W&G's liability. Based on that calculation, the federal court concluded that the settlement value of Miller's claim against W&G was $417,000, or one-half its real value if liability was not disputed. Thus, the federal court determined that the $400,000 settlement was fair and reasonable.

Reasoning that Miller received only 50 percent of the value of his claim against W&G, the federal court found that awarding MFS 50 percent of its subrogation claim would be a "fair and equitable" allocation under § 48-118. The federal court entered a final order to that effect on July 20, 1995, and modified it in

ways not pertinent to the present dispute on October 27. The parties did not raise, and the federal court did not determine, the amount of credit to which MFS would be entitled on disability benefits and medical and other expenses that accrued after the order.

Thereafter, neither Miller, MFS, nor W&G appealed the federal court's decision. However, Miller filed a petition in the Nebraska Workers' Compensation Court on February 6, 1996, for medical expenses incurred in 1992 and other workers' compensation benefits and expenses that accrued after the final order in federal court. In so doing, Miller asked the Workers' Compensation Court to determine whether MFS is entitled to a 50-cents-on-the-dollar credit, or a dollar-for-dollar credit on Miller's current and future workers' compensation benefits and expenses.

On September 26, 1996, the workers' compensation trial judge found that he had no jurisdiction to resolve the issue presented by Miller because such jurisdiction had vested in the federal court under § 48-118. Miller then filed an application for review in the Workers' Compensation Court. The review panel found that the Workers' Compensation Court did have jurisdiction to hear Miller's claim under § 48-118 and remanded the case to the workers' compensation trial judge. MFS subsequently appealed to the Nebraska Court of Appeals. In a memorandum opinion filed June 24, 1998, the Court of Appeals affirmed the order of the review panel, and MFS petitioned this court for further review.

ASSIGNMENTS OF ERROR

MFS argues that the Court of Appeals erred in finding that (1) the Nebraska Workers' Compensation Court has jurisdiction under § 48-118 to determine the amount of credit to which MFS is entitled on Miller's present and future workers' compensation benefits and expenses and (2) the 1994 amendments to § 48-118 effected procedural rather than substantive changes which thereby make the amended statute applicable retroactively to accidents occurring before the effective date of the amendment.

SCOPE OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an inde-

pendent, correct conclusion irrespective of the determination made by the court below. *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999).

ANALYSIS

As to both of MFS' assignments of error, the controlling statute is § 48-118. As amended in 1994, § 48-118 (Cum. Supp. 1996) reads in pertinent part:

> When a third person is liable to the employee . . . for the injury . . . the employer shall be subrogated to the right of the employee . . . against such third person . . . . Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee . . . and shall be treated as an advance payment by the employer, on account of any future installments of compensation. Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee . . . to bring suit against such third person in his . . . own name . . . based upon such liability, but in such event an employer having paid or paying compensation to such employee . . . shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid.

Section 48-118 further mandates that MFS and Miller

> shall have an equal voice in the claim [against W&G] and the prosecution of such suit and any dispute arising [between Miller and MFS] *shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought.*

(Emphasis supplied.) This language appears in § 48-118, both prior and subsequent to the 1994 amendments. Hence, there is no question that this section controls the current jurisdictional dispute.

In pointing to this language to support the notion that jurisdiction lies only in the federal court, MFS seems to urge two contradictory conclusions: either (1) the instant case is pending before the federal court or (2) the case is not pending before the

federal court but the federal court is "the district court in which such action could be brought." The first assertion lacks merit. The federal court entered a final order of dismissal on October 27, 1995, and no party appealed from that order. Therefore, the case is no longer pending before the federal court.

With no third-party action pending in this matter, either version of § 48-118 provides that "the district court in which such action could be brought" has jurisdiction to pass upon disputes between the employer and the employee. However, the parties dispute which court has jurisdiction over the present matter. Therefore, two questions must be answered to resolve the present jurisdictional issue. First, does the term "such action" as used in § 48-118 refer to the case against the third party (W&G) or to the subrogation dispute between the employer (MFS) and employee (Miller)? Second, does the term "district court" in § 48-118 include the federal court and the Workers' Compensation Court, as well as state district courts?

As for the meaning of the term "such action," the pertinent part of § 48-118 is less than clear because it uses the terms "claim," "suit," "dispute," "case," "action," and "such action" in the same sentence. However, in using the term "such action," the statute refers the reader back to the previous use of the term "action" in the same section. The previous use of the term "action" is synonymous with the term "case" in that sentence. In fact, both the reference to the term "case" and to the term "action" contemplate a cause that is "pending." That "pending" cause refers to the third-party "suit" and not a "dispute" arising between an employer and an employee. Therefore, we conclude that the plain meaning of the term "such action" as used in this part of § 48-118 is the underlying third-party action.

[2] Because the term "such action" refers to third-party cases (like Miller's personal injury tort suit against W&G in the instant case), it follows that the Workers' Compensation Court lacks jurisdiction to hear the present dispute between Miller and MFS. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998). The jurisdiction of the Workers' Compensation Court is set out in

Neb. Rev. Stat. § 48-152 (Reissue 1998). Under that provision, the Workers' Compensation Court can resolve only disputes that arise from the provisions of the Nebraska Workers' Compensation Act.

The provisions of the Nebraska Workers' Compensation Act do not confer jurisdiction on the Workers' Compensation Court to hear personal injury suits against nonemployers. Miller's third-party suit against W&G was a personal injury case against a defendant who was not Miller's employer. Miller's suit against W&G did not arise under the provisions of the Nebraska Workers' Compensation Act, and the Workers' Compensation Court did not have jurisdiction to determine the amount of credit to which an employer may be entitled under these circumstances.

MFS, citing *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982), argues that the federal court is the only forum with jurisdiction to determine the amount of credit to which MFS is entitled. We disagree.

Shirley TePoel, the original plaintiff in *Moyer v. Douglas & Lomason Co., supra*, was injured by a machine on the production line of her employer, Douglas & Lomason Company. TePoel sued the manufacturer of the machine in federal court. Despite its resistance, the employer was joined in the suit under § 48-118. TePoel and the machine's manufacturer agreed to a settlement during the jury trial. *Moyer v. Douglas & Lomason Co., supra.*

Although TePoel and her employer came to an agreement on the employer's subrogation interest, they did not discuss attorney fees and expenses. As such, TePoel's attorney, George Moyer, deducted those amounts from the employer's subrogation upon distribution 10 days before the federal court entered an order of dismissal. Over 3 months later, the employer demanded that Moyer compensate the employer for the full subrogation amount. Moyer refused and filed a declaratory action in the Platte County District Court. The district court held for the employer, and Moyer appealed. *Id.*

Upon hearing Moyer's appeal, this court held that the federal court had exclusive jurisdiction in the matter and reversed the decision of the district court. *Id.* In so doing, we noted that

§ 48-118 "is devoid of any relevant legislative history" that would resolve the question of which forum has jurisdiction under these circumstances. *Moyer v. Douglas & Lomason Co.*, 212 Neb. at 685, 325 N.W.2d at 651. Nevertheless, we reasoned that the federal court "was in a unique position to know the extent of participation in the recovery by both counsel" and that it would be "almost impossible" for any other court to apportion the contributions of the respective attorneys. *Id.*

The foregoing reveals three important distinctions between *Moyer v. Douglas & Lomason Co., supra*, and the instant case. First, the dispute in *Moyer v. Douglas & Lomason Co.* arose while the case was still pending in federal court, not after the case was resolved. Next, the holding in *Moyer v. Douglas & Lomason Co.* involved and was limited to the division of fees and court expenses—not the amount of credit to be awarded on future workers' compensation benefits and expenses. Finally, the federal court in *Moyer v. Douglas & Lomason Co.* was in a unique position to evaluate the contribution of each attorney that no other court could glean from merely reviewing the record. By contrast, with the stipulated facts and the relevant law in the present dispute, the federal court would be in no better position than any state district court to adjust the credit to which MFS is entitled.

Further, § 48-118 cannot specifically confer jurisdiction upon federal courts, as the existence of federal jurisdiction is a matter of federal law rather than state law. *Kramer v. Caribbean Mills*, 394 U.S. 823, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969). Under federal law, 28 U.S.C. § 1445(c) (1988), federal courts may have jurisdiction over suits arising under state workers' compensation laws only if the suit is originally filed in federal court (as opposed to being removed there from state court) and diversity jurisdiction exists under 28 U.S.C. § 1332 (1994). See, *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961); *Prescott v. United States*, 523 F. Supp. 918 (D. Nev. 1981), *aff'd* 731 F.2d 1388 (9th Cir. 1984).

We, therefore, conclude that the term "district court" as used in § 48-118 cannot mean federal courts exclusively and that a state district court would have jurisdiction over the subject matter of this action.

Having initially determined that the Workers' Compensation Court does not have jurisdiction in the present matter, we do not consider MFS' second assignment of error. It is worth noting, however, that this court has already determined that the 1994 amendments to the subrogation clause in § 48-118 are substantive rather than procedural in nature. See *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998).

CONCLUSION

Because the Workers' Compensation Court lacked jurisdiction to hear the instant cause, we reverse the judgment of the Court of Appeals and remand this matter with directions to dismiss the action in the Workers' Compensation Court.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

J.K. ET AL., APPELLEES, V. TERRENCE J. KOLBECK, M.D., AND TERRENCE J. KOLBECK, M.D., P.C., APPELLEES, AND ST. PAUL FIRE & MARINE INSURANCE CO., GARNISHEE-APPELLANT.

595 N.W.2d 875

Filed June 11, 1999. No. S-98-180.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Garnishment: Statutes.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
4. **Garnishment: Judgments.** Pursuant to the plain language of Neb. Rev. Stat. § 25-1056 (Cum. Supp. 1998), a valid judgment is a prerequisite to the issuance of a garnishment.
5. **Judgments: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 25-1301(1) (Reissue 1995), a judgment is the final determination of the rights of the parties in an action.
6. **Judgments: Records: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 25-1301(2) (Reissue 1995), rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded.

Joseph W. Grant and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellant.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellees J.K. et al.

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

MCCORMACK, J.

This consolidated garnishment case arises out of three civil suits filed by J.K., C.A.N., and C.S. (claimants) against Terrence J. Kolbeck, M.D., and Terrence J. Kolbeck, M.D., P.C. (Kolbeck). The claimants sued Kolbeck, an Omaha gynecologist, alleging sexual misconduct during the course of examinations he performed on them. Kolbeck's malpractice carrier, St. Paul Fire & Marine Insurance Co. (St. Paul), is a garnishee and the appellant in this action. We reverse and remand.

BACKGROUND

The claimants sued Kolbeck for damages resulting from alleged sexual misconduct committed by him during the course of gynecological examinations. After the suits were filed, St. Paul took a reservation of rights from Kolbeck reserving its right to deny coverage for sexual misconduct, although St. Paul did provide Kolbeck with legal counsel. Shortly before trial, Kolbeck settled with the claimants. The confidential settlements totaled $400,000 and called for dismissal of the suits with prejudice. The agreements purported to settle for negligence and professional malpractice rather than intentional sexual misconduct. The agreements contained covenants that the claimants would not attempt to collect against Kolbeck personally, but would seek payment of the settlement only through Kolbeck's professional liability carrier, St. Paul.

On claimants' motion, the suits were dismissed with prejudice in accordance with the settlement agreements, and a garnishment was issued to St. Paul.

St. Paul responded that the settlement agreements did not constitute judgments upon which garnishment could lie, that

they were entered into without St. Paul's consent, that they were unenforceable as a matter of law, and that there was no support for the claimants' contention that a sexual battery could constitute a professional service.

The claimants and St. Paul filed motions for summary judgment. The trial court sustained the claimants' motions and overruled St. Paul's motion. The trial court held that the agreements constituted judgments upon which garnishment proceedings could lie and further, that the sexual misconduct of Kolbeck was committed in the course of, and as an inseparable part of, his professional services, and therefore coverage under Kolbeck's policy was warranted. The trial court further held that even though St. Paul had defended the actions against Kolbeck, because it had done so under a reservation of rights, Kolbeck was free to settle without St. Paul's consent.

St. Paul timely appealed the order granting summary judgment to the claimants.

ASSIGNMENTS OF ERROR

St. Paul assigns that the trial court erred in (1) holding that the agreements which called for and resulted in the dismissal of the underlying actions with prejudice constituted judgments upon which the claimants could garnish St. Paul's professional liability policy; (2) finding that the settlement agreements were considered res judicata and immune from collateral attack; (3) attributing any legal significance to the agreements when testimony from the claimants contradicted purported statements of fact contained in the agreements and when other competent evidence demonstrated the absence of a factual basis for the claimed liability; (4) refusing to admit exhibits 26 and 27; (5) failing to hold that the settlements, without St. Paul's consent, violated the terms of the policy; (6) holding that an insured may settle and bind his insurance company if the insurance company has defended a suit under a reservation of rights; (7) holding that Kolbeck's alleged tortious conduct was committed in the course of, and as an inseparable part of, the professional services rendered and that the acts complained of were covered under Kolbeck's professional liability policy; (8) granting summary judgment to claimants; (9) failing to grant summary judgment to

St. Paul; and (10) that the trial court's order dated January 29, 1998, is contrary to and not supported by the law or the evidence.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999); *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999).

ANALYSIS

St. Paul's first assignment of error, that the dismissals of the claimants' suits with prejudice did not constitute judgments upon which garnishments could lie, is dispositive of the case. We reverse and remand.

[3] Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985).

[4] A valid judgment is clearly required in order for a garnishment to lie. By the plain language of Neb. Rev. Stat. § 25-1056 (Cum. Supp. 1998), garnishment in aid of execution is available only "when a judgment has been entered." The trial court found that the dismissals of the claimants' suits with prejudice pursuant to the confidential settlement agreements constituted judgments for the purposes of § 25-1056. In light of our duty to strictly construe that statute, we must disagree.

[5,6] A judgment is the final determination of the rights of the parties in an action. Neb. Rev. Stat. § 25-1301(1) (Reissue

1995). Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action. § 25-1301(2).

The dismissals in this case did not pronounce a judgment, nor was any relief granted or denied. Instead, the orders stated, "**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED**, that the above-captioned matter shall be and hereby is dismissed with prejudice in accordance with the terms of the 'Confidential Settlement Agreement.'"

Even if, as the claimants argue, the settlement agreements were incorporated into the orders, the fact remains that the trial court did not enter any judgments against Kolbeck. The dismissals of the suits represent the trial court's relinquishing, rather than exercising, its power over the parties, and as such, they are the antithesis of a judgment. Garnishment proceedings exist to enforce the authority of the courts, not to police the actions of private parties who have entered into an agreement for the purpose of avoiding that authority.

Having determined that there was no judgment upon which garnishment could lie, we find that the granting of summary judgment to the claimants was clearly improper. Instead, there remains no question of fact the resolution of which would allow the claimants to prevail on their garnishment, and so judgment should have been entered as a matter of law in favor of St. Paul.

CONCLUSION

A garnishment action is an action to enforce a judgment. As there were no judgments outstanding against Kolbeck in this matter, St. Paul was entitled to summary judgment against the claimants. The orders of the trial court are reversed and the causes remanded for entry of summary judgment in favor of St. Paul for the sole reason that the dismissal of this consolidated action is not a judgment upon which a garnishment could lie. As this holding is dispositive of this appeal, we do not address St. Paul's other assignments of error.

REVERSED AND REMANDED.

STEPHAN, J., not participating.

S. JANET GRESS, APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLEE, V. BERNARD D. GRESS, APPELLANT.

596 N.W.2d 8

Filed June 11, 1999. No. S-98-403.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Child Support: Social Security.** Whether excess Social Security benefits should be credited against child support arrearage is a question of law.
3. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
4. **Child Support: Social Security.** Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation in the absence of circumstances making the allowance of such a credit inequitable.
5. ____: ____. Social Security benefit payments are the result of the obligor's disability and are a substitute for the obligor's loss of earning power and his or her obligation to pay for the support of his or her dependents.
6. **Child Support: Social Security: Equity.** The credit allowed for Social Security benefit payments is an equitable credit, which in no way modifies the underlying obligation of the parent to meet his or her child support payments.
7. **Social Security.** Social Security dependency benefits are not a mere gratuity from the federal government.
8. **Divorce: Modification of Decree: Child Support: Social Security.** A request to credit Social Security benefits is a request for a change in only the source of payment, paid on behalf of an employee, and therefore does not require a modification hearing, but, rather, only an opportunity for the custodial parent to adduce evidence of any inequity that might occur as the result of crediting those benefits to court-ordered child support.
9. **Divorce: Child Support.** Child support payments become a vested right of the payee in a dissolution action as they accrue.
10. **Courts: Modification of Decree: Child Support.** A court may modify the amount of child support due in the future but may not forgive or modify past-due child support.
11. **Modification of Decree: Child Support: Equity.** An equitable credit against an arrearage is not a modification of a child support obligation.
12. **Child Support: Social Security: Equity.** Equitably, a noncustodial parent is entitled to utilize Social Security benefits as a substitute for his or her income during the period for which he or she is entitled to receive benefits.
13. **Child Support: Social Security: Time.** Excess Social Security dependency benefits are to be credited against child support arrearage which has accrued since the date of the occurrence which entitled the parent to such benefits, unless the allowance of such credit, in the particular case, would be inequitable.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

John C. Hahn, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant.

Danelia F. Kracht, Deputy Lincoln County Attorney, for intervenor-appellee.

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

HENDRY, C.J.

INTRODUCTION

This is an appeal from an order allowing a parent's Social Security benefits to be credited against his child support obligations on a month-to-month basis but not allowing excess benefits to be credited against his accrued arrearage. The primary issue on review is whether monthly Social Security benefits received for the benefit of a minor child which are in excess of a monthly support obligation should be applied to past-due child support arrearage. We determine that excess Social Security benefits should be applied to child support arrearage which has accrued since the date of the occurrence which entitled the parent to receive benefits and remand the cause to the district court with directions.

BACKGROUND

On September 30, 1974, appellant Bernard D. Gress (Gress) and S. Janet Gress were divorced and a decree of dissolution was entered by the district court for Lincoln County, Nebraska. Janet Gress was given custody of the parties' then minor child, Bradford Dean Gress, born June 6, 1968. Gress was ordered to pay child support in the amount of $250 per month commencing October 1, 1974, and continuing through June 6, 1987.

The district court records reveal that Gress made regular payments for both child support and spousal support from July 1974 through September 1975, totaling $400 to $600 per month. The amount of the payments began to decrease in August 1975, and after September 1975, there does not appear to be another pay-

ment until January 1978. From January until August 1978, Gress made payments ranging from $50 to $150 per month.

On August 3, 1978, it was determined that Gress had fallen behind in his child support payments and that there was an accumulated arrearage in the amount of $8,225. An order was entered by the district court for Lincoln County upon stipulation of the parties, reducing child support from $250 per month to $100 per month, effective August 1, 1978. The order further required Gress to make additional payments of $50 per month to purge the arrearage. From August 1978 through June 1979, Gress made payments averaging $150 per month. The record does not indicate any other payments made by Gress until January 1998, when he began making payments of $100 per month through August 1998.

In July 1979, Gress became eligible for Social Security benefits. However, the record does not disclose when Gress became disabled or any information related to his disability. After Gress became eligible for benefits, Social Security payments were made for the benefit of Bradford in the following monthly amounts: $185 from August to October 1979, no payments from November 1979 to June 1980, $26.60 from July 1980 to June 1981, $50.40 from July 1981 to June 1982, $67 from July to November 1982, $253 from December 1982 to December 1983, $262 from January to December 1984, $271 from January to December 1985, and $280 from January to June 1986. Bradford stopped receiving Social Security benefits after June 3, 1986.

On November 17, 1997, the deputy county attorney for Lincoln County filed a motion on behalf of the State of Nebraska to credit Gress' child support obligation with the Social Security benefit payments that were made for the benefit of Bradford. The purpose of the motion was to determine the amount of child support arrearage and accrued interest still owing. The State became a real party in interest, by virtue of the filing, as an intervenor. See Neb. Rev. Stat. § 43-512.03 (Cum. Supp. 1996). The State's motion requested (1) a credit against child support equal to the amount of the monthly Social Security payment when the payment was less than the monthly child support obligation and (2) a suspension of child support for those months in which the Social Security payment exceeded the

monthly child support obligation. Gress argued that the Social Security benefits paid in excess of each month's child support obligation, instead of being suspended, should be credited against the outstanding balance he owed in arrearage.

On March 31, 1998, the district court for Lincoln County entered an order granting the State's motion to credit the child support payments as set out in the State's motion of November 17, 1997. Gress appealed the decision to the Nebraska Court of Appeals, and we removed the case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). The State and Gress are the only participants in this matter, as Janet Gress is not a party to this appeal.

ASSIGNMENTS OF ERROR

Gress contends, rephrased, that the district court erred in refusing to credit excess Social Security benefits received by Janet Gress for the benefit of Bradford against Gress' child support arrearage.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990).

[2,3] Whether excess Social Security benefits should be credited against child support arrearage is a question of law. To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

ANALYSIS

We have clearly established that a noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability. *Hanthorn v. Hanthorn, supra*. However, whether Social Security benefits exceeding the

amount of monthly child support should be credited toward child support arrearage is an issue of first impression in this state.

[4,5] In *Hanthorn v. Hanthorn, supra*, we held that Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation in the absence of circumstances making the allowance of such a credit inequitable. Such benefit payments are the result of the obligor's disability and are a substitute for the obligor's loss of earning power and his or her obligation to pay for the support of his or her dependents. *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974).

[6] We qualified our holding in *Hanthorn v. Hanthorn*, 236 Neb. at 232, 460 N.W.2d at 654, however, by noting that a Social Security payment made in a particular month operates as a satisfaction of the court-ordered child support only on a month-to-month basis, and a "payment in a particular month may not be carried over to satisfy court-ordered support amounts owing in *future* months." (Emphasis supplied.) We also noted that the credit allowed for the disability benefit is an equitable credit, which in no way modifies the underlying obligation of the parent to meet his or her child support payments. *Id.*

[7,8] In *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993), we explained that Social Security dependency benefits are not a mere gratuity from the federal government. The benefits have been earned in part through an employee's payment of Social Security taxes. Consequently, a request to credit Social Security benefits is a request for a change in only the source of payment, paid on behalf of the employee, and therefore does not require a modification hearing, but, rather, only an opportunity for the custodial parent to adduce evidence of any inequity that might occur as the result of crediting those benefits to court-ordered child support. *Id.*

Relying on our holdings in *Brewer v. Brewer, supra*, and *Hanthorn v. Hanthorn, supra*, Gress argues that the Social Security payments made on his behalf for the benefit of Bradford were a substitute for Gress' income and, therefore, that any payments in excess of his monthly obligation should be credited to his child support arrearage. The State, however,

focuses on our language in *Hanthorn*, and argues that because excess benefits may not be carried over to future payment obligations, excess benefits may also not be applied to past-due amounts. The State insists that Social Security benefits can be applied only to the current month's obligation. If Social Security benefits exceed the amount due for the month, they are a gratuity for the dependents. If the benefits are less than the amount due, the noncustodial parent is obligated to pay the difference.

This court has never held that Social Security benefits may not be applied to child support arrearage. The holding in *Hanthorn* that Social Security payments in a particular month may not be carried over to future months was based on the fact that future child support payments had not yet accrued and were subject to modification.

[9,10] Child support payments become a vested right of the payee in a dissolution action as they accrue. *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991). While a past-due child support arrearage is already accrued and vested, a future payment is not. *Id.* A court may, therefore, modify the amount of child support due in the future but may not forgive or modify past-due child support. *Id.* See, also, *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990) (holding that although prospective modification of ongoing duty of support is permitted, retroactive modification of accrued arrearage in child support which becomes vested as it accrues is not).

[11] Although arrearages are nonmodifiable, an equitable credit against an arrearage is not a modification of a child support obligation. An equitable credit for Social Security disability benefits is "by nature different from a retroactive modification of a vested and accrued obligation." *Hanthorn v. Hanthorn*, 236 Neb. 225, 230, 460 N.W.2d 650, 654 (1990). Such a credit does not modify the amount of child support owed; it simply recognizes another source of payment for the obligation. See *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). Accordingly, a noncustodial parent may be entitled to an equitable credit against child support arrearage, but there is no entitlement to credit against future child support payments. Future obligations are not yet accrued, and because they are subject to modification, they are not ascertainable.

Many jurisdictions deem excess benefits as a gratuity on behalf of the children. See *In re Marriage of Cowan*, 279 Mont. 491, 928 P.2d 214 (1996); *Weaks v. Weaks*, 821 S.W.2d 503 (Mo. 1991); *Children & Youth Services v. Chorgo*, 341 Pa. Super. 512, 491 A.2d 1374 (1985). Some jurisdictions refusing to credit excess Social Security benefits against accrued child support arrearage have reasoned that child support is meant to provide for the immediate needs of the child. The obligor should, therefore, not be permitted to accumulate arrearage in anticipation of future government benefits, while leaving the children's current needs unmet. See, *Coulon v. Coulon*, 915 P.2d 1069 (Utah App. 1996); *Children & Youth Services v. Chorgo, supra*; *Mask v. Mask*, 95 N.M. 229, 620 P.2d 883 (1980).

We find, however, that it would be inequitable to punish a disabled parent unable to meet his or her current child support obligations because of an inability to work during the period in which the obligation accrued. Additionally, parties seeking credit for disability benefits often face significant health and financial problems. We therefore determine that the more reasoned approach is to allow an equitable credit for excess Social Security benefits against child support arrearage with certain qualifications.

[12] As we have stated, the credit allowed for Social Security benefit payments is equitable in nature. Equitably, a noncustodial parent is entitled to utilize Social Security benefits as a substitute for his or her income during the period for which he or she is entitled to receive benefits. We acknowledge, however, that often there is a lapse of time between when a person is entitled to receive benefits and when payments are actually received. See, *Hern v. Erhardt*, 113 Nev. 1330, 948 P.2d 1195 (1997); *Frens v Frens*, 191 Mich. App. 654, 478 N.W.2d 750 (1991); *Newman v. Newman*, 451 N.W.2d 843 (Iowa 1990).

Potts v. Potts, 240 N.W.2d 680 (Iowa 1976), is one of the earlier cases recognizing the lapse of time between incurring a disability and the commencement of benefits, and permitting credit for arrearage accrued during this time period. In *Potts*, a noncustodial father brought an action seeking credit for excess Social Security disability payments made to his dependent children against his prior and subsequent child support obligation.

The record in the case disclosed that a portion of the arrearage had accrued after his disability but prior to the commencement of Social Security benefits, and the remainder of the arrearage accrued after Social Security payments were terminated. The court reasoned:

> Ordinarily a disabled parent should be credited for social security dependency payments only to the extent of his child support obligation during the period such benefits are paid. This will usually cover the period of disability. But in an exceptional case like the present one where a child support arrearage occurred because of a lapse of time between the occurrence of the disability and the commencement of benefit payments, any excess of payments over obligation during the benefit period may fairly be credited against that arrearage. Such credit does not unreasonably vary the decree or divert the social security benefits from their purpose.

Id. at 682. Accord *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996).

We are in agreement with this reasoning and determine that the date of the occurrence which entitles a person to Social Security benefits should be used for purposes of establishing when the benefits may be utilized as a substitute for income. See, *Hern v. Erhardt, supra* (holding critical time period with respect to applying Social Security disability benefits as credit against child support arrearage is when parent under support obligation becomes disabled); *Weaks v. Weaks, supra* (finding that recipient of disability benefits is commonly deprived of only means of support upon becoming disabled); *Potter v. Potter*, 169 N.J. Super. 140, 404 A.2d 352 (1979) (holding Social Security regarded as fully substitutionary for lost earning power during period of time when parent is disabled and unable to work).

[13] Equitable considerations lead us to allow excess Social Security dependency benefits to be credited against child support arrearage which has accrued from the date of the occurrence which entitled the parent to such benefits, unless the allowance of such credit, in the particular case, would be inequitable. See *Hanthorn v. Hanthorn*, 236 Neb. 225, 460

N.W.2d 650 (1990). This, however, does not relieve the parent from making a good faith effort to apply for dependent benefits as soon as possible. See *Hern v. Erhardt, supra.*

The record in this case does not present any evidence of inequity in crediting Gress for his child support arrearage. However, the record does not indicate the date of the occurrence which entitled Gress to benefits. We therefore remand the cause to the district court for a determination of the date of the occurrence which entitled Gress to benefits. The district court is directed to apply any excess Social Security benefits to all vested arrearage which accrued from the date of the occurrence which entitled Gress to utilize Social Security benefits as a substitute for his income. As to the arrearage which accrued prior to the date of the occurrence, no credit may be given.

CONCLUSION

We remand this cause to the district court for determination of the date of the occurrence which entitled Gress to Social Security benefits with directions to credit any excess benefit payments to all vested arrearage which accrued from that date.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT PIER AND DONA JO PIER, APPELLEES, V. STEPHANIE A. BOLLES, APPELLANT, AND BRETT E. PIER, APPELLEE.

596 N.W.2d 1

Filed June 11, 1999. No. S-98-900.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion, irrespective of the decision made by the court below.
2. **Visitation: Appeal and Error.** Factual determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.
3. **Visitation: Statutes.** In Nebraska, grandparent visitation is a creature of statute.
4. **Visitation.** In order for a trial court to grant grandparent visitation under Neb. Rev. Stat. § 43-1802(1) (Reissue 1998), evidence must be adduced to enable the court to find by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

5. ____. Once an order has been entered granting or denying grandparent visitation, the grandparent visitation statutes provide that the visitation order may be modified by the court upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the child.
6. **Visitation: Statutes: Parental Rights.** Pursuant to the grandparent visitation statutes, a grandparent's ability to seek visitation in the first instance is premised upon the relationship between the grandchild and his or her parent. Once the parental relationship is terminated, the statutory basis on which a grandparent can seek visitation is likewise extinguished.
7. **Visitation: Statutes: Legislature: Intent: Adoption.** The grandparent visitation statutes expressly provide a method by which to modify previously ordered grandparent visitation, and thus, the Legislature intended that grandparent visitation granted under the statutes not be interrupted by the adoption statutes.
8. **Visitation: Adoption.** The grandparent visitation statutes provide a two-step analysis by which the court, upon application, can determine on a case-by-case basis whether an order previously granting or denying grandparent visitation should be modified. Thus, following the adoption of a child, if the evidence shows that there has been a material change in circumstances justifying a change and the best interests of the child would be served, previously granted grandparent visitation can be modified, up to and including termination of grandparent visitation.
9. **Visitation: Parental Rights: Adoption.** A prior court order granting grandparent visitation is not automatically terminated because of a biological parent's voluntary relinquishment of parental rights and the subsequent adoption of the minor child by his or her stepparent.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Gregory C. Damman and Joseph H. Murray, of Germer, Murray & Johnson, for appellant.

Mary Morgan Cote for appellees Robert Pier and Dona Jo Pier.

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

MILLER-LERMAN, J.

NATURE OF CASE

Stephanie A. Bolles, formerly Stephanie A. Pier, the natural mother of a minor child named "Dennie LeRoy Pier" at birth, appeals from the order of the district court for Hall County denying her petition for modification, in which Stephanie sought to terminate the grandparent visitation of Robert Pier and

Dona Jo Pier, husband and wife, the paternal grandparents of Dennie. We affirm in part and reverse in part the order of the district court, and remand the cause for proceedings consistent with this opinion.

STATEMENT OF FACTS

Stephanie and Brett E. Pier were married on May 4, 1990. The couple had one child during their marriage Dennie, who was born on March 11, 1991. On December 14, 1992, Stephanie and Brett divorced. Pursuant to the district court's decree of dissolution of marriage, custody of Dennie was granted to Stephanie. The decree also granted grandparent visitation to Brett's parents, Robert and Dona Jo. The decree provided, however, that Stephanie could unilaterally terminate any and all visitation with the grandparents if Brett violated his criminal probation order or was charged with a criminal offense within 2 years after the entry of the decree. In September 1994, the grandparents' visitation was terminated, evidently due to the occurrence of one of these events.

On October 20, 1994, Robert and Dona Jo initiated a new action in the district court, seeking grandparent visitation with Dennie. This appeal arises from this separate action. The grandparents were evidently granted temporary visitation in the course of the new action. On May 26, 1995, the district court awarded the grandparents visitation with Dennie. It is this visitation order which was the subject of Stephanie's petition to modify, the denial of which is before this court.

In August 1993, Stephanie married Martin Bolles, who became Dennie's stepfather. On October 20, 1995, Brett voluntarily relinquished his parental rights to the child and consented to Dennie's adoption by Martin. In accordance with state law, on February 2, 1996, the district court, having jurisdiction over Stephanie and Brett's divorce, entered an order consenting to the county court's adoption proceedings. Thereafter, on April 11, Martin adopted Dennie.

On June 6, 1997, Stephanie moved to modify the May 1995 grandparent visitation order, seeking to terminate Robert and Dona Jo's visitation with Dennie due to Brett's relinquishment of his parental rights and the adoption of Dennie by Martin. Modification of an existing grandparent visitation order is per-

mitted under the grandparent visitation statutes, Neb. Rev. Stat. §§ 43-1801 through 43-1803 (Reissue 1998), upon a showing that there has been a material change in circumstances and that modification would serve the best interests of the child. See § 43-1802(3).

The trial court conducted a hearing on July 31, 1998. The evidence consisted of the following: Stephanie and Brett's divorce decree; the May 26, 1995, order granting Robert and Dona Jo visitation with Dennie; Brett's relinquishment of parental rights and consent to adoption; the district court's order consenting to the adoption; the adoption decree; Dennie's birth certificate reissued after his adoption by Martin showing Dennie's name as "Dennie LeRoy Bolles"; a one-page, two-paragraph affidavit from Dona Jo stating that she has "had a close, loving relationship with him [Dennie]" and has exercised regular visitation with him; and the parties' trial stipulation, agreeing to the submission of Stephanie's petition on the basis of the above evidence. Stephanie specifically stipulated that she "offer[s] no evidence on the issue of whether or not the requested modification and termination of grandparent visitation rights is in the best interests of" Dennie.

In a written order entered August 10, 1998, the district court denied Stephanie's petition for modification. The order provided that "the prior order of this Court granting grandparent visitation . . . is not automatically terminated because of the adoption of the minor child by the step-father" and it is "in the best interests of the minor child to maintain [Robert and Dona Jo's] grandparent visitation rights." This appeal followed.

ASSIGNMENT OF ERROR

On appeal, Stephanie has assigned one error in which she claims that based upon Brett's relinquishment of his parental rights and the subsequent adoption of Dennie by Martin, the trial court erred in denying her motion to modify Robert and Dona Jo's grandparent visitation.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion, irrespective of the decision

made by the court below. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999); *State ex rel. Wood v. Fisher Foods*, 254 Neb. 982, 581 N.W.2d 409 (1998). Factual determinations concerning grandparent visitation are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion. *Morris v. Corzatt*, 255 Neb. 182, 583 N.W.2d 26 (1998).

ANALYSIS

[3] The instant appeal presents the issue of whether under Nebraska law paternal grandparent visitation with a child, granted following a divorce proceeding, is automatically terminated by the father's voluntary relinquishment of parental rights and the subsequent adoption of the child by the stepfather. In Nebraska, grandparent visitation is a creature of statute. See *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982). See, also, *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). At common law in Nebraska and elsewhere, "grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents. . . . Indeed, the parents' obligation to allow such visitation was a moral, not a legal obligation." *Ex Parte Bronstein*, 434 So. 2d 780, 782 (Ala. 1983). Recognizing the important role that grandparents can play in a child's life, every state adopted a statutory scheme permitting grandparent visitation under varying circumstances. 3 Family Law and Practice § 32.09[7][b][ii] (Arnold H. Rutkin ed., 1999). The circumstances under which grandparents can seek and retain visitation differ widely from state to state. *Id.*

Nebraska was the last state in the nation to grant grandparent visitation. Judiciary Committee Hearing, L.B. 105, 89th Leg., 1st Sess. 91 (Mar. 25, 1985). In 1986, the grandparent visitation statutes, 1986 Neb. Laws, L.B. 105, were enacted by the Nebraska Legislature, setting forth the grandparents' statutory visitation. Under the grandparent visitation statutes, a grandparent may seek visitation under the following circumstances:

> A grandparent may seek visitation with his or her minor grandchild if:

> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

§ 43-1802(1). Robert and Dona Jo's grandparent visitation order at issue in this case was entered pursuant to § 43-1802(1)(b) after the divorce of Stephanie and Brett.

[4,5] In order for a trial court to grant visitation in the first instance, evidence must be adduced to enable the court to find "by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship." § 43-1802(2). Once an order has been entered granting or denying grandparent visitation, § 43-1802(3) provides that the visitation order may be modified by the court "upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the child." As noted above, the proceedings herein were conducted pursuant to § 43-1802(3).

Stephanie argues that Brett's voluntary relinquishment of his parental rights and consent to Dennie's adoption by Martin terminates, by operation of law, Robert and Dona Jo's grandparent visitation previously granted by court order. Stephanie relies on the adoption statutes in support of her argument. Robert and Dona Jo argue that their grandparent visitation survived Dennie's adoption and that the controlling statute in this case is the modification provision found at § 43-1802(3). We agree with Robert and Dona Jo.

Stephanie claims that the effect-of-adoption statutes automatically extinguish the visitation of the grandparents when the child is adopted. She relies on Neb. Rev. Stat. §§ 43-110 and 43-111 (Reissue 1998). According to § 43-110,

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal

> consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.

Pursuant to § 43-111, after an adoption occurs, "the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution."

At issue in this case is the status of the natural grandparents' visitation following the child's adoption by the stepparent. Section 43-110 speaks to the rights of the adoptive family and states, inter alia, that the adoptive parent and "his, her or their kindred" shall enjoy the consequences of the natural relation of such family members upon adoption. Section 43-111 speaks to the status of the natural parents following the adoption of the child and states, inter alia, that the "natural parents of the adopted child shall be relieved of all parental duties." In contrast to § 43-110, nowhere in § 43-111 is there any reference to the "kindred" of the natural parent as being affected by or relieved of duties of their natural relationship to the child. Thus, the explicit effect of §§ 43-110 and 43-111 is to provide that the adoptive parent and his or her kindred enjoy a new relationship to the child but that only the natural parents of the adoptive child are relieved of their duties to the child. The substance of § 43-111 was last amended in 1985. When the grandparent visitation statutes, which include a provision for visitation modification, became effective in 1986, the effect of adoption upon the natural parent and absence of explicit effect on the natural parent's "kindred" under § 43-111 were in place, and it is assumed that the Legislature was aware of and acquiesced in the law as it existed when it passed the new legislation pertaining to the same or a related subject matter. See *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). Thus, although § 43-111 relieves the natural parents of their parental duties, unlike § 43-110, it does not provide for a stated effect of adoption on the natural grandparents. Such effect is to be found in the grandparent visitation statutes. As we have previously observed, "the visitation act and the adoption statutes do not relate to the same subject.

The former defines grandparents and their rights; the latter define parents and their rights." *Rust v. Buckler*, 247 Neb. 852, 854, 530 N.W.2d 630, 632 (1995).

Grandparent visitation in Nebraska was created by statute, and we must look to those statutes to determine the visitation rights of natural grandparents following an adoption of the child. 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. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

[6] In this case, Robert and Dona Jo sought and obtained their visitation in an independent action filed in 1994. Their standing was predicated upon their satisfying the statutory definition of "grandparent," a definition they met at the time they filed the 1994 action. Specifically, they were the biological parents of Brett, who was the biological parent of Dennie. See § 43-1801. Subsequent to the entry of the 1995 visitation order, however, Brett voluntarily relinquished his parental rights to Dennie, and the child was adopted by Martin. There is no question that under the grandparent visitation statutes, if Brett had terminated his parental rights and Dennie had been adopted by his stepfather prior to Robert and Dona Jo's seeking grandparent visitation, Robert and Dona Jo would have had no standing under the statutes to seek such visitation. Pursuant to the grandparent visitation statutes, a grandparent's ability to seek visitation in the first instance is premised upon the relationship between the grandchild and his or her parent. Once the parental relationship is terminated, the statutory basis on which a grandparent can seek visitation is likewise extinguished. *Rust v. Buckler*, 247 Neb. at 855, 530 N.W.2d at 632 (applying "plain, ordinary, and popular" reading to adoption statute, maternal grandparents who adopted child became child's "parents," who were not deceased, divorced, or in process of seeking divorce, thus precluding visitation by paternal grandparents under grandparent visitation statutes because no condition existed under which they could seek visitation).

[7,8] Grandparent visitation is statutorily derived. Unlike the provisions relative to grandparents seeking visitation in the first

instance, nothing contained within the modification provisions of the grandparent visitation statutes makes the modification of previously ordered grandparent visitation dependent upon the parent's continued parental relationship with the child. Indeed, construing the adoption statutes and the grandparent visitation statutes in pari materia, we determine that by the grandparent visitation statutes' express provision of a method by which to modify previously ordered grandparent visitation, the Legislature intended that grandparent visitation granted under these statutes not be interrupted by the adoption statutes. Instead, the grandparent visitation statutes provide a two-step analysis by which the court, upon application, can determine on a case-by-case basis whether an order previously granting or denying grandparent visitation should be modified. Thus, following the adoption of the child, if the evidence shows that there has been a material change in circumstances justifying a change and the best interests of the child would be served, previously granted grandparent visitation can be modified, up to and including termination of grandparent visitation.

In construing the modification provision of the grandparent visitation statutes, this court has recently affirmed a trial court's order, inter alia, terminating previously granted grandparent visitation, upon a finding by the trial court based on evidence that such termination comports with the statutory provisions. In *Morris v. Corzatt*, 255 Neb. 182, 583 N.W.2d 26 (1998), the grandparents had been granted visitation under Kansas law with one of two grandchildren. When the grandchildren and their mother moved to Nebraska, the grandparents registered their Kansas order in Nebraska. Thereafter, the grandparents sought visitation with the second grandchild under the Nebraska grandparent visitation statutes, and the mother cross-petitioned to modify visitation as to the first child also under the same statutory provisions. The trial court denied the grandparents' petition seeking visitation with the second grandchild and granted the mother's petition to modify, vacating the Kansas grandparent visitation order as to the first grandchild.

On appeal, we affirmed the decisions of the trial court. In so ruling, we recognized that the "statutory criteria for modification of a prior grandparent visitation order are different than the

criteria for obtaining grandparent visitation in the first instance and are set out in § 43-1802(3)." *Morris v. Corzatt*, 255 Neb. at 188, 583 N.W.2d at 30. We then reviewed the evidence in the case, which consisted of abundant live testimony from the grandparents, the mother, a Kansas family mediator, a friend of the mother who was a witness to telephone conversations between the mother and the grandmother, and a Nebraska child custody officer, acting in a capacity similar to a guardian ad litem. Five other witnesses testified by affidavit, providing substantive factual information regarding the relationships between the parties and the children. Based upon this detailed record, we found no abuse of discretion in the trial court's determination that the grandparents were attempting to undermine the relationship between the mother and the children and that such activities were not in the best interests of the children. We affirmed the trial court's order vacating the grandparent visitation order as to the first grandchild pursuant to § 43-1802(3) and the denial of grandparent visitation as to the second grandchild pursuant to § 43-1802(2)

The Legislature provided a specific provision under § 43-1802(3) by which an order pertaining to grandparent visitation granted under the grandparent visitation statutes can be modified upon the occurrence of changed circumstances justifying modification and where modification would serve the best interests of the child. Stephanie moved under § 43-1802(3) to modify visitation. At the trial on the petition to modify, the parties in the instant case specifically stipulated that Stephanie offered no evidence on whether modifying the grandparent visitation order was in Dennie's best interests. We further note that the only evidence offered by Robert and Dona Jo is a single sentence contained in Dona Jo's affidavit stating in a conclusory manner that she has had "a close, loving relationship with [Dennie] since his birth" and that Robert and Dona Jo have exercised regular visitation with the child since grandparent visitation was granted.

[9] The trial court determined in its August 13, 1998, written order that "the prior order of this Court granting grandparent visitation . . . is not automatically terminated because of the adoption of the minor child by the step-father." We agree with

this written legal conclusion and as a matter of law affirm that portion of the trial court's order. The trial court continued, however, that it was "in the best interests of the minor child to maintain [Robert and Dona Jo's] grandparent visitation rights." Given the scant record of evidence regarding the child's best interests, we find this determination to be an abuse of discretion and reverse this portion of the trial court's order.

CONCLUSION

Under our obligation to review questions of law independent of the trial court's decision, we hold that the trial court in this case correctly concluded that the grandparent visitation previously granted was not automatically terminated by Brett's voluntary relinquishment of parental rights and Dennie's subsequent adoption by his stepfather. Accordingly, we affirm that portion of the trial court's order. Under our de novo standard of review of the trial court's factual finding concerning continued visitation in this case, we hold that given the lack of evidence on the issue of the child's best interests, the trial court abused its discretion in finding that continued grandparent visitation was in the best interests of Dennie.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HOWARD S. FACKLER AND PATRICIA A. FACKLER, HUSBAND AND WIFE, APPELLANTS, V. ROGER M. GENETZKY, APPELLEE.

595 N.W.2d 884

Filed June 18, 1999. No. S-98-457.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Malpractice.** The standards of professional negligence apply to a malpractice action involving a veterinarian.

4. **Malpractice: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized professional standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
5. **Summary Judgment: Proof.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial.
6. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
7. **Actions: Judgments: Final Orders: Appeal and Error.** Where multiple causes of action are alleged, an entry of judgment on one cause of action is a final, appealable order with respect to that cause of action, despite the pendency of other causes of action in the same suit.
8. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
9. **Actions.** Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief.
10. **Damages: Mental Distress: Animals.** Nebraska law regards animals as personal property; mental suffering is not a legitimate measure of damages for destruction of personal property.
11. ____: ____: ____. Damages for mental suffering or emotional distress may not be recovered for the negligently inflicted death of an animal.
12. **Actions: Equity: Unjust Enrichment.** An action for assumpsit for money had and received may be brought where a party has received money which in equity and good conscience should be repaid to another; in such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.
13. **Actions: Equity: Words and Phrases.** Although founded on equitable principles, an action for assumpsit for money had and received falls under the common-law class of assumpsit and is an action at law.
14. **Actions: Proof.** In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.

Appeal from the District Court for Dakota County: MARK J. FUHRMAN, Judge. Reversed and remanded for further proceedings.

Dorothy A. Schinzel for appellants.

Charles T. Patterson and Patrick L. Sealey, of Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

Howard S. Fackler and Patricia A. Fackler appeal from a summary judgment entered against them by the district court in their professional negligence action against Roger M. Genetzky, a veterinarian. For the reasons stated herein, we reverse the judgment and remand the cause for further proceedings.

FACTUAL BACKGROUND

PLEADINGS

The Facklers filed a petition in the district court on February 12, 1997, against Genetzky and the Atokad racetrack, located in South Sioux City, Nebraska. Atokad subsequently settled with the Facklers and was dismissed as a defendant. The petition generally alleged that Genetzky and Atokad were responsible for the deaths of two racehorses owned by the Facklers. Specifically, the Facklers claimed five "causes of action" as follows:

(1) The "Indian Magic" claim. The Facklers allege that Genetzky and Atokad are responsible for the death of a 5-year-old gelding named "Indian Magic." The theory advanced by the Facklers is that Genetzky gave Indian Magic injections of Lasix and "Bute," two commonly used equine medications, on June 17, 1995. Indian Magic died during the night of June 19-20. The Facklers allege that an autopsy performed by the Veterinary Diagnostic Center of the University of Nebraska concluded that the death was caused by an infection resulting from the use of nonsterile procedures during the administration of an injection given to the horse by Genetzky, making him the cause of Indian Magic's death. The Facklers claim that Indian Magic's value, based upon his initial cost and expected earnings for the next 15 years, was $279,710.

(2) The second "cause of action" related only to Atokad and has been dismissed pursuant to the settlement.

(3) The "Patricia Gold" claim. The Facklers allege that Genetzky and Atokad are responsible for the death of a 3-year-old mare named "Patricia Gold." Patricia Gold's value is alleged to be at least $850,000, based upon her initial cost, future earning capacity, and the projected birth of nine colts, expected to be worth at least $50,000 each. The Facklers allege that they asked Genetzky to administer a lubricating injection to Patricia Gold's knee. On June 4, 1995, Genetzky administered a substance called "Vetalog," which the Facklers allege is not a lubricant, but instead acts to freeze a joint. When the Facklers ran Patricia Gold, her knee shattered, and she was put down.

(4) The "emotional distress" claim. The Facklers allege that the deaths of Indian Magic and Patricia Gold were caused by Genetzky and Atokad and resulted in "much emotional distress" for the Fackler family. This "cause of action" consists entirely of reiterations of how much the Facklers cared for the horses. The Facklers also claim that the horses, particularly Indian Magic, were very close to the Facklers' son. The Facklers' son, however, is not a party to the action.

(5) The "fraudulent billing" claim. The Facklers allege that Genetzky billed the Facklers for services which were not performed and that as a result, Genetzky collected $252 from the Facklers to which he was not entitled.

Summary Judgment Orders

On April 21, 1997, Genetzky moved for partial summary judgment on the emotional distress claim. On July 17, the district court granted partial summary judgment in favor of Genetzky as to the emotional distress claim, based on its determination that Nebraska law does not support a claim for emotional distress resulting from the death of an animal. On January 2, 1998, Genetzky filed a motion for summary judgment on the remaining claims. On April 15, the district court granted summary judgment in favor of Genetzky as to the Indian Magic and Patricia Gold claims, stating that the plaintiffs had failed to present evidence regarding a breach by Genetzky of the standard of care. On the same date, the district court entered summary judgment in favor of Genetzky on the fraudulent billing claim because there was no evidence of damages from the alleged overbilling.

EVIDENCE FOR SUMMARY JUDGMENT MOTIONS

In support of the motions for summary judgment, Genetzky offered 11 exhibits, and the Facklers offered exhibit 12 in opposition. These exhibits are summarized as follows:

Exhibits 1 and 2 are the pleadings. Exhibit 3, entered in support of the 1998 motion for summary judgment, is a copy of the summary judgment order for the 1997 summary judgment on the emotional distress claim. Exhibits 5 and 6 relate only to Atokad and are not relevant to this appeal. Exhibits 10 and 12 are affidavits from the Facklers in opposition to summary judgment, stating only their belief that issues of material fact remain to be decided.

Exhibit 4 is Genetzky's answers to interrogatories. Generally, it contains information about his bills to the Facklers and his insurance coverage.

Exhibit 7 is the deposition of Howard Fackler. The deposition is concerned primarily with the methods used by the Facklers to determine the alleged value of the horses. The deposition also contains Howard's opinion regarding the standard of care that Genetzky should have met, based on his observation that Genetzky had not cleaned Indian Magic's neck prior to administering an injection. Howard claims that the autopsy report for Indian Magic established Genetzky's negligence. Howard also offers his opinion regarding the cause of Patricia Gold's shattered knee. Howard concedes that he is neither a veterinarian nor a veterinary expert. Howard also concedes that the Facklers did not intend to call an expert witness to support the Patricia Gold claim. Howard testified that he had not paid $315 of Genetzky's bills.

Exhibit 8 is the deposition of Patricia Fackler. Patricia's testimony offers nothing beyond that of Howard, and she also concedes that Genetzky's bills are unpaid.

Exhibit 9 is the deposition of Genetzky. Genetzky's testimony relates primarily to his qualifications, as well as to the factual events prior to the deaths of Indian Magic and Patricia Gold. Genetzky generally confirms the allegations of the Facklers regarding the treatments administered to the horses. There is some brief discussion of the autopsy report, but Genetzky expresses no opinion as to its contents, which were unclear from

the deposition testimony. Genetzky expresses no opinion regarding the standard of care, whether he met the standard of care, or what may have caused the death of the horses.

Exhibit 11 is the Facklers' answers to interrogatories. In the interrogatory answers, the Facklers named the expert witnesses they intended to call at trial, as well as the general subject of their testimony, but did not describe the opinions the experts were expected to offer.

The record does not contain the autopsy report, nor does it contain any expert testimony other than that of Genetzky. The only evidence in the record relating to the standard of care, possible breach of the standard of care, and the actual cause of the death of the horses comes from Howard's nonexpert testimony.

ASSIGNMENTS OF ERROR

The Facklers assign, consolidated and restated, that the district court erred in entering summary judgment against them on their first, third, fourth, and fifth causes of action.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

[2] In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Koltes v. Visiting Nurse Assn., supra*; *Divis v. Clarklift of Nebraska*, 256 Neb. 384, 590 N.W.2d 696 (1999).

ANALYSIS

Indian Magic and Patricia Gold Claims

[3] The allegations in the Facklers' petition, construed liberally, state a professional negligence cause of action against Genetzky. This court has previously applied the standards of

professional negligence to a malpractice action involving a veterinarian. *Barney v. Pinkham*, 29 Neb. 350, 45 N.W. 694 (1890). This is the rule in other jurisdictions as well. See, e.g., *Price v. Brown*, 545 Pa. 216, 680 A.2d 1149 (1996); *Downing v. Gully*, 915 S.W.2d 181 (Tex. App. 1996); *Restrepo v. State*, 146 Misc. 2d 349, 550 N.Y.S.2d 536 (1989), *aff'd* 179 A.D.2d 804, 580 N.Y.S.2d 874 (1992); *Turner v. Sinha*, 65 Ohio App. 3d 30, 582 N.E.2d 1018 (1989); *Bartlett v. MacRae*, 54 Or. App. 516, 635 P.2d 666 (1981). As stated by the Supreme Court of Pennsylvania,

> As to a cause of action based on the negligence of a veterinarian in the performance of his/her professional duties or services, we note at the outset that malpractice claims have traditionally arisen in the context of services provided by the legal and medical professions. Similar to the practice of law or medicine, the vocation of veterinary medicine involves specialized education, knowledge, and skills. We conclude, therefore, that professional negligence concepts also extend to veterinary medicine.

Price v. Brown, 545 Pa. at 222, 680 A.2d at 1152. We agree.

[4] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized professional standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Although Genetzky disputes the amount of damages claimed in the Facklers' petition, he does not dispute that the Facklers could show some damages from the professional malpractice claims. Genetzky argues that he was entitled to summary judgment because the evidence presented a prima facie case that Genetzky had not deviated from the generally recognized standard of care and that the Facklers failed to rebut his prima facie showing.

[5,6] A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). In the absence of a prima facie showing by the movant

that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Id.*

In the present case, Genetzky has offered no evidence in support of his motion for summary judgment that establishes the professional standard of care for a veterinarian under these circumstances nor any evidence establishing that his actions comported with such standard of care. Such evidence is necessary for Genetzky to have made a prima facie showing for summary judgment.

A similar situation was presented in *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). In *Hanzlik v. Paustian, supra*, the defendant physician in a medical malpractice action successfully moved for summary judgment based upon answers to interrogatories and the depositions of the parties. The defendant's deposition explained the procedures he had followed and the possible consequences of those procedures, but the record contained no evidence that the procedures met the accepted standards of reasonable medical care. *Id.* Based on that record, we determined that "[t]he defendant failed to make a prima facie showing of the absence of negligence on his part, and therefore no burden of producing evidence shifted to the plaintiff." *Id.* at 328, 318 N.W.2d at 716. Consequently, we determined that the defendant was not entitled to summary judgment.

In *Black v. Schmitz*, 211 Neb. 378, 318 N.W.2d 746 (1982), this court reversed a summary judgment granted in a medical malpractice action. In that case, the defendant physician alleged in his answer that he had acted in accordance with the appropriate standard of care. The only evidence entered in support of the summary judgment, however, was the court file and the deposition of the plaintiff's medical expert. *Id.* We determined that "[i]n the absence of any affidavit or deposition of a medical expert witness for the defendants establishing the facts alleged in the answer, there was no evidence upon which the trial court could enter a summary judgment." *Id.* at 380, 318 N.W.2d at 747.

Our decisions in *Hanzlik v. Paustian, supra*, and *Black v. Schmitz, supra*, are controlling in the present case. Genetzky provided no evidence in support of his motion for summary judgment establishing either the appropriate standard of care or that his actions met such standard of care. Because Genetzky failed to make a prima facie showing of the absence of negligence on his part regarding the Indian Magic and Patricia Gold claims, no burden of producing evidence shifted to the Facklers. We, therefore, conclude that Genetzky was not entitled to summary judgment on the Indian Magic and Patricia Gold claims.

Emotional Distress Claim

The first issue we must confront regarding the emotional distress claim is whether it has been properly preserved for appellate review. This claim is styled in the Facklers' petition as their "Fourth Cause of Action." This claim was dismissed by the district court in an order filed July 17, 1997. The Facklers did not take an appeal in this case, however, until May 11, 1998.

[7] Where multiple causes of action are alleged, an entry of judgment on one cause of action is a final, appealable order with respect to that cause of action, despite the pendency of other causes of action in the same suit. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998). In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998). Consequently, if the emotional distress claim was in fact a distinct cause of action, then the district court's granting of summary judgment on July 17, 1997, was a final, appealable order and the Facklers failed to take a timely appeal. See *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997). The critical question, then, is whether the emotional distress claim is a separate cause of action.

[8,9] A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *Fitzke v. City of Hastings, supra*. Whether more than one cause of action is stated depends mainly upon whether more than one primary right or subject of

controversy is presented and also upon whether recovery on one ground would bar recovery on the other, whether the same evidence would support the different counts, and whether separate actions could be maintained for separate relief. *Id.*

It is evident, based upon the pleadings and the standards set forth above, that the emotional distress claim is not a cause of action, but, rather, a separate theory of recovery or element of damage. It is based on the same set of operative facts that support the Indian Magic and Patricia Gold claims. The claim presents the same right and subject of controversy as the professional negligence claims, depends upon the same evidence, and would not allow for a separate action or separate recovery from the professional negligence claims. The emotional distress claim was not a separate cause of action, and the district court's partial summary judgment relating to the emotional distress claim was not, standing alone, a final, appealable order. Thus, the Facklers did not waive the claim by failing to take a timely appeal, and we properly have jurisdiction to consider it.

[10] The district court entered partial summary judgment based upon its determination that emotional damages cannot be recovered for the death of an animal. Nebraska law has generally regarded animals as personal property. See *Nehr v. State*, 35 Neb. 638, 53 N.W. 589 (1892). This court has held that mental suffering is not a legitimate measure of damages for destruction of personal property. *Henderson v. Weidman*, 88 Neb. 813, 130 N.W. 579 (1911).

In other jurisdictions, the general rule is that an animal, regardless of sentimental attachment, is personal property, and recovery cannot be had for emotional damages resulting from the negligent destruction of that property. See, e.g., *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996); *Julian v. De Vincent*, 155 W. Va. 320, 184 S.E.2d 535 (1971); *Zeid v. Pearce*, 953 S.W.2d 368 (Tex. App. 1997); *Strawser v. Wright*, 80 Ohio App. 3d 751, 610 N.E.2d 610 (1992); *Daughen v. Fox*, 372 Pa. Super. 405, 539 A.2d 858 (1988), *appeal denied* 520 Pa. 605, 553 A.2d 967; *Fowler v Town of Ticonderoga*, 131 A.D.2d 919, 516 N.Y.S.2d 368 (1987); *Roman v. Carroll*, 127 Ariz. 398, 621 P.2d 307 (Ariz. App. 1980). But see, *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981);

Fredeen v. Stride, 269 Or. 369, 525 P.2d 166 (1974); *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964).

Some courts have recognized a cause of action for intentional infliction of emotional distress where the intentional killing of an animal was concerned. See, *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985); *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Idaho App. 1985).

In considering the cases involving negligent injury or destruction of animals, however, we determine that the majority approach is well reasoned and consistent with settled principles of Nebraska law. This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property. People may develop an emotional attachment to personal property, whether animals or inanimate objects with sentimental value, but the law does not recognize a right to money damages for emotional distress resulting from the negligent destruction of such property.

[11] Accordingly, we hold that damages for mental suffering or emotional distress may not be recovered for the negligently inflicted death of an animal. The district court's determination to that effect was not error.

Fraudulent Billing Claim

The Facklers allege that Genetzky billed the Facklers for services which were not performed and that as a result, Genetzky collected $252 from the Facklers to which he was not entitled. When an overbilling claim has been raised as an action in itself, rather than a defense to a collection action, this court has regarded the claim as an action for assumpsit for money had and received. See, e.g., *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987); *Village of Morrill v. Roosevelt P.P. Dist.*, 215 Neb. 41, 337 N.W.2d 125 (1983).

[12,13] An action for assumpsit for money had and received may be brought where a party has received money which in equity and good conscience should be repaid to another. *Daubman v. CBS Real Estate Co.*, 254 Neb. 904, 580 N.W.2d 552 (1998); *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995). In such a circumstance, the law implies a promise on the part of the person who received the money to

reimburse the payor in order to prevent unjust enrichment. *Id.* Although founded on equitable principles, the action falls under the common-law class of assumpsit and is an action at law. See *id.*

[14] In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff. See *Sesostris Temple Golden Dunes v. Schuman, supra.*

In the present case, the Facklers adequately pled an action for assumpsit for money had and received, claiming that Genetzky had overcharged the Facklers in the amount of $252. The undisputed evidence entered in support of Genetzky's motion for summary judgment, however, established that the Facklers had not paid Genetzky and still owed him a total of $315.

Given these facts, it is clear that there was no genuine issue as to any material fact. Genetzky had neither received nor retained the money, so the Facklers could not prove any of the elements required to sustain the cause of action. Thus, Genetzky was entitled to judgment as a matter of law regarding the Facklers' fraudulent billing claim.

CONCLUSION

Because Genetzky failed to make a prima facie showing of the absence of negligence on his part, we conclude that the district court erred when it granted summary judgment in favor of Genetzky on the professional negligence claims regarding Indian Magic and Patricia Gold. It is regarding those issues that the district court's judgment is reversed, and the cause is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHEILA A. ROZMUS, APPELLEE, V. RONALD L. ROZMUS, APPELLEE, STATE OF NEBRASKA, INTERVENOR-APPELLEE, AND POLICY STUDIES, INC., DOING BUSINESS AS CHILD SUPPORT SERVICES OF NEBRASKA, APPELLANT.

IN RE APPROVAL AND APPOINTMENT OF AUTHORIZED ATTORNEYS. LEGAL AID SOCIETY, APPELLEE, V. POLICY STUDIES, INC., DOING BUSINESS AS CHILD SUPPORT SERVICES OF NEBRASKA, APPELLANT.

IN RE INTEREST OF BRADLEY D. AND RYAN D., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. POLICY STUDIES, INC., DOING BUSINESS AS CHILD SUPPORT SERVICES OF NEBRASKA, APPELLANT.

595 N.W.2d 893

Filed June 18, 1999. Nos. S-98-774, S-98-775, S-98-872.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Parties: Judgments: Appeal and Error.** An appeal is generally available only to persons who were parties to the case below, although in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **Attorney and Client.** Selecting an attorney is clearly a decision reserved for the client exclusively.
6. **Standing: Claims: Parties.** A litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal in No. S-98-774 dismissed.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Appeal in No. S-98-775 dismissed.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Appeal in No. S-98-872 dismissed.

Shawn D. Renner and Mary Kay Frank, of Cline, Williams, Wright, Johnson & Oldfather, and Andrew W. Loewi, Jeanine W.

Anderson, and Richard P. Barkley, of Brownstein, Hyatt, Farber & Strickland, P.C., for appellant.

Thomas C. Riley, Douglas County Public Defender, Leslie E. Kendrick, and Nicole R. Neesen, for appellees.

Jeffrey R. Wagner and Brian R. Leahy, of Legal Aid Society, Inc., for appellees.

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

CONNOLLY, J.

In these consolidated appeals, Policy Studies, Inc., doing business as Child Support Services of Nebraska (PSI), appeals various orders which disqualified PSI, a for-profit corporation, and barred PSI from enforcing the collection of child support orders for the Nebraska Department of Health and Human Services (DHHS). The orders were based on a finding that PSI and its attorneys were engaged in the unauthorized practice of law and were in violation of the Nebraska Supreme Court's Professional Service Corporations rule and Code of Professional Responsibility. DHHS did not appeal. Because PSI does not have standing, we dismiss.

BACKGROUND

CONTRACT WITH DHHS AND PSI STRUCTURE

PSI is a Colorado corporation (not a professional corporation), which filed a certificate of authority to transact business with the Nebraska Secretary of State in February 1993. PSI is organized to conduct "all lawful business for which a corporation may be organized pursuant to the Colorado Corporation Code." Only one of its officers and directors is an attorney, and that attorney is not licensed to practice law in Nebraska.

In February 1993, DHHS, then the Nebraska Department of Social Services, entered into a 5-year contract with PSI to assist with the enforcement of child support in Douglas County. In February 1998, DHHS entered into a similar 3-year contract with PSI. Both contracts provide as part of PSI's responsibilities:

> To represent the State in judicial and administrative hearings, including appeals, and to vigorously advocate the

> interests of the State consistent with the provisions of the Code of Professional Responsibility. In this regard, [PSI] agrees to bring all court actions in the name of the State of Nebraska on behalf of the child and the State or as provided by [DHHS] policy and State statute . . . .
>
> . . . .
>
> . . . ESTABLISHING LEGAL OBLIGATION FOR FINANCIAL AND MEDICAL SUPPORT: The timely use of appropriate legal remedies to secure orders of paternity and support . . . .
>
> . . . .
>
> . . . ENFORCEMENT: The timely use of appropriate legal remedies to enforce all orders of support . . . .

DHHS paid PSI for its services monthly based upon the amount of child support it collected.

In at least nine separate orders beginning in 1993, the Douglas County District Court appointed PSI's salaried attorneys as attorneys authorized to enforce child support, upon request of PSI's president and pursuant to Neb. Rev. Stat. § 43-512(6)(a) (Reissue 1998). In May 1998, PSI employed 78 people in Nebraska to perform its contract with DHHS. Five of them were attorneys, all licensed to practice law in Nebraska. Patricia Jacobs Kivett, managing attorney for PSI's Omaha office, stated that in 1997, PSI-employed attorneys entered appearances on behalf of DHHS in over 4,400 contempt hearings.

IN RE APPROVAL AND APPOINTMENT OF AUTHORIZED ATTORNEYS

In the case *In re Approval and Appointment of Authorized Attorneys*, case No. S-98-775 (*Authorized Attorneys*), the Douglas County public defender's office, on behalf of its clients, filed motions in district court to disqualify all attorneys employed by PSI in child support cases in which both PSI and the public defender represented parties (365 cases). The motions alleged that the opposing attorneys' employer, PSI, was practicing law but did not comply with the Nebraska Supreme Court's Professional Service Corporations rule and that thus, PSI was committing the unauthorized practice of law, in violation of Neb. Rev. Stat. § 7-101 (Reissue 1997). The motions also

alleged that PSI and/or the attorneys it employed were violating the Nebraska Code of Professional Responsibility, Canon 3, DR 3-102(A), which prohibits the sharing of fees with a nonlawyer, and Canon 5, DR 5-107(C)(2), which prohibits the practice of law within a corporate form wherein a nonlawyer is a corporate director or officer.

Subsequently, Legal Aid Society (Legal Aid), on behalf of its clients, filed motions in the district court to disqualify PSI in paternity actions in which it and PSI were representing parties (36 cases). The motions alleged that PSI was engaging in the unauthorized practice of law. In addition, Legal Aid moved the court to consolidate its motions to disqualify with the public defender's motions, which the court granted.

ROZMUS V. ROZMUS

Rozmus v. Rozmus, case No. S-98-774 (*Rozmus*), is an appeal from an order of the district court for Douglas County which granted a motion to disqualify PSI and its attorneys from enforcing the collection of child support orders for DHHS. That order is based on a finding that PSI and its attorneys were engaged in the unauthorized practice of law in violation of this court's Professional Service Corporations rule and the Code of Professional Responsibility. The record of *Authorized Attorneys* reflects that the motion to disqualify filed in *Rozmus* was one of the 365 public defender motions considered and determined in *Authorized Attorneys*.

IN RE INTEREST OF BRADLEY D. AND RYAN D.

In re Interest of Bradley D. and Ryan D., case No. S-98-872 (*Bradley D.*), is an appeal from a similar order entered by the separate juvenile court of Douglas County. In *Bradley D.*, the motion to disqualify was filed by Legal Aid and "other counsel." The trial court, on the motion of Legal Aid's counsel, consolidated 27 other child support cases as shown by an attachment to an order of the court dated July 16, 1998.

DISPOSITION OF *AUTHORIZED ATTORNEYS*, *ROZMUS*, AND *BRADLEY D.*

In sum, the motions in these three cases allege that PSI is a "for-profit" corporation doing business in Nebraska under a contractual arrangement with DHHS. It is argued that the business

of PSI, child support enforcement, amounts to the unauthorized practice of law by PSI as a "for-profit" corporation and is in violation of the Nebraska Supreme Court's Professional Corporations rule and the Code of Professional Responsibility. PSI contends that it was not practicing law in the performance of its contract with DHHS because the legal services performed for the benefit of DHHS were performed by employees who are licensed attorneys and not by laypersons. PSI argues that its interest, profiting financially by collecting as much child support as possible, does not conflict with the State's interest in collecting as much child support as possible. Therefore, as a matter of policy, PSI should be permitted to continue representing DHHS.

In *Authorized Attorneys* and *Rozmus*, the district court determined that PSI's actions constituted the practice of law by a corporation that was in compliance with neither the Nebraska Professional Corporation Act nor the Nebraska Supreme Court's rules governing the corporate practice of law, thereby violating § 7-101. The court ordered that PSI "is hereby disqualified from practicing law in this Court, as required by its contract with [DHHS] until such time as said corporation shall comply with the Nebraska Professional Corporation Act and the rules of the Supreme Court . . . ."

In *Bradley D.*, the juvenile court determined that PSI's actions in performing the contract with DHHS constituted the practice of law, but also determined that PSI was not in compliance with the Nebraska Professional Corporation Act and the rules of this court governing the corporate practice of law. The court concluded that "the actions of [PSI] and its authorized attorneys constitute the unauthorized practice of law" and ordered that PSI "is hereby disqualified from practicing law in the Douglas County Juvenile Court."

PSI appealed from both the district court's and juvenile court's disqualification orders in three separate appeals. The three appeals have been consolidated.

ASSIGNMENTS OF ERROR

First, PSI assigns that the district court erred in holding that PSI violated § 7-101 by employing licensed Nebraska attorneys to represent DHHS in child support enforcement actions.

Second, PSI assigns that both the district and juvenile courts erred in holding that PSI engaged in the unauthorized practice of law by employing licensed Nebraska attorneys to represent DHHS in child support enforcement actions. Third, PSI assigns that both the district and juvenile courts erred by failing to hold that PSI-employed lawyers did not engage in fee splitting in violation of Canon 3, DR 3-102(A), of the Nebraska Code of Professional Responsibility.

SCOPE OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

ANALYSIS

[2] As noted, DHHS did not appeal. Thus, the threshold issue is whether PSI, a nonparty, has standing to appeal. "An appeal is generally available only to persons who were parties to the case below," 5 Am. Jur. 2d *Appellate Review* § 264 at 38 (1995), although "in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it," § 265 at 39. See, e.g., *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987) (holding that nonparty attorney can separately appeal from final criminal judgment on issue of attorney fees for representing indigent client). Since DHHS did not appeal, we need to determine whether PSI has standing to bring these appeals.

[3,4] Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Cotton v. Steele, supra*; *Hawkes v. Lewis, supra*. 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. *Cotton v. Steele, supra*; *Hawkes v. Lewis, supra*.

DHHS, as the client whose attorneys were disqualified and as a party of record in the underlying child support, paternity, and child custody cases, clearly would have standing to appeal the disqualification orders; however, DHHS did not appeal. On the other hand, PSI is not a party of record in any of the underlying actions in which the disqualification orders were entered.

PSI cites no case in which an appellate court entertained an appeal of an attorney disqualification order in which the disqualified attorney rather than the client brought the appeal.

Nonetheless, PSI argues that "[t]he prospect of termination of the contract and withholding of monies otherwise due to PSI gives PSI precisely the sort of 'personal stake' in the outcome of the disqualification controversy necessary to establish PSI's standing to prosecute these appeals." Supplemental brief for appellant at 8. We note that the "personal stake" that PSI asserts, making profits by continuing to represent DHHS, is no different than any lawyer's financial interest in the continued representation of a client. Based upon PSI's reasoning, whenever a party's lawsuit is dismissed on a demurrer, summary judgment, or on the merits and the party chooses not to appeal, the party's attorney may nonetheless independently appeal on the ground that it has a personal stake in collecting continued fees or a contingency fee.

[5] Although PSI may arguably have an "interest" in making more money, that interest is, at best, peripheral to the real interest at stake in a disqualification proceeding, which is the client's interest in having the attorney of his or her choice. See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). See, also, *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997) (stating that providing interlocutory appeal for client assisted in protecting client's interest in retaining counsel of his or her choosing). Selecting an attorney is clearly a decision reserved for the client exclusively. See Canon 7, EC 7-7, of the Nebraska Code of Professional Responsibility. In this case, DHHS did not appeal the disqualifications and thus, in effect, rejected the opportunity to reinstate PSI as its counsel. PSI's request that this court reverse the disqualification orders, thereby reinstating its employed attorneys as counsel for DHHS, impermissibly interferes with DHHS' decision not to further

pursue retaining PSI's attorneys. Attorneys should not be able to use the legal system to force themselves upon uninterested clients. We conclude that PSI's asserted personal stake in the matter is not sufficient to give it standing to appeal.

[6] PSI also argues that because its client, DHHS, had a right to *immediately* appeal the disqualification orders per our decision in *Richardson v. Griffiths,* but did not, it should be able to do so in DHHS' absence. See *Richardson v. Griffiths, supra* (holding that party may make interlocutory appeal from disqualification order). However, the fact that DHHS had an immediate right to appeal does not mean that PSI also has that right. DHHS' right to appeal, whether interlocutory or otherwise, is its own. "[A] litigant must assert the litigant's own legal rights and interests, and *cannot rest his or her claim on the legal rights or interests of third parties.*" (Emphasis supplied.) *Hawkes v. Lewis*, 255 Neb. 447, 454, 586 N.W.2d 430, 435 (1998). Accord *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993).

Finally, PSI asserts that because the disqualification motions adjudicated in *Authorized Attorneys* were consolidated on a " 'miscellaneous' docket," which had previously been utilized to appoint PSI-employed attorneys as authorized attorneys eligible to prosecute child support enforcement, the consolidated hearing on the motions was a "special proceeding." Supplemental brief for appellant at 12. PSI contends that because the court's order was the result of a special proceeding and affected a substantial right, it has the right to appeal the disqualification order. This argument confuses the issue of standing with that of whether the disqualification order is a final order. Thus, this argument is also without merit.

CONCLUSION

We conclude that PSI lacks standing to appeal on its own behalf any of the district court's and juvenile court's attorney disqualification orders. Thus, we are without jurisdiction to adjudicate the merits of PSI's appeals and dismiss the appeals accordingly.

APPEALS IN NOS. S-98-774, S-98-775, AND S-98-872 DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN C. WHITEHEAD, RESPONDENT.
595 N.W.2d 269

Filed June 18, 1999. No. S-99-042.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, John C. Whitehead, was admitted to the practice of law in the State of Nebraska on June 29, 1964.

A disciplinary complaint is pending before the Counsel for Discipline of the Nebraska State Bar Association. Respondent was suspended from the practice of law on January 13, 1999, until further order of this court.

On October 17, 1997, respondent was found guilty by a jury in the U.S. District Court for the District of Nebraska of, inter alia, check kiting, a violation of 18 U.S.C. § 1344(1) (1994). On April 8, 1999, the U.S. Court of Appeals for the Eighth Circuit affirmed one count of the conviction, the check-kiting violation. See *U.S. v. Whitehead*, Nos. 98-2289, 98-2290, 1999 WL 191178 (8th Cir. Apr. 8, 1999).

On May 20, 1999, respondent filed a "Voluntary Surrender of License" to practice law.

Respondent admits that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (3), of the Code of Professional Responsibility. Respondent has freely and voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, or hearing prior to entry of such an order.

The court concludes there is a basis for disbarment and hereby accepts respondent's surrender of his license to practice law and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

MARTIN EVERTS, APPELLANT, V. JAN HARDCOPF-BICKLEY, DOING BUSINESS AS BICKLEY & ASSOCIATES, APPELLEE.

595 N.W.2d 911

Filed June 25, 1999. No. S-98-226.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
3. **Negligence: Proof: Trial.** In order to submit the issue of assumption of risk to the jury, the evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury.
4. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury.
5. **Jury Instructions: Pleadings: Evidence.** Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
6. ____: ____: ____. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for a new trial.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellant.

R. Douglas Stave and, on brief, Ronald H. Stave for appellee.

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

WRIGHT, J.

NATURE OF CASE

Martin Everts brought suit, claiming that a vocational rehabilitation counselor was negligent in recommending that he

work in a job which exceeded his physical capabilities and thereby caused him injury. The jury returned a verdict in favor of the rehabilitation counselor, and Everts timely appealed.

SCOPE OF REVIEW

[1] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

[2] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997).

FACTS

On September 9, 1991, Everts injured his lower back during the course of his employment with McGill Restoration. He visited his family physician, Dr. Robert Brown. Brown referred Everts to Dr. Louis Tribulato, an orthopedic surgeon, who diagnosed Everts with a moderate lumbar strain. Everts was given restrictions of moderate to light work with no lifting over 50 pounds.

Everts also underwent a "work hardening" program, and on completion of the program, he was evaluated as performing within the light to medium category of physical demand characteristics of work. The evaluator noted at that time that Everts was "not functioning at the physical demand characteristics" required for his job as a caulker/bricklayer, that his symptoms increased when he lifted increased weight, and that he was experiencing decreased lumbar flexibility. Thus, the evaluator opined that Everts could not return to his previous position as a caulker/bricklayer, and it was recommended that Everts consult with a vocational rehabilitation counselor regarding future potential employment opportunities.

After Everts completed the work hardening program, Brown provided McGill Restoration's workers' compensation carrier with a diagnosis. Brown diagnosed Everts as having a herniated lumbar disk and persistent pain in his back. Brown noted that he agreed with the recommendations of the work hardening pro-

gram. He also concluded that Everts was not capable of returning to his prior profession and, thus, needed to be retrained. In Brown's opinion, Everts suffered from a permanent partial disability of 15 percent to his body as a whole.

In January 1992, at the request of the workers' compensation carrier, Everts saw Dr. Anil Agarwal for an independent medical exam. Agarwal diagnosed Everts with a bulging lumbar disk at L5-S1 and chronic lumbar strain. Agarwal determined that further medical treatment or physical therapy was not necessary at that time; however, he recommended that Everts not lift over 50 pounds and that Everts avoid prolonged or repeated bending and stooping. Agarwal acknowledged that Everts' current job required him to lift in excess of 50 pounds, and thus, Agarwal opined that Everts' job needed to be modified.

Everts was next sent to Bickley & Associates to undergo vocational rehabilitation. Jan Hardcopf-Bickley (Bickley) was assigned as Everts' counselor. She was provided with Everts' medical history and informed of the physical restrictions placed on Everts by his doctors. During the rehabilitation, Bickley contacted Tim McGill, president of McGill Restoration, to see whether he had any positions available which matched the physical restrictions placed on Everts. She faxed McGill seven pages of a report regarding Everts' work hardening program. However, she omitted a page of the report stating that Everts could not return to his previous position as a caulker/bricklayer. McGill did not receive any other medical records or reports regarding Everts' restrictions. McGill informed Bickley that he did not have many jobs which would not exceed Everts' physical restrictions. However, he did have a temporary position which Everts could fill. Based upon the information provided by Bickley, McGill agreed to offer Everts a job which McGill believed to be within Everts' physical restrictions.

Thereafter, Bickley and Everts met to discuss various job opportunities, including McGill's offer to rehire Everts for a short period of time within the confines of his physical restrictions. Bickley visited the potential jobsite, weighed the equipment Everts would be using, and investigated the body positions Everts would be required to assume. Bickley then recommended that Everts return to work for McGill Restoration.

At trial, Bickley testified that although she did not provide McGill with copies of all of Everts' medical records or a copy of each doctor's recommendation, she did fax McGill a partial copy of the work hardening report and informed McGill generally of the restrictions placed on Everts. In addition, McGill testified that he knew Everts could lift only up to a certain weight and that Everts needed to be assigned jobs which did not require bending or stooping.

Everts returned to work for McGill Restoration on April 10, 1992, and 4 days later, he was sent to the Omaha Country Club to cut out a joint on a swimming pool and prepare it for caulking. The joint was to be cut at a distance of 8 to 12 inches from the top of the pool. In order to perform this work, Everts was required to utilize a grinder that weighed about 25 pounds.

Before beginning work, Everts performed stretching exercises he had learned at the work hardening program. He then began grinding in the shallow end of the pool, where the work could be performed approximately waist high. As Everts reached the deeper end of the pool, he was required to raise the grinder over his head. While working with the grinder over his head, Everts experienced a sudden, stabbing pain in his lower back, and he was no longer able to hold the grinder.

Everts left the pool and drove to Immanuel Medical Center. He was diagnosed by Tribulato with a herniated disk at L5-S1 and a bulging disk at L4-5. Everts subsequently underwent a laminectomy and diskectomy, and as a result, he was given a permanent impairment rating of 10 percent of his back and total body.

Everts subsequently sued Bickley, claiming that she had been negligent in recommending that he return to work for McGill Restoration. The jury returned a verdict in favor of Bickley, and Everts timely appealed.

ASSIGNMENTS OF ERROR

Everts claims the trial court erred (1) in instructing the jury on the defense of assumption of risk, which was clearly inapplicable and unsupported by the evidence; (2) in refusing to allow Everts' expert to testify as to Bickley's reputation of character for truthfulness in the vocational rehabilitation community; (3)

in failing to take judicial notice of and instruct the jury on Neb. Rev. Stat. § 71-1,132.04 (Reissue 1990); (4) in sustaining Bickley's objections to improper impeachment; (5) in failing to instruct the jury to disregard Bickley's testimony; (6) in failing to receive into evidence a cover letter from Bickley's undergraduate university; (7) in overruling Everts' motion for judgment notwithstanding the verdict; and (8) in failing to grant Everts' motion for a new trial.

ANALYSIS

Over Everts' objection, the jury was instructed regarding assumption of risk. Everts argues that the trial court erred in giving this instruction. In response, Bickley asserts that any error in instructing the jury as to assumption of risk was harmless, since Bickley was entitled to a directed verdict on the issue of negligence. Bickley, however, did not cross-appeal the denial of her motion for directed verdict.

Everts alleged that Bickley was negligent in recommending that he return to work in a job which demanded work clearly in excess of the physical restrictions recommended by Everts' doctors. Everts contends that Bickley was negligent in failing to reasonably analyze the job requirements and the physical demands of the employment to which Bickley recommended that Everts return. According to Everts, Bickley did not place him in a job where he would be assured that he could work within the restrictions placed upon him by his treating physicians. Everts argues that since he was acting within the restrictions placed upon him by his physicians at the time of his injury and Bickley told him that he could work within those restrictions, he did not assume the risk of Bickley's negligence.

[3,4] In order to submit the issue of assumption of risk to the jury, the evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. See *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994). When a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may

be submitted to the jury. *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995). The jury in the case at bar was instructed on the affirmative defense of assumption of risk, and Everts claims that the trial court erred in tendering this instruction.

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. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). It is the burden of the complaining party to establish that judicial prejudice has occurred. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

The pertinent facts surrounding Everts' injury are as follows: Everts testified that the work he did for McGill Restoration when he returned to work was within his physical restrictions. Everts stated that on the day of the accident, he knew what task he would perform at the pool. Bickley had contacted McGill about a job for Everts within his physical restrictions, and Bickley testified that she obtained confirmation in writing that McGill could provide Everts with a job within the restrictions imposed by his doctors. Bickley testified that she weighed and evaluated the equipment Everts would be using and that after performing these tests, she determined Everts could return to work for McGill Restoration on a short-term basis.

On the date of Everts' injury, he and a coworker were assigned to caulk the Omaha Country Club's swimming pool. The coworker did not arrive at the site on time, and thus, Everts began to operate the grinder which was needed for the job. Everts testified that the grinder weighed about 25 pounds and that although he never weighed it, he believed that it was within his restrictions. There is nothing in the evidence to contradict the fact that the grinder weighed about 25 pounds. When Everts began working, he was holding the grinder waist high. As he moved along the side of the pool, the floor deepened, which required Everts to hold the grinder above his head. While he was in this position, he felt a sharp pain in his back and had to cease work.

The restrictions of which Everts was aware did not prohibit him from lifting a 25-pound object. Nor was Everts prohibited from lifting items over his head. Therefore, there is no evidence to show that Everts was not acting within the confines of his restrictions at the time of the injury. Everts testified on cross-examination that the work he did for McGill Restoration during the 4 days in question was work which fell within the restrictions as he understood them.

[5] Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986). We conclude that in this case, the evidence failed to support the trial court's instruction on assumption of risk to the jury. This doctrine applies only when the danger is known and the risk therefrom is appreciated and voluntarily accepted. See *McDermott v. Platte Cty. Ag. Socy., supra.*

Everts could not be said to have assumed the risk of his injury if he was working within the confines of his restrictions. He had been informed by several doctors and by Bickley herself that he was allowed to work within certain restrictions. Implicit in the restrictions was the assurance that he would not be further injured as long as they were followed. From this, we conclude that Everts could not have knowingly and voluntarily exposed himself to danger. Thus, the trial court erred when it instructed the jury on the affirmative defense of assumption of risk.

[6,7] We next proceed to determine whether the erroneous jury instruction was harmless. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997). A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during the trial. *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996).

Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Sacco v. Carothers, supra.* We conclude that there was insufficient evidence presented to instruct the jury on assumption of risk and that the instruction was prejudicial to Everts.

Bickley argues that even if the instruction on assumption of risk was erroneous, this case should have been dismissed on a directed verdict, and that the erroneous instruction resulted in no prejudice to Everts. We briefly dispose of this argument on the basis that Bickley did not cross-appeal the denial of her motion for directed verdict. Therefore, we decline to consider this argument.

Because we determine that the erroneous jury instruction requires a new trial, we decline to consider Everts' other assignments of error.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MICHAEL GALLNER, APPELLEE, V. JUDY GALLNER, APPELLANT.
595 N.W. 2d 904

Filed June 25, 1999. No. S-98-334.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Equity: Judgments: Interest.** The language of Neb. Rev. Stat. § 45-103.01 (Reissue 1993) is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
3. **Judgments: Interest: Time.** When a judgment is modified on appeal, interest accrues on the full amount of the judgment as modified from the date the original judgment is due.
4. **Judgments: Interest: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 45-103.01 (Reissue 1993), interest accrues from the date the original judgment is due, regardless of whether an appeal is taken prior to that date.
5. **Judgments: Attorney Fees: Interest: Time.** An award of attorney fees in a dissolution decree is a decree or judgment for the payment of money such that, pursuant to Neb. Rev. Stat. § 45-103.01 (Reissue 1993), interest should accrue on the attorney fees from the date they were due.

6. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
7. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed.

C. Gregg Larson for appellant.

Patrick M. Flood and Thomas J. Nack, of Hotz & Weaver, for appellee.

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

WRIGHT, J.

NATURE OF CASE

This is an appeal from an order of the Douglas County District Court that granted partial release of a judgment in dissolution of marriage, as well as subordination of child support and alimony liens.

SCOPE OF REVIEW

[1] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999); *Brunges v. Brunges*, 255 Neb. 837, 587 N.W.2d 554 (1998).

FACTS

The appellee, Michael Gallner, and the appellant, Judy Gallner, were married January 3, 1982. The parties had one child, born October 6, 1983, and were divorced by decree dated May 5, 1994. The trial court dissolved the marriage, divided the property, awarded custody of the minor child to Judy, and awarded child support and alimony.

Judy appealed, and the net result of the appeal was to increase the amount of the cash award to $109,534 in order to equalize the property division. Previously, the trial court had awarded Judy $50,000 to equalize the division of the marital estate, to be

paid within 120 days of the date of the decree. The Nebraska Court of Appeals affirmed all other aspects of the award, including $15,000 in accountant fees and $15,000 in attorney fees, payable to Judy's certified public accountant and attorney, respectively. The Court of Appeals' memorandum opinion was filed April 16, 1996, and on May 30, this court denied Judy's petition for further review.

On January 30, 1998, Michael filed an amended application for an order declaring satisfaction of judgment and for a subordination of the child support and alimony liens to a mortgage/deed of trust on his home. Specifically, Michael sought an order declaring that there was no interest due or owing on the $109,534 property division obligation or on the accountant fee obligation and that upon payment of $11,000, the obligation for payment of the accountant fees would be satisfied. He also sought an order subordinating any child support or alimony liens to the new mortgage/deed of trust.

The purpose of obtaining this order was so that Michael could refinance his home. It was undisputed that he had paid the $109,534 property division to Judy by August 19, 1996. He had also paid all relevant attorney fees and had continued to make the court-ordered alimony and child support payments. At the time of the application, he still owed $11,000 in accountant fees, which he sought to pay out of the funds from the refinancing.

The house which Michael sought to refinance was allegedly purchased for $330,000 and financed by a 90-percent purchase money loan in the amount of $297,000. Michael testified that the house had recently been appraised at $460,000 and that he was seeking a 75-percent loan in the amount of $345,000.

Judy resisted Michael's application on the basis that he had not paid the property division in full because he had not paid any interest thereon. She asserted that the appeal process did not stay the 120 days allotted by the trial court to pay the property division and that interest accrued from 120 days after the May 5, 1994, dissolution decree. Judy further asserted that interest was due on attorney fees which were paid late, as well as on other sums awarded by the decree.

Judy also alleged that since Michael held no property in Douglas County other than his house, the subordination agree-

ment would unduly reduce her security for payment of child support and alimony. She further asserted that the subordination would be inappropriate in light of the fact that Michael had been late in paying several of his child support and alimony payments and had failed to comply with other elements of the decree.

Judy issued a subpoena duces tecum, requesting that Michael produce his federal tax returns, financial statements, copies of mortgage applications, appraisals on the home sought to be financed, life insurance policies, and records of all property owned by Michael and located in Douglas County. Michael requested that the subpoena be quashed on the grounds that the documents were irrelevant to the application and that such production would be unduly burdensome. The district court subsequently granted the motion to quash.

On March 10, 1998, the district court issued an order declaring satisfaction of judgment and subordination of child support and alimony liens. The court determined that no interest was due on the property division and that the property division had been satisfied in full. With regard to the $11,000 balance of the accountant fees, the court stated that after payment of such fees, all obligations in that regard would be satisfied. The court overruled Judy's motions for a new trial and for attorney fees and costs, and Judy timely perfected this appeal.

ASSIGNMENTS OF ERROR

Judy asserts that the district court erred (1) in quashing her subpoena duces tecum, (2) in granting Michael's amended application for an order declaring satisfaction of judgment and subordination of child support and alimony liens, (3) in subordinating child support and alimony liens to a refinance mortgage/deed of trust on real estate owned by Michael, (4) in finding that Michael had met his burden under Neb. Rev. Stat. § 42-371 (Reissue 1998), (5) in failing to award interest on child support payments which were more than 30 days late, (6) in failing to award interest on delinquent alimony payments, (7) in failing to award attorney fees and costs under Neb. Rev. Stat. § 25-824 (Reissue 1995), (8) in failing to grant a new trial, and (9) in failing to require Michael to produce his entire 1996 federal tax return.

ANALYSIS

This action is controlled by § 42-371, which provides:

> (1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office . . . .
>
> . . . .
>
> (4) Whenever a judgment creditor refuses to execute a release of the judgment or subordination of a lien as provided in this section, the person desiring such release or subordination may file an application for the relief desired. . . . If the court finds that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security, the court may issue an order releasing real or personal property from the judgment lien or issue an order subordinating the judgment lien.

The district court entered an order declaring that Michael had satisfied his property division obligations under the divorce decree in full and declaring that upon payment of the sum of $11,000, Michael's obligation for accountant fees would be satisfied. The court ordered that any child support or alimony liens be subordinated to the new mortgage/deed of trust Michael sought relating to a home located at 11313 William Plaza, Omaha, Nebraska.

Judy asserts that the district court erred in releasing the property division judgment, because there was still due and owing postjudgment interest on the $109,534. She also claims that there is due and owing postjudgment interest on the original order for attorney and accountant fees.

[2] We first address the property division. Neb. Rev. Stat. § 45-103.01 (Reissue 1993) provides that interest "shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment." The language of § 45-103.01 is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). The property division judgment, as modified by the Court of Appeals, stated that the trial court

should have awarded Judy $109,534 in cash to equalize the property division. The trial court had stated that the property division award was to be paid within 120 days of the date of the decree and would not bear interest if it was paid within that time.

We must determine when the interest on the judgment started to accrue. The question is whether the interest started to accrue on May 5, 1994, or 120 days after that date. In *Welch*, we explained that a "decree or judgment for the payment of money" under the postjudgment interest statute is "one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor." 246 Neb. at 452, 519 N.W.2d at 274. "Interest does not accrue until the debt becomes due." *Id.* at 453, 519 N.W.2d at 274.

Michael argues that with regard to the property division amount, there was no decree or judgment for the payment of money until May 30, 1996, after Judy's appeal had been addressed by the Court of Appeals and this court had denied further review. He claims that because he paid the judgment within 120 days of May 30, no interest accrued. Judy claims that regardless of her appeal, at the very latest, there was a decree or judgment for the payment of money of the entire amount of the property division, as modified by the Court of Appeals, 120 days after May 5, 1994, and that interest should accrue from that date.

In *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996), the Court of Appeals held that interest on a judgment increased upon appeal commences to run from the date the trial court entered its original judgment. In *Ramaekers*, the original action was brought by a corporation to determine the amount the corporation owed the estate of its principal stockholder, William F. Ramaekers, upon his death, under a written agreement providing for the sale of stock of the deceased stockholders of the corporation to the corporation. A judgment was entered in favor of the estate, and the estate appealed to the Court of Appeals. The Court of Appeals increased the amount of the judgment, and its mandate was filed with the district court. Thereupon, the district court allowed interest on the increased amount from the time the Court of Appeals' mandate was spread until the amount was paid in full,

a period of 7 days. The estate appealed, asserting that interest should have accrued from the date of the original district court's order.

The Court of Appeals concluded that where a money judgment has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, the interest on the award as modified runs from the date of the original judgment, as if no appeal had been taken. Interest accrues on the judgment from the date the judgment is due, regardless of whether the amount of the judgment was reduced or increased on appeal.

[3,4] We adopt the rationale of the Court of Appeals in *Ramaekers*. When a judgment is modified on appeal, interest accrues on the full amount of the judgment as modified from the date the original judgment is due. See *Ramaekers, McPherron & Skiles v. Ramaekers, supra*. This is true regardless of which party has taken the appeal and regardless of whether the judgment was increased or decreased on appeal. We further conclude that pursuant to § 45-103.01, interest accrues from the date the original judgment is due, regardless of whether an appeal is taken prior to that date. See *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Thus, Judy was entitled to postjudgment interest on the property division, which interest accrued 120 days after entry of the divorce decree, and the district court erred in declaring full satisfaction of the property division.

We next address the district court's order declaring that upon payment of $11,000, the obligation for payment of accountant fees would be satisfied. Judy argues that such order was in error because interest had accrued from the date of the May 5, 1994, decree which ordered the fees paid "forthwith."

[5] In *Welch*, we held that an award of attorney fees in a dissolution decree is a decree or judgment for the payment of money such that, pursuant to § 45-103.01, interest should accrue on the attorney fees from the date they were due. Michael asserts that *Welch* is distinguishable because the trial court ordered that Michael pay Judy's accountant through the clerk of the district court, rather than paying Judy.

We hold that regardless of the manner in which the accountant fees were made payable, Judy has standing to assert on

appeal that postjudgment interest is due thereon. Judy was a party to the dissolution decree. The accountant fees were awarded pursuant to Neb. Rev. Stat. § 42-367 (Reissue 1998), which allows the court to decree costs against either party and award execution for the same. See, also, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980) (award of fees to attorney was property of and for benefit of wife). Accordingly, the district court erred in ordering that upon payment of $11,000, without postjudgment interest, Michael's obligation for payment of the accountant fees would be satisfied.

Judy also asserts that there is interest due on the attorney fees. Because the order from which she appeals did not purport to declare satisfaction of the attorney fee obligation, we need not address this issue. Similarly, we do not address Judy's assertions regarding interest due on certain delinquent child support payments and alimony payments because the district court did not release Judy's right to collect interest due on such payments.

In addition, Judy asserts that Michael failed to turn over certain limited partnerships and investments awarded to her in the divorce decree. She argues that Michael owes her an accounting for any benefit he may have received during the period that such financial interests remained in his possession. The district court did not address this issue in its order, and therefore, we do not reach this issue on appeal.

We next address whether the district court erred in ordering that child support and alimony liens be subordinated to the new mortgage/deed of trust. Section 42-371(4) provides that the court may issue an order subordinating a judgment lien "[i]f the court finds that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security . . . ." Judy argues that it was improper for the court to order the child support and alimony liens subordinated because this action unduly reduces the security for the liens. She argues that the evidence is insufficient to support Michael's testimony that his home is currently valued at $460,000 because no appraisals were offered in evidence. Regardless, given Michael's valuation of the property, Judy notes that refinancing will reduce Michael's equity in the home from $163,000 to $115,000. She points out that Michael

has no other legal assets in Nebraska and that he has a history of being late in making his child support and alimony payments.

[6] At the time of the decree, the trial court determined that Michael had an earning capacity of at least $200,000 annually. At the time of the hearing on his application for an order declaring partial satisfaction of judgment and subordination of child support and alimony liens, Michael estimated that there remained approximately $140,000 in child support payments and $42,000 in alimony. The relief sought by Michael involves the equitable powers of the court, and therefore, the standard of review is de novo. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998).

Problematic with our de novo review is the lack of evidence related to the denial of the subpoena duces tecum by the district court. Prior to the hearing on the application, Judy requested that Michael produce income tax returns for the years 1993 through 1996; an estimated tax return for 1997; copies of financial statements; copies of all mortgage applications, including all appraisals of real property; documents concerning life insurance policies from 1993 to date insuring the life of Michael; and any and all documents concerning real or personal property owned by Michael and located in Douglas County.

[7] Neb. Ct. R. of Discovery 26 (rev. 1996) sets forth the general provisions regarding discovery. Under rule 26(b)(1),

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Generally, the control of discovery is a matter for judicial discretion. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

We conclude that the district court abused its discretion in quashing the subpoena. The fact in issue is whether the subordination requested would unduly reduce the security regarding the remaining amount of approximately $182,000 in child support and alimony. Clearly, the items requested by Judy were relevant to a determination of Michael's financial status and whether the child support and alimony liens should be subordinated in order to allow Michael to refinance his real estate.

The evidence is insufficient to establish that such subordination would not unduly reduce the security for the payment of the liens. Michael has the burden to demonstrate that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security. The failure to produce an appraised value of the real estate and the failure to produce evidence of income tax returns and projected income tax returns leaves the court without any reasonable basis for determining whether to subordinate the child support and alimony liens. Given the minimal effort required to produce the requested information, including a copy of the real estate appraisal, we do not find that such subpoena was overly broad or unduly burdensome.

Although at one point Michael was determined to have income of over $200,000 per year, his record in making timely child support and alimony payments is not reliable, and he did not pay the accountant fees until he attempted to refinance the real estate. On paper, the refinancing of the real estate results in a decrease in equity. Given the fact that Michael had the burden to produce evidence which would show that the subordination would not unduly reduce the security, we conclude that he failed to produce sufficient evidence to sustain his burden of proof under the circumstances. Since Michael is asking for equitable relief, it is his obligation to produce the information which will support such relief. We therefore conclude that the district court erred in subordinating the liens without first having sufficient information before it.

As to whether the district court erred in failing to grant Judy attorney fees pursuant to § 25-824, we conclude that the court did not abuse its discretion in that regard. The action was not frivolous and was not interposed solely for delay or harassment.

CONCLUSION

For the reasons stated herein, the judgment of the district court is reversed. Judy has filed a motion for attorney fees in this court, and she is awarded the sum of $3,500. Michael has also filed a motion in this court for attorney fees. That motion is overruled.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. DEBBIE ANN CUNY, APPELLANT.

595 N.W.2d 899

Filed June 25, 1999. No. S-98-607.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. 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. **Police Officers and Sheriffs: Arrests: Jurisdiction.** The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he or she was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his or her territorial jurisdiction.
3. **Police Officers and Sheriffs: Misdemeanors: Jurisdiction: Statutes.** When there is no authority under common law for a police officer to arrest a misdemeanant suspect outside the officer's geographical jurisdiction, the state must rely upon statutory authorization to prove that the actions of the officer were lawful.
4. **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.
5. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
6. **Police Officers and Sheriffs: Jurisdiction: Arrests.** Neb. Rev. Stat. § 29-215 (Reissue 1995) does give certain extrajurisdictional arrest powers to certain law enforcement officers.
7. **Police Officers and Sheriffs: Jurisdiction.** Neb. Rev. Stat. § 29-215 (Reissue 1995) applies only to Nebraska law enforcement officers and does not apply to law enforcement officers who cross state lines.

8. **Police Officers and Sheriffs: Jurisdiction: Arrests: Drunk Driving.** Neb. Rev. Stat. § 29-215 (Reissue 1995) does not authorize an out-of-state police officer to arrest a suspect for misdemeanor driving under the influence outside the officer's geographical jurisdiction.
9. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded.

Appeal from the District Court for Sheridan County, PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Sheridan County, CHARLES PLANTZ, Judge. Judgment of District Court reversed and dismissed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Debbie Ann Cuny appeals her conviction for driving under the influence (DUI), a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. We reverse, and dismiss.

BACKGROUND

On July 28, 1996, Officers Wilmer Youngman and Tino Lopez, both police officers with the Pine Ridge Police Department of the Pine Ridge Indian Reservation in South Dakota, were on routine patrol near the Nebraska-South Dakota border. When the officers were about one-quarter mile north of the South Dakota border on Highway 407, they observed a vehicle enter Highway 407 from a side road and head south toward the officers, partially in the northbound lane. The officers observed the vehicle continue to travel south partially in the northbound lane toward them. The officers pulled their patrol

car over toward the shoulder of the road as the approaching vehicle came closer. The vehicle then started pulling back into its own lane and went past the officers' patrol car. The officers turned their patrol car around, activated the car's red emergency lights, and followed the vehicle. The vehicle did not stop until after it had left the Pine Ridge Indian Reservation and traveled approximately one-quarter mile across the Nebraska border into Sheridan County.

Lopez approached the vehicle and discovered that the driver was Cuny. Lopez asked Cuny for her license, which she did not have on her person. Lopez detected an odor of alcohol coming from Cuny and noticed her speech was slurred. Youngman then approached Cuny and detected an odor of alcohol on her breath. Youngman asked Cuny to perform field sobriety tests, from which Youngman determined that Cuny was under the influence of alcohol. Youngman radioed the Sheridan County authorities, and Cuny was detained until Sheridan County Sheriff Terry E. Robbins arrived 10 to 15 minutes later. Robbins discussed the situation with Youngman, and Youngman informed him of the events leading up to the detention of Cuny. Robbins then went to talk to Cuny and noticed that her eyes were red and watery and that she had a faint odor of alcohol on her breath. Cuny admitted to Robbins that she had been driving the vehicle. Robbins administered field sobriety tests, from which he determined that Cuny was under the influence of alcohol, and placed her under arrest. Cuny was taken back to the Sheridan County sheriff's office, where she performed additional sobriety tests.

Cuny was charged with one count of DUI, a violation of § 60-6,196, and one count of not having an operator's license, a violation of Neb. Rev. Stat. § 60-484 (Cum. Supp. 1996).

Cuny subsequently pled guilty to not carrying her license while operating her vehicle. Thereafter, a single count of DUI was tried before a jury in the Sheridan County Court.

Before the trial, however, Cuny moved to suppress all evidence against her, alleging that she was subjected to an unlawful investigatory stop, detention, and arrest in Sheridan County by police officers of the Pine Ridge Police Department. Further, at the outset of the trial, Cuny renewed her motion to suppress and further moved to dismiss the case based on the same actions

of the Pine Ridge police officers. Upon conclusion of the State's case in chief, Cuny again renewed her motion to suppress and, further, moved for a directed verdict. All of Cuny's motions were denied.

The jury found Cuny guilty of DUI. Cuny subsequently appealed to the Sheridan County District Court, which affirmed the denial of the motion to suppress and consequently affirmed Cuny's conviction.

ASSIGNMENTS OF ERROR

Cuny assigns that the trial court erred in overruling her motions to suppress and motion to dismiss because (1) the Pine Ridge police officers did not have power or authority in Sheridan County to effect the investigatory stop, custodial detention, and transfer of custody of Cuny to the sheriff of Sheridan County; (2) the Pine Ridge police officers did not have the power or authority to effect a proper and lawful search and seizure of Cuny in Sheridan County; (3) the sheriff of Sheridan County did not have the power or authority to effect a proper and lawful search and seizure of Cuny in Sheridan County; and (4) the sheriff of Sheridan County lacked justification for the investigatory stop.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. 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. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998).

ANALYSIS

[2,3] We must first decide whether the Pine Ridge police officers had the authority to stop and detain or arrest Cuny. The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he or she was appointed, unless the police officer

is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his or her territorial jurisdiction. *State v. Masat*, 239 Neb. 849, 479 N.W.2d 131 (1992). It is clear that the common-law exception of "fresh pursuit" does not apply to Cuny's case. Common-law fresh pursuit is limited to felonies, and Cuny was charged with a violation of § 60-6,196, a Class W misdemeanor. There being no authority under common law for the Pine Ridge police officers to arrest a misdemeanant suspect outside the officers' geographical jurisdiction, the State must rely upon statutory authorization to prove that the actions of the Pine Ridge police officers were lawful. See, *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991), citing *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Once the Pine Ridge police officers left the reservation and entered Nebraska, they were outside the territorial limits of their jurisdiction. Therefore, the question becomes whether there is statutory authority that gives the Pine Ridge police officers the power to apprehend a suspected misdemeanor offender in Nebraska.

The district court found that Neb. Rev. Stat. § 29-215(2)(b) (Reissue 1995) is such a statute. Section 29-215(2)(b) states as follows:

> Any such law enforcement officer who is within this state, but beyond the territorial limits of his or her primary jurisdiction, shall have the power and authority to enforce the laws of this state or any legal ordinance of any city or incorporated village or otherwise perform the functions of his or her office, including the authority to arrest and detain suspects, as if enforcing the laws or performing the functions within the territorial limits of his or her primary jurisdiction in the following cases:
>
> . . . .
>
> . . . Any such law enforcement officer, if in a fresh attempt to apprehend a person suspected of committing a misdemeanor or a traffic infraction, may follow such person anywhere in an area within twenty-five miles of the boundaries of the law enforcement officer's primary jurisdiction and there arrest and detain such person and return

such person to the law enforcement officer's primary jurisdiction.

[4,5] 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. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Woods, supra.*

[6-8] Section 29-215 does give certain extrajurisdictional arrest powers to certain law enforcement officers. However, we conclude that § 29-215 applies only to Nebraska law enforcement officers and does not apply to law enforcement officers who cross state lines. This conclusion is supported by the language of § 29-215(1):

> Every sheriff, deputy sheriff, marshal, deputy marshal, police officer, or peace officer as defined in subdivision (15) of section 49-801 shall have the power and authority to enforce the *laws of this state and of the political subdivision which employs* the law enforcement officer or otherwise perform the functions of that office anywhere within his or her primary jurisdiction. *Primary jurisdiction shall mean the geographic area within territorial limits of the state or political subdivision which employs the law enforcement officer.*

(Emphasis supplied.) Therefore, we hold that § 29-215 does not authorize an out-of-state police officer to arrest a suspect for a misdemeanor DUI inside Nebraska. The Pine Ridge police officers did not have the authority to pursue and arrest Cuny for a misdemeanor offense in Nebraska. As such, their stop and detainment, or arrest, of Cuny was unlawful.

[9] Having concluded that the actions of the Pine Ridge police officers were unlawful, we find the evidence obtained by Robbins was the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution, and must be excluded. See *State v. Tingle*, 239 Neb.

558, 477 N.W.2d 544 (1991), citing *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963), *cert. denied* 376 U.S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (1964). After concluding that the Pine Ridge police officers were without authority to make the stop and arrest, we hold that Cuny's arrest was unlawful and that the trial court was clearly wrong in not suppressing all evidence obtained pursuant to the illegal actions.

CONCLUSION

We conclude that the Pine Ridge police officers did not have the authority to arrest Cuny, and therefore, such actions were unlawful. For the foregoing reasons, Cuny's arrest was illegal, and all evidence obtained pursuant to the illegal arrest should have been suppressed. We reverse, and dismiss.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLANT, V.
MARSHA K. LOUTHAN, APPELLEE.
595 N.W.2d 917

Filed June 25, 1999. No. S-98-624.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Constitutional Law: Pleas: Proof: Waiver.** A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him or her, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
3. **Criminal Law: Statutes.** Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding.

4. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent.
5. **Constitutional Law: Pleas: Appeal and Error.** A person who is convicted on the basis of a guilty plea has a right to appeal on the ground that the plea was not knowing and voluntary.
6. **Constitutional Law: Due Process: Drunk Driving: Prior Convictions: Right to Counsel: Case Overruled.** The due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based driving under the influence conviction and the procedure set forth in Neb. Rev. Stat. § 60-6,196(3) (Reissue 1998), which permits a defendant to challenge the validity of a prior driving under the influence conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel. To the extent that *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); and *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984), hold that a prior conviction sought to be used for enhancement in a driving under the influence prosecution can be collaterally attacked in a separate proceeding, they are overruled.

Appeal from the District Court for Stanton County, ROBERT B. ENSZ, Judge, on appeal thereto from the County Court for Stanton County, STEPHEN P. FINN, Judge. Judgment of District Court reversed and cause remanded with directions to dismiss.

W. Bert Lammli, Stanton County Attorney, for appellant.

Mark A. Johnson, of Johnson & Morland, P.C., for appellee.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar, for amicus curiae City of Omaha.

Joe Stecher, Dodge County Attorney, and Kevin J. Slimp, for amicus curiae Nebraska County Attorneys Association.

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

STEPHAN, J.

INTRODUCTION

The State appeals from an order of the district court for Stanton County in a separate proceeding filed by Marsha K.

Louthan in which she challenged, for purposes of penalty enhancement, the validity of a prior conviction for driving under the influence of alcoholic liquor (DUI). Reversing an order of the county court for Stanton County, the district court held that because the record failed to disclose that Louthan expressly waived certain constitutional rights when she entered her guilty plea on February 28, 1994, the conviction entered on such plea was invalid and could not be used for enhancement purposes. We reverse, and remand with directions to dismiss.

FACTS AND PROCEDURAL BACKGROUND

On February 9, 1998, after being charged with second-offense DUI in Cuming County, Louthan filed a petition for relief in a separate proceeding in the county court for Stanton County, seeking a determination that her 1994 conviction by that court for first-offense DUI was invalid for enhancement purposes. At a hearing on Louthan's petition, the county court took judicial notice of the record from the 1994 proceeding. The record included a completed checklist signed by the county judge and filed when Louthan entered her guilty plea and was convicted, but it did not include a verbatim transcription of that proceeding.

According to the checklist, Louthan appeared with counsel on February 28, 1994, and was advised of the nature of the charges and the possible penalties. The court advised Louthan of the "[p]resumption of innocence and right to remain silent," the "[r]ight to a jury trial with burden on State to prove its case beyond a reasonable doubt . . . to confront & cross examine State's witnesses, and to call and subpoena witnesses," and "[t]o have all proceedings recorded and to use the record for appeal." Louthan was advised of the possible pleas and the consequences of pleading not guilty, pleading guilty, or standing mute. Louthan entered a plea of guilty, and the court found that the plea had a factual basis and was "freely, voluntarily, and intelligently made with a full understanding of the charges and possible penalties." The checklist included a finding of guilt beyond a reasonable doubt, a waiver of the right of allocution, and a sentence consisting of a $200 fine, costs, and probation.

Louthan's counsel argued that the 1994 conviction should be held invalid for purposes of enhancement because the checklist

did not include an express waiver of the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination, as required by *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). The county court denied the relief requested by Louthan, noting that the checklist reflected that the guilty plea was accepted upon a finding that there was a factual basis and that it was freely, voluntarily, and intelligently made. The court concluded:

> It would be impossible for the Court to make that finding without determining in advance all of those things which Hays says has to be done in order to find and adjudge the defendant guilty. It is the Court's opinion that that finding is an affirmative showing that those facts and the things required in Hays have taken place. There was an adjudication of guilt. The Court will deny, as I indicated, [the petition] for those reasons. To hold otherwise would indicate that the Court makes no intelligent decisions at all.

Louthan appealed to the district court, which held that the record failed "to disclose that [Louthan] expressly waived her constitutional right to confront witnesses, right to jury trial and privilege against self-incrimination when she entered her guilty plea on February 28, 1994, and as such same is constitutionally invalid for purposes of enhancement." The State perfected this appeal and successfully petitioned to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The State assigns, rephrased, that the district court erred in determining that the Stanton County DUI conviction was invalid for enhancement purposes and in determining that the county court had jurisdiction to maintain a separate proceeding.

STANDARD OF REVIEW

[1] The State's assignments of error present questions of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999).

ANALYSIS

"Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke v. Raley*, 506 U.S. 20, 26, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). Nebraska's current DUI law, Neb. Rev. Stat. § 60-6,196 (Reissue 1998), is such a statute in that it provides for enhanced penalties resulting from multiple convictions during a 12-year period. DUI convictions for first, second, and third offense are Class W misdemeanors which carry maximum penalties ranging from 60 days' imprisonment, a $500 fine, and a 6-month license revocation for a first offense to 1 year's imprisonment, a $600 fine, and a 15-year license revocation for a third offense. Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 1998) and 60-6,196(2). If the offender has three or more prior DUI convictions during a 12-year period, the offense becomes a Class IV felony with a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both, with no minimum sentence and a 15-year revocation of driving privileges. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 1998) and 60-6,196(2)(d). For second and subsequent offenses, the statute provides for mandatory incarceration for a prescribed period when the offender is placed on probation or given a suspended sentence. § 60-6,196(2)(b) through (d). With respect to prior convictions utilized for enhancement, § 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 under this section and under a city or village ordinance enacted pursuant to this section in the twelve years prior to the date of the current conviction. The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

Determining the validity of prior DUI convictions for purposes of sentence enhancement implicates evolving principles of law by which we must define the point at which the interest of the State in the finality of judgments of conviction must yield to the due process rights of an accused. A starting point for this

analysis is *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), in which the Court held that the validity of a prior felony conviction offered for purposes of enhancement could be successfully challenged on the ground that the defendant was denied his Sixth Amendment right to counsel at the time of the conviction. Subsequently, in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the Court reversed plea-based convictions because the record did not affirmatively show that the defendant entered the pleas voluntarily and intelligently, with the knowledge that they constituted a waiver of his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. The Court concluded that it could not "presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243.

[2] This court first addressed *Boykin* in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), a direct appeal from a plea-based conviction. We interpreted *Boykin* as requiring that "a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." *State v. Turner*, 186 Neb. at 425, 183 N.W.2d at 765. This became known as the "*Boykin-Turner* rule," which was expanded in three subsequent decisions by this court: *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), a direct appeal from a second-offense DUI conviction based upon a guilty plea; *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), a direct appeal from a forgery conviction based upon a plea of nolo contendere; and *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997), on further review of a direct appeal from plea-based convictions for disturbing the peace and criminal mischief. In *Hays*, we articulated the current rule:

> [A] guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty he waives his right to confront witnesses against him, his right to a jury trial, and his privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant con-

> cerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her right to assistance of counsel [due to scrivener's error, "right to assistance of counsel" should read "privilege against self-incrimination," as stated *supra*], right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.

253 Neb. at 476-77, 570 N.W.2d at 829. We have written that although a court "'"cannot presume a waiver of . . . federal rights from a silent record,"'" *id.* at 472, 570 N.W.2d at 827, quoting *State v. Tweedy, supra*, "'a verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid,'" *id.*, quoting *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). We recognized in *Ziemba* that a checklist authenticated by the signature or initials of the judge which is a part of the record and shows compliance with all requirements for a valid plea of guilty can be utilized to affirmatively establish the validity of a prior plea-based conviction.

In *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), *overruled, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), we held that a defendant charged with a third-offense DUI under an earlier version of our current DUI statute had no right to collaterally attack his first- and second-offense convictions in order to prevent them from being used for enhancement. Subsequently, in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *overruled, Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), the Supreme Court held that an uncounseled misdemeanor conviction, even though it did not result in incarceration, could not be used under an enhanced penalty statute to convert a subsequent

misdemeanor into a felony with a prison term. Relying upon *Baldasar, supra*, and *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), this court held in *Smith* that for purposes of DUI sentence enhancement, a defendant's objection to the introduction of a transcript of conviction which failed to show on its face that counsel was afforded or the right waived did not constitute a collateral attack on the former judgment and should have been sustained by the trial court. We overruled *Voight, supra*, and *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), to the extent that they conflicted with this holding.

In a series of subsequent cases, we interpreted *Smith* as establishing the rule that in DUI enhancement proceedings, a defendant could object to the record of a prior conviction on the basis that it did not affirmatively establish that he or she was represented by counsel or had waived the right to counsel. *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), *denial of habeas corpus rev'd on other grounds* 958 F.2d 831 (8th Cir. 1992); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984); *State v. Ziemba, supra*. Without citation of authority, we stated in *Baxter* that "[o]ther objections to the validity of the judgment must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." 218 Neb. at 416, 355 N.W.2d at 516. This reference to a "separate proceeding" was repeated in subsequent opinions citing to *Baxter* as original authority. See, *State v. Davis, supra*; *State v. Fraser, supra*. See, also, *State v. Hamblin, supra*. However, we tacitly departed from this line of cases in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984), where we held that a defendant could properly raise objections under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), to prior plea-based convictions offered under the habitual criminal statute.

We addressed this inconsistency in *State v. Oliver*, 230 Neb. 864, 870, 434 N.W.2d 293, 298 (1989), a direct appeal from a conviction for third-offense DUI, wherein we stated:

> Upon further consideration of the matter, we now expressly disapprove our holding in the *Gonzales* case that a defendant may raise the constitutional invalidity of a prior conviction in an enhancement proceeding, and now hold that such an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

In *State v. Crane*, 240 Neb. 32, 35, 480 N.W.2d 401, 403 (1992), we characterized this as a procedural rule, stating:

> We have repeatedly held that, as a procedural matter, a defendant cannot collaterally attack a prior conviction in an enhancement proceeding and that challenging a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack. . . . We do, however, allow challenges to prior plea-based convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered. . . . We do so because we do not regard such a challenge as a collateral attack on the former judgment. . . . One could also challenge the constitutional validity of a prior conviction through a separate proceeding, such as an action for declaratory judgment.

Our first occasion to review a collateral attack to a prior plea-based conviction in a separate proceeding was *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), in which a defendant charged with third-offense DUI challenged his two prior convictions on *Boykin* grounds both by objection and by filing a "Petition for Relief in a Separate Proceeding." We characterized this as a "second-tier challenge" to the prior convictions, which, unlike a "first-tier challenge" based upon denial of the Sixth Amendment right to counsel, could not be asserted by general objection because it constituted a collateral attack on a prior conviction. *Id.* at 827, 491 N.W.2d at 330-31. However, we held that the petition for a "separate proceeding" was a proper vehicle for asserting the *Boykin* challenge to the prior plea-based convictions. *Id.*

Following our decision in *Wiltshire*, the U.S. Supreme Court decided two cases involving the assertion of *Boykin* challenges to plea-based convictions in enhancement proceedings. In *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), the defendant challenged, on *Boykin* grounds, the use of prior state court convictions to enhance the sentence for his conviction on federal drug and firearms charges. The Supreme Court affirmed the holding of the lower courts that the federal statute under which Custis was convicted did not authorize collateral attacks on prior convictions. It also rejected his contention that the U.S. Constitution required some procedural route through which the prior convictions could be challenged in enhancement proceedings, interpreting its prior holdings to permit such a challenge only when the prior conviction was tainted by the "unique constitutional defect" of failure to appoint counsel. 511 U.S. at 496. In refusing to extend its holding in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the Court specifically found that none of Custis' constitutional challenges to his prior convictions, including the claim that a guilty plea was not knowing and voluntary, "rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." 511 U.S. at 496. In reaching this conclusion, the Court also stated:

> Ease of administration also supports the distinction. As revealed in a number of the cases cited in this opinion failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of . . . failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.
>
> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly

> administration of justice. . . . [P]rinciples of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state-court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]." . . . These principles bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality served by the limitation on collateral attack has special force."

(Citations omitted.) *Id.* at 496-97.

In *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), the defendant objected to the use of a prior misdemeanor conviction offered for purposes of enhancing a sentence for his conviction on federal felony drug charges, arguing that at the time of the prior conviction he had been denied his Sixth Amendment right to counsel. Overruling *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), the Court held that a sentencing court may use a defendant's prior uncounseled misdemeanor conviction to enhance the sentence for a subsequent offense so long as the prior conviction did not itself result in a sentence of imprisonment. Thus, based upon *Custis* and *Burgett* as modified by *Nichols*, the federal Constitution affords a right to challenge a prior conviction offered for purposes of enhancement only where it resulted in imprisonment and the defendant was denied the Sixth Amendment right to counsel.

The impact of *Custis* and *Nichols* upon a defendant's ability to assert a prior plea-based conviction in a separate proceeding was addressed by the appellate courts of this state in *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), *aff'd on other grounds, State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995). In *LeGrand,* a defendant charged with third-offense DUI unsuccessfully petitioned the district court in a separate proceeding to invalidate his prior plea-based convictions for purposes of enhancement on the ground that they were not based on a full

advisement of constitutional rights as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). After analyzing the historical development of the "separate proceeding" rule culminating in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), the decisions of the Supreme Court in *Custis* and *Nichols*, and an indication in *Wiltshire* that this court would follow U.S. Supreme Court precedent in recognizing the right to challenge the use of prior convictions for enhancement purposes, the Court of Appeals concluded that the "separate proceeding" was no longer necessary in order to comport with federal constitutional law. Accordingly, it held that

> it is impermissible to attack the validity of a prior conviction in an enhancement proceeding on any grounds, with one exception: We do allow challenges to prior plea-based convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered, when the defendant was sentenced to imprisonment for any period of time as a result of the pleas.

LeGrand v. State, 3 Neb. App. at 318-19, 527 N.W.2d at 213.

On further review, this court determined that the Court of Appeals erred in concluding that *Custis* and *Nichols* invalidated the use of separate proceedings to challenge prior plea-based convictions for purposes of enhancement. Reasoning that "states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution," *State v. LeGrand*, 249 Neb. at 8, 541 N.W.2d at 385-86, we concluded:

> Thus, there exists no federal mandate to overrule separate state proceedings to collaterally attack prior state convictions on grounds other than right to counsel or waiver of counsel. A constitutionally invalid conviction used for sentence enhancement works a second constitutional violation on the defendant by allowing an invalid conviction to serve as a predicate for a recidivist conviction. Without separate proceedings, a defendant in a state case, who is not in custody, has no other forum to challenge a constitutionally infirm judgment sought to be used for sentence enhance-

> ment. With this in mind, we reaffirm our holdings in *State v. Oliver*, [230 Neb. 864, 434 N.W.2d 293 (1989)], and *State v. Wiltshire, supra*, that separate proceedings are a valid means to collaterally attack allegedly constitutionally invalid prior convictions used for sentence enhancement.

State v. LeGrand, 249 Neb. at 9, 541 N.W.2d at 386. However, we concluded that the collateral attack was without merit and therefore affirmed.

[3,4] Upon further consideration, we now conclude that our holding in *LeGrand* with respect to separate proceedings is unsound for several reasons. We have held that where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding. See *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992). The only statutory procedure for challenging a prior DUI conviction offered for purposes of enhancement is that set forth in § 60-6,196(3). We have construed the language of this section, previously codified at Neb. Rev. Stat. § 39-669.07 (Reissue 1988), as permitting only a first-tier challenge based upon denial of Sixth Amendment rights. *State v. Wiltshire, supra*; *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986). Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 436 N.W.2d 164 (1989); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989). The Legislature has not enacted a procedure for asserting second-tier challenges to prior plea-based DUI convictions, and thus, unless such a procedure is constitutionally mandated, it "is unauthorized and, therefore, unavailable under Nebraska criminal procedure." *State v. Miller*, 240 Neb. at 299, 481 N.W.2d at 581.

[5] A person who is convicted on the basis of a guilty plea has a right to appeal on the ground that the plea was not knowing and voluntary. See *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). The record in such an appeal would ordinarily include both a transcript and a bill of exceptions. See Neb. Ct. R. of Prac. 4 and 5 (rev. 1996). The transcript would include any checklist utilized by the court at the time the plea was accepted, while the bill of exceptions would include the verbatim colloquy

between the court and the accused regarding his or her understanding of the plea and the waiver of rights attendant thereto. It is upon this complete record that an appellate court determines whether the legal prerequisites for a valid plea-based conviction, as most recently articulated in *Hays*, were met.

When the defendant elects *not* to appeal, however, no bill of exceptions is prepared. Under regulations promulgated by the Nebraska Records Management Division, in effect at the time of Louthan's 1994 conviction and now, the tapes from which the verbatim record ordinarily included in a bill of exceptions could be prepared may be erased 30 days after the appeal time has elapsed. See Records Retention and Distribution Schedule, paragraph 18-10-7 (rev. 1998) and this court's Rules for Release, Substitution, and Disposal of Exhibits (rev. 1996). Thus, when a separate proceeding is commenced years after a plea-based conviction from which there was no direct appeal, the record will likely not contain any colloquy between the court and the accused at the time of the acceptance of the plea. That is true of the record before us in the present case. While it is impermissible on direct appeal to presume waiver from a silent record, it is illogical and not in the interests of justice to presume from an incomplete record in a separate proceeding that the trial court abrogated its responsibility to ascertain the defendant's understanding and voluntary waiver of rights before accepting a guilty plea. Yet that is precisely the position in which the district court in the present case was placed in order to comply with both *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), and *Hays, supra*. At some point, judgments of conviction must become final and the State should not be required to "rummage through frequently nonexistent or difficult to obtain . . . transcripts or records" in order to defend them against collateral attack. See *Custis v. United States*, 511 U.S. 485, 496, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Moreover, the "separate proceeding" by which defendants are currently permitted to challenge prior DUI convictions for purposes of enhancement is inconsistent with limitations which our law places upon collateral attack of criminal convictions under other circumstances. For example, subsequent to *LeGrand*, we held that a defendant may not utilize a special proceeding to col-

laterally attack a prior conviction that is an element of a subsequent offense. *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). An incarcerated defendant is not permitted to utilize a motion for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1995) in order to secure review of issues which could have been litigated on direct appeal. *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995).

[6] We therefore hold that the due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based DUI conviction and the procedure set forth in § 60-6,196(3), which permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel. We need not, and therefore do not, reach the issue of whether such a challenge is permissible where the prior conviction did not result in a sentence of imprisonment. See, *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). To the extent that *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); and *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984), hold that a prior conviction sought to be used for enhancement in a DUI prosecution can be collaterally attacked in a separate proceeding, they are overruled.

CONCLUSION

For the foregoing reasons, we conclude that Louthan's 1994 DUI conviction was not subject to collateral attack in a separate proceeding and therefore reverse the judgment of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA EX REL. CITY OF ALMA, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE, V. FURNAS COUNTY FARMS, A GENERAL PARTNERSHIP, ET AL., APPELLANTS.

595 N.W.2d 551

Filed July 2, 1999. No. S-98-211.

1. **Mandamus: Judgments: Appeal and Error.** An action for a writ of mandamus is a law action, and in an appellate review of 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 unless clearly erroneous.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Mandamus: Words and Phrases.** Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
4. **Mandamus: Public Officers and Employees.** A duty imposed by law which may be enforced by writ of mandamus must be one which the law specifically enjoins as a duty resulting from an office, trust, or station.
5. ____: ____. Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
6. **Mandamus: Injunction.** Where injunctive relief may be sought, mandamus is not an available remedy.

Appeal from the District Court for Harlan County: STEPHEN ILLINGWORTH, Judge. Reversed and vacated, and cause remanded for further proceedings.

Noyes W. Rogers for appellant.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellee.

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

STEPHAN, J.

INTRODUCTION

In this action, the City of Alma sought a writ of mandamus, requiring respondents to comply with certain ordinances pertaining to the construction of new solid and liquid waste storage

facilities, and a declaratory judgment with respect to the validity and applicability of those ordinances. The district court for Harlan County entered a peremptory writ of mandamus from which this appeal was taken. We conclude that the entry of the writ was error and therefore reverse and vacate, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The City of Alma (City), organized and existing as a city of the second class pursuant to Neb. Rev. Stat. § 17-101 et seq. (Reissue 1997), filed a verified petition on November 5, 1997, seeking a writ of mandamus pursuant to Neb. Rev. Stat. § 25-2156 (Reissue 1995) and a declaratory judgment pursuant to Neb. Rev. Stat. § 25-21,150 (Reissue 1995). It named as respondents Furnas County Farms (FCF), a general partnership; Sand Livestock Systems, Inc. (SLS), a corporation; Charles W. Sand, Jr.; and Timothy A. Cumberland. Sand and Cumberland are alleged to be general partners of FCF as well as corporate officers of SLS. The City alleged that FCF was the record title owner of a 125-acre tract of land located in Harlan County approximately 8 miles from the Alma city limits and that SLS has or claims an ownership interest and easement in this property. The City alleged that FCF and SLS intended to build and operate a "large hog confinement facility" on this property for the purpose of penning, feeding, and finishing a constant capacity of 30,000 to 36,000 head of feeder pigs for market. The City further alleged that this proposed facility would involve excavation of three waste disposal lagoons, each 24 feet deep, and together having a surface area of approximately 26 acres, which would "hold a total of approximately 145 million gallons of liquidized hog manure on a continuing, on-going, and daily basis." According to the City's allegations,

> current data show the surface and subsurface drainage to and from the lagoons, without adequate and proper controls, has a high potential of polluting, injuring, and contaminating ground water which supplies Relator's public drinking water wells, within three to five years, perhaps sooner, creating a significant endangerment to public health.

The City alleged that pursuant to the authority conferred upon it by Neb. Rev. Stat. § 17-536 (Reissue 1997), it enacted ordinances which require any person or entity seeking to construct or operate any manufacturing, livestock, or other facility within 15 miles of its city limits "which will create liquid or solid liquid waste to be stored or disposed of into holding ponds, lagoons, tanks, or other containers, or which will be discharged into waterways or onto or under the soil" to first apply for and obtain a permit from the City. The ordinances include certain design, construction, and monitoring requirements for such facilities, in addition to those imposed by the Nebraska Department of Environmental Quality (NDEQ), with which an applicant must comply in order to obtain a permit.

The City alleged that respondents, claiming that the ordinances were invalid, commenced construction of the hog confinement facility without obtaining the permit which the ordinances require. It further alleged:

> Respondents Furnas County Farms and Sand Livestock Systems, Inc., are proper subjects to be compelled to perform mandatory duties by means of a writ of mandamus by virtue of their legal status and station as legal entities created by the law of the state of Nebraska, and the obligations specifically enjoined upon them by Relator's . . . ordinances. Respondent Furnas County Farms, as a Nebraska general partnership, and Respondent Sand Livestock Systems, Inc., as a Nebraska corporation, are required to transact only lawful business in . . . Nebraska. [Citations omitted.] Respondents Charles W. Sand, Jr., and Timothy A. Cumberland are proper parties to be named herein so as to physically receive any writ of mandamus which may be issued herein to Respondent Furnas County Farms because they are the general partners of said partnership, and directly responsible for its activities. Respondent Charles W. Sand, Jr., is also a proper party to be named herein to physically receive any writ of mandamus which may be issue [sic] herein to Respondent Sand Livestock Systems, Inc., because he is president of the corporation, and directly responsible for its day-to-day activities.

The City alleged that the subject ordinances were enacted in order to protect its water supply from pollution and contamination and that

> [a] law action for damages is not adequate to protect the ultimate health, welfare, and safety of the public, and will not ensure that the Respondent's [sic] will construct the proposed hog confinement facility in a manner which will prevent pollution of the Relator's water supply in the first instance, nor remove pollution therefrom in the second instance. Accordingly, Relator and the public it represents will suffer irreparable harm for which they have no adequate remedy at law which will timely compel Respondent's compliance with the mandatory obligations of Relator's lawful ordinances for the benefit of the public's health, welfare, and safety.

The City prayed for a writ of mandamus requiring respondents to comply with the ordinances "or, alternatively, to appear and show cause, if any there be, as to why they refuse to comply . . . ." In addition, the City prayed for a judgment declaring the ordinances in question "to be within its statutory and lawful powers" and "valid and binding upon Respondents."

An alternative writ of mandamus directed to respondents was filed on November 5, 1997, the same date on which the petition was filed. The alternative writ recited that the City had "made a prima facie showing that its water supply and the public's health, welfare, and safety may be jeopardized by the failure of Respondents to comply with said ordinances, and an action at law for damages may not be an adequate remedy." The alternative writ further provided that FCF and SLS were "mandated by Nebraska law to act in a lawful manner" and required them "to comply with all valid laws, ordinances, and regulations of the State of Nebraska and its subdivisions," including compliance with the City's ordinances applicable to the construction of hog confinement facilities. Individual respondents were required by the alternative writ to cause FCF and SLS to comply with its terms. The alternative writ further required that any respondent failing or refusing to comply with its directive appear and show cause at a hearing scheduled for November 19, 1997.

Three responsive pleadings were filed on the day prior to the hearing. FCF filed an answer and cross-petition in which it alleged that the ordinances at issue were passed and adopted after its acquisition of the proposed hog confinement facility site "for the sole purpose of stopping or hindering the completion" of the facility. FCF alleged that it had undertaken studies to determine that the facility met with all regulations and laws of the State of Nebraska as promulgated by NDEQ and further, that the facility would not cause pollution or injury to the City's water supply. It further alleged that the subject ordinances constitute local or special laws, in violation of article III, § 18, of the Nebraska Constitution; that they deprive FCF of constructing a hog confinement facility on its land in violation of due process guarantees of the state and federal Constitutions; that the ordinances are not reasonably necessary to prevent pollution or injury to the City's water supply, but, rather, are calculated to make the construction of the facility unreasonably expensive and burdensome; and that the ordinances are preempted by Neb. Rev. Stat. § 81-1504(11) (Cum. Supp. 1996), granting NDEQ the power to issue permits for the discharge of wastes into air, land, and water. In its cross-petition, FCF sought damages for a delay in construction of the hog confinement facility attributable to "the invalid ordinances adopted by the City of Alma and the attempt to force compliance of same." The City moved to strike the cross-petition on the ground that it was not a permissible pleading in an action for mandamus pursuant to Neb. Rev. Stat. § 25-2164 (Reissue 1995). SLS filed an answer consisting of a general denial and a specific denial of "any interest in any of the real estate described in Relator's Petition, either through fee ownership or easements." Sand and Cumberland filed a general demurrer.

During the hearing on November 19, 1997, the district court heard argument on the City's motion to strike the cross-petition, the demurrer of Sand and Cumberland, and the directive to show cause set forth in the alternative writ. An attorney employed by SLS testified that SLS had commenced construction of the confinement facility pursuant to a contract with FCF, but had ceased construction activity when it learned of the filing of this action.

She further testified that construction was 6 to 8 months from completion when it was halted. The district court took all matters argued at the hearing under advisement pending the submission of briefs.

On December 3, 1997, prior to any decision by the district court on the matters under advisement, FCF filed a motion for leave to submit "as further showing of cause why a Writ of Mandamus should not [be] issue[d]" a permit issued by NDEQ and received by FCF on December 1, 1997, purportedly authorizing construction of the waste lagoons for the confinement facility. The City filed a written objection on the grounds that FCF should have moved for a continuance of the show cause hearing and that the permit was irrelevant.

On February 23, 1998, the district court entered a peremptory writ of mandamus commanding respondents to comply with the requirements of the subject ordinances. In its writ, the court sustained the motion to strike the cross-petition as contrary to § 25-2164 and overruled the motion to allow an additional showing. In addition, the court found that enactment of the ordinances at issue were within the City's statutory authority, that the ordinances were valid, and that "the respondents are required to apply for a permit through the City of Alma as specified in its ordinances." The court further determined that it was "not required in this order to rule on the constitutionality or reasonableness of relators [sic] ordinances and declines to do so." Respondents perfected an appeal from the peremptory writ and filed a "Notice of Constitutional Questions" pursuant to Neb. Ct. R. of Prac. 9E (rev. 1996) as well as a petition to bypass, which we granted. Although the notice of appeal was filed on behalf of all four original respondents, only FCF filed a brief in this court.

ASSIGNMENTS OF ERROR

FCF contends, restated and renumbered, that the district court erred in (1) issuing a peremptory writ of mandamus without conducting a trial on the issues raised in its answer, (2) not determining that the ordinances in question were unconstitutional, and (3) refusing to receive evidence of the permit issued by NDEQ.

STANDARD OF REVIEW

[1,2] An action for a writ of mandamus is a law action, and in an appellate review of 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 unless clearly erroneous. *State ex. rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999).

ANALYSIS

In addressing FCF's first assignment of error, we must initially determine whether mandamus is an appropriate remedy in this case. We note that in its brief, FCF states that it "did not challenge the applicability of a mandamus action to a totally private partnership (which is highly questionable)" because it desired a determination of the constitutionality of the ordinances. Brief for appellant at 29. This strategy on the part of FCF does not restrict our obligation to analyze the issue before us in accordance with established principles of law. An appellate court will not pass on the constitutionality of legislation absent a need to do so in order to properly dispose of an action. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

[3-5] Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999); *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998). A duty imposed by law which may be enforced by writ of mandamus must be one "which the law specifically enjoins as a duty *resulting from an office, trust or station*." (Emphasis supplied.) § 25-2156. In

applying this statutory language, we have characterized mandamus as a means of compelling acts by "public officers." *State, ex rel. Cashman, v. Carmean*, 138 Neb. 819, 295 N.W. 801 (1941). Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

The record in the present case discloses no duty on the part of respondents traceable to any "office, trust or station." In arguing that respondents were not entitled to raise the issue of constitutionality, the City states in its brief, "Respondents . . . are not public 'ministerial officers' who have sworn an oath to uphold the Constitution." Brief for appellee at 15. In the same vein, the City argues that "Respondents, not being public officers, but instead private citizens upon whom a mandatory duty to apply for a permit devolves, irrespective of their view of the constitutionality thereof, must obey the law." *Id.* at 18. Thus, the duty which the City seeks to enforce by writ of mandamus is that duty which a private landowner would have in complying with ordinances placing restrictions on a specific use of property. This duty does not result from any "office, trust or station" as required by § 25-2156. While it is true that a compliance with a municipal ordinance may inure to the benefit of the general public, it does not follow that such compliance on the part of private persons or entities is a ministerial duty enforceable by the extraordinary remedy of mandamus.

[6] As counsel acknowledged during oral argument, the relief sought in this case is in the nature of an injunction. The City is attempting to prevent FCF from constructing the waste lagoons necessary for its proposed hog confinement facility without first obtaining a permit from the City as required by its ordinance. The City's position is analogous to the interest of a licensing authority in preventing an individual from engaging in a particular profession without first obtaining the necessary license as prescribed by law. We have held that statutes requiring the licensing of certain professionals serve the purpose of protecting public rights, property, and welfare, and that the remedy of injunction is an appropriate means of preventing one who has not obtained a license from engaging in a profession in which

licensure is required. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). Where injunctive relief may be sought, mandamus is not an available remedy. *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 105 N.W.2d 721 (1960). See, also, Neb. Rev. Stat. § 25- 2157 (Reissue 1995).

In the present case, the City could have sought an injunction to prevent FCF from constructing the waste lagoons without first obtaining a permit as required by its ordinances. It also could and did seek a declaratory judgment to determine the validity of its ordinances and their applicability to respondents. Therefore, the City had a "plain and adequate remedy in the ordinary course of the law" which, pursuant to § 25-2157, precluded issuance of a writ of mandamus.

Because there has been no trial on the City's request for declaratory relief, which will necessarily involve consideration of the defenses asserted in the answer of FCF, we remand the cause to the district court for that purpose and do not reach the remaining assignments of error.

CONCLUSION

We conclude that mandamus does not lie in this case because the act which the City sought to compel was not one which the law specifically enjoins as a duty resulting from an office, trust, or station, and because the City had a plain and adequate remedy in the ordinary course of the law, namely, a request for injunctive and declaratory relief. We therefore reverse and vacate the peremptory writ of mandamus and remand the cause for further proceedings with respect to the City's request for declaratory relief.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., not participating.

IN RE INTEREST OF DANIELLE D. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHERYL S. AND STEVEN S., APPELLANTS.

595 N.W.2d 544

Filed July 2, 1999. No. S-98-579.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Juvenile Courts: Parental Rights: Due Process.** In deciding due process requirements in a particular case, a court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use.
3. **Due Process.** Due process is flexible and calls for such procedural protections as a particular situation demands.
4. **Juvenile Courts: Parental Rights: Due Process.** Neb. Rev. Stat. § 43-279.01(1) (Reissue 1998) states in part that when a petition alleges a juvenile to be within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997) and the parent or custodian appears with or without counsel, the court shall inform the parties of the right to confront and cross-examine witnesses.
5. **Parental Rights.** A petition brought under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997) is brought on behalf of the child, not to punish the parents.
6. **Parental Rights: Child Custody.** The purpose of the adjudication phase of a proceeding is to protect the interests of the child.
7. **Juvenile Courts: Parental Rights: Testimony: Notice.** When the State seeks to have a child testify in chambers at an adjudication or termination hearing, the State must give notice of such request to the parents or their counsel prior to the adjudication or termination hearing.
8. **Juvenile Courts: Parental Rights: Testimony.** A juvenile court must conduct a hearing separate from an adjudication or termination hearing to determine whether reasons exist for excluding the parents from the child's testimony at the adjudication or termination hearing.
9. ____: ____: ____. In order for a child to testify in chambers, a separate hearing must be held prior to or at the adjudication or termination hearing before the child is allowed to testify.
10. **Juvenile Courts: Parental Rights: Testimony: Proof.** At a separate hearing held to request that a child testify in chambers, the State must show that the presence of the parents during the child's testimony would be harmful to the child and, therefore, that the child should be allowed to testify in chambers.
11. **Juvenile Courts: Parental Rights: Testimony.** A child should be allowed to testify in chambers at a separate hearing when there are legitimate concerns about the child's testifying in the presence of his or her parents.

12. **Juvenile Courts: Testimony.** Once the State has made a showing as to why a child should be allowed to testify in chambers, it is then within the juvenile court's discretion to determine whether the child will be allowed to testify in chambers.
13. **Juvenile Courts: Parental Rights: Proof.** Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998) provides that when adjudicating whether a juvenile is dependent or neglected within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997), the State must establish its allegations by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Jeffrey A. Wagner for appellants.

James S. Jansen, Douglas County Attorney, and Melissa A. Stanosheck, for appellee.

Sandra Stern, guardian ad litem.

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

MCCORMACK, J.

NATURE OF CASE

Steven S., stepfather, and Cheryl S., natural mother of Danielle D., Derrick J., and Deanna J., appeal an order of the separate juvenile court of Douglas County, Nebraska, finding Danielle, Derrick, and Deanna to be juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1997). Cheryl did not file a brief but filed a notice of joining Steven's appeal in which she agrees with the assignments of error, the statement of facts, and the arguments, and joins in the prayer for relief as stated in Steven's brief. We are treating this case as an appeal by Cheryl. We affirm.

BACKGROUND

The State of Nebraska filed an amended petition alleging that Danielle, Derrick, and Deanna came within the meaning of § 43-247(3)(a) by reason of the faults and habits of Steven and Cheryl. Specifically, the amended petition alleged that "[o]n or about January 28, 1998, and/or on other occasions in the past, Steven . . . used inappropriate and excessive physical discipline on [Danielle, Derrick, and Deanna], placing said children at risk

for harm" and that Steven's "use of alcohol and/or controlled substances places said children at risk for harm." The amended petition further alleged that "Cheryl . . . has taken insufficient steps to protect said children . . . ."

On May 6, 1998, an adjudication hearing was held in the juvenile court. At the adjudication hearing, the State called Danielle to testify. The State and guardian ad litem requested that Danielle, who was 16 years old at the time, be allowed to testify in chambers. Both counsel for Steven and Cheryl objected on grounds that they did not receive advance notice of such request and that the State did not demonstrate a compelling need for in-chambers testimony. The trial court found that Nebraska law does not require such procedures and allowed Danielle's testimony to be taken in chambers without Steven and Cheryl being present, noting that "the best interests of the child [are] paramount." Additionally, the trial court required that Danielle's testimony be taken on the record, that all counsel be present, that both Steven's and Cheryl's counsel have the opportunity to cross-examine Danielle, and that Steven and Cheryl be allowed to consult with each of their counsel between the direct examination and the cross-examination of Danielle.

Danielle testified that on January 28, 1998, she was struck by Steven as a form of discipline for borrowing and shrinking a friend's skirt and for skipping school. Danielle testified that Steven grabbed her by the ear while she was in the front room of their home, dragged her by the ear to the hallway, hit her with a television remote control, and then slapped her more than 10 times. Danielle testified that her nose started bleeding and that Steven stopped hitting her long enough for her to get some toilet paper from the bathroom for her nose, but then continued slapping her in the bathroom. Danielle described falling to the floor several times and each time she got up, Steven would slap her again. Danielle testified that Cheryl was at work when this incident occurred.

Danielle testified regarding another incident that occurred around Christmas 1997 in which Steven grabbed her by the hair and smacked her for skipping school, in which incident she suffered a black eye. Danielle testified that Cheryl was not home

during this incident either but that she later told Cheryl how she had received the black eye and Cheryl did nothing about it.

Danielle also testified about another incident in which she and Steven got into an argument and Steven hit her. She stated that after Steven hit her, she went to her room, and that Steven followed her and yelled at her. Danielle testified that just before Steven hit her again, Cheryl came into the room and was hit on the arm by Steven when she intervened.

Danielle further testified that Steven yelled at her almost every day, calling her such names as "slut," "whore," and "stupid." According to Danielle, Steven lost his temper regularly and at those times, he would throw and break things.

Danielle further testified regarding Steven's alleged drug usage. She stated that during December 1997, Steven would smoke marijuana up to three times a day, and that he would smoke marijuana with Derrick "all the time." Danielle also testified that Cheryl's friends would come over and smoke marijuana and that Cheryl was around when this happened.

David E. Isbell, an investigator for the Ralston Police Department, was also called as a witness by the State. Isbell testified that on January 29, 1998, he was contacted by Danielle's high school to investigate possible child abuse and injuries Danielle had allegedly received the previous night. Isbell testified that when he met with Danielle on January 29, he observed injuries to her face, specifically a cut to the inside of her mouth, a bruise to her lip where the teeth had almost gone through, a red hemorrhage to the right eye, a blackened area around the right eye, and swelling around the right eye. Isbell also testified that he spoke with Cheryl about the incident and that Cheryl stated she was aware of the incident that had occurred in her home the previous evening, saying that when she got home from work that night, her children told her Steven had struck Danielle. Isbell further testified that Cheryl told him that when she asked Danielle about what had happened, Danielle told her Steven had "smacked" or "slapped" her. Isbell testified that Cheryl admitted to knowing of other incidents between Danielle and Steven and between Derrick and Steven. Cheryl told Isbell she knew of an incident that occurred around Christmas 1997 between Danielle and Steven in which Danielle received a black eye when Steven

had slapped her. Isbell also testified that Cheryl admitted that around Christmas 1997 there had been a problem where Derrick had "bowed up" against Steven and Steven had smacked him.

Isbell further testified that Cheryl told him she had confronted Steven on several occasions in reference to the problems with Danielle and Derrick, and had told him not to hit the children. She acknowledged a problem in the home and thought the whole family needed anger management classes. Isbell testified that Cheryl acknowledged that on January 28, 1998, the children had confronted her and given her an ultimatum either to choose them over Steven or they were going to call and report him to the police. Isbell also stated that Cheryl told him she was afraid to contact Child Protective Services or law enforcement because she did not want her children taken away from her. Finally, Isbell testified that based on his interview with Cheryl, he issued her a criminal citation for child neglect for failure to report incidents of physical abuse.

The State also called Shirley King, the case manager from Child Protective Services assigned to investigate the case. King testified as to her conversations with Cheryl and Steven. When asked about the January 28, 1998, incident, Cheryl told King that she was not there when it happened but that she noticed only a slight mark to Danielle's lip and was not aware of any bruising to her eye. King testified that Cheryl denied that there were any previous incidents of physical abuse, even though the children reported to King that they told Cheryl about problems on several occasions. In regard to the Christmas 1997 incident with Derrick, Cheryl indicated to King that she did not see any bruises on Derrick, but that Derrick had told her that he and Steven had "gotten into it." King testified that Cheryl further indicated that she had seen bruises on Danielle in the past but thought those were due to Danielle and Steven wrestling or "horsing around." Cheryl denied any drug usage in the home by Steven or herself.

King further testified that Steven admitted to her that he hit Danielle in the face with the television remote control but stated it was an accident. King testified that Steven also denied any drug usage. King stated that based upon her investigation, she substantiated physical abuse of Danielle and failure to protect

Danielle on the part of Cheryl due to the discussions with the children that Cheryl had been made aware of numerous incidents.

Derrick testified on behalf of Steven. Derrick testified that he was not home on January 28, 1998, when Danielle was struck but that Danielle told Derrick that she and Steven had gotten into an argument and that it was "no big deal." Derrick also testified that Danielle told him that Steven had smacked her around the house or dragged her into the kitchen by her ear and that he punched her in the mouth and hit her with the television remote control. Derrick stated that he told Cheryl what Danielle said had happened. Derrick testified that he has never seen Steven strike Danielle or Deanna but that he has been struck by Steven on two occasions, both of which occurred when he and Steven had gotten into an argument and Derrick had swung at Steven first. On one such occasion, Derrick testified that Steven punched him in the face with his fist and that he told his mother about being hit. Derrick also testified that Danielle hit him, Deanna, and Steven. Derrick testified that Danielle hits people every day and likes to hit Derrick and Steven in their private parts.

Derrick denied ever smoking marijuana in Steven and Cheryl's home and denied any knowledge of drug use by Steven. On cross-examination however, Derrick admitted that Cheryl's friend would come over and use drugs and that Cheryl knew her friend was doing this when she was not at home. Derrick also acknowledged hearing Steven call Danielle names such as "bitch," "slut," and "whore."

On cross-examination, Derrick admitted that he had asked Cheryl to leave Steven on a couple of occasions due to his being hit by Steven and due to Steven's continued screaming and yelling at Danielle.

Cheryl testified on her own behalf. Regarding the January 28, 1998, incident, Cheryl testified that Danielle told her Steven had smacked her but that Danielle also said she had been hitting and kicking Steven, as she normally did. Cheryl stated that she believed Danielle had orchestrated the January 28 incident so that she would be removed from the home. Cheryl also admitted that around Christmas 1997 Danielle told her Steven had hit her

and that Danielle had a mark on her eye but that Cheryl did not know if it was a black eye or makeup. Cheryl testified that she did not have any knowledge of her friend's coming over and using drugs in Steven and Cheryl's home. Cheryl admitted that the children had threatened to leave or to contact law enforcement if she did not leave Steven.

At the close of the evidence, the trial court found the allegations of the amended petition to be true by a preponderance of the evidence. Steven and Cheryl both timely appealed. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Steven and Cheryl assign, restated, that the trial court erred in (1) granting the State and the guardian ad litem's request for in-chambers testimony of Danielle and (2) finding the allegations in the State's petition to be true by a preponderance of the evidence.

SCOPE OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

ANALYSIS

We analyze this case as an appeal by Cheryl, the children's natural mother. We do not analyze this case as to Steven, the stepfather, and our holding is only as to the natural parent. Steven and Cheryl allege that the trial court erred in allowing Danielle to testify outside of their presence. Steven and Cheryl argue that by allowing Danielle to testify in chambers, their due process rights to confront and cross-examine adverse witnesses were violated. Steven and Cheryl concede that the right to confront and cross-examine is not absolute and that in-chambers testimony is sometimes appropriate. Steven and Cheryl argue,

however, that when the State is seeking to have a child testify in chambers, the State must make some showing that requiring the child to testify in the presence of his or her parents would be detrimental to the child.

In re Interest of L.V., 240 Neb. 404, 482 N.W.2d 250 (1992), was a termination of parental rights case. We held in that case that procedural due process is applicable to proceedings for termination of parental rights. This procedural due process includes notice to the person whose right is affected by the proceedings to inform the person concerning the subject and issues involved in the proceedings; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

The case *In re Interest of Kelley D. & Heather D., supra*, was a temporary adjudication case where the trial court allowed the children to testify while seated in such a way so that the children would not be required to look at their father during the testimony. The father was only able to see the children's backs, and the father's counsel was able to see the sides of the children's faces, but not their eyes. The father's objection that this procedure violated his right to confrontation was overruled. We held in this case that the manner in which the children were situated during questioning did not violate any right of fundamental fairness or confrontation.

[2,3] In deciding due process requirements in a particular case, a court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). Due process is flexible and calls for such procedural protections as a particular situation demands. *In re Interest of L.V., supra.*

[4] Neb. Rev. Stat. § 43-279.01(1) (Reissue 1998) states in part that when a petition alleges a juvenile to be within the provisions of § 43-247(3)(a) and the parent or custodian appears with or without counsel, the court shall inform the parties of the right to confront and cross-examine witnesses.

[5,6] A petition brought under § 43-247(3)(a) is brought on behalf of the child, not to punish the parents. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). The purpose of the adjudication phase of a proceeding is to protect the interests of the child. *Id.*

In the instant case, the State called Danielle as a witness and the State and guardian ad litem requested that her testimony be heard in chambers. Upon this request, the trial court's response was simply, "[a]ll right." Both Steven's and Cheryl's counsel then objected on the grounds that they did not receive advance notice of such request and that the State did not demonstrate a need for in-chambers testimony. However, the trial court allowed Danielle to testify outside the presence of Steven and Cheryl.

[7-12] We now hold that when the State seeks to have a child testify in chambers at an adjudication or termination hearing, the State must give notice of such request to the parents or their counsel prior to the adjudication or termination hearing. Further, a juvenile court must conduct a hearing separate from the adjudication or termination hearing to determine whether reasons exist for excluding the parents from the child's testimony at the adjudication or termination hearing. The separate hearing must be held prior to or at the adjudication or termination hearing before the child is allowed to testify. At the separate hearing, the State must show that the presence of the parents during the child's testimony would be harmful to the child and, therefore, that the child should be allowed to testify in chambers. A child should be allowed to testify in chambers at a separate hearing when there are legitimate concerns about the child's testifying in the presence of his or her parents. It is only logical that the child not be faced with the risk of being harmed when that is what the court is trying to prevent by holding the separate hearing. Once the State has made a showing as to why the child should be allowed to testify in chambers, it is then within the juvenile court's discretion to determine whether the child will be allowed to testify in chambers.

In the instant case, Steven and Cheryl were not given advance notice of the State's request that Danielle's testimony be taken in chambers. Further, the record contains no showing by the State that the presence of Steven and Cheryl during Danielle's

testimony could be harmful to Danielle. Therefore, there is no justification on the record to support the trial court's decision to allow Danielle to testify in chambers. We hold that the trial court abused its discretion.

[13] Steven and Cheryl also assert that the trial court erred in finding that the State proved the allegations in the petition to be true by a preponderance of the evidence. Section 43-279.01(3) provides that when adjudicating whether a juvenile is dependent or neglected within the purview of § 43-247(3)(a), the State must establish its allegations by a preponderance of the evidence. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

We find, in our de novo review, that even if we exclude the testimony of Danielle, that the other evidence submitted by the State shows by a preponderance of the evidence that the allegations of the petition are true. Isbell testified that he observed injuries to Danielle's face including a cut to the inside of her mouth, a bruise to her lip where her teeth had almost gone through, and a blackened area and swelling to the right eye. Cheryl told Isbell that her children had reported to her that Steven had smacked and slapped Danielle the evening before Isbell made his observations. Cheryl admitted to Isbell that she was aware of prior incidents, specifically the one occurring around Christmas 1997 when Danielle had received a black eye after Steven slapped her. Cheryl also told Isbell that her children had given her an ultimatum to choose between Steven and the children or they were going to report Steven to the police but that Cheryl was afraid to call Child Protective Services because she did not want her children taken away from her. King testified that Cheryl had admitted to seeing bruises on Danielle in the past and that Steven admitted to her that he had hit Danielle in the face with the television remote control but that it was an accident. Also considered is the testimony of Derrick that he had asked Cheryl to leave Steven because of Steven's hitting Derrick and because of Steven's screaming and yelling at Danielle, calling her a "bitch," a "slut," and a "whore." There is also evidence of drug use by Cheryl's friend in the home when Cheryl was not present.

The evidence set forth above is sufficient, if believed by the trier of fact, to prove the allegations of the petition by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DWAYNE GREER, APPELLANT.

596 N.W.2d 296

Filed July 9, 1999. No. S-97-596.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based upon the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion 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.
5. **Burglary: Intent.** The offense of burglary is defined by Neb. Rev. Stat. § 28-507(1) (Reissue 1995), which states that a person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
6. **Burglary.** Evidence of any act of physical force, however slight, by which an obstruction to the entry of premises is removed is sufficient to prove the essential element of breaking as used in the statutory offense of burglary.
7. **Jury Instructions: Appeal and Error.** Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.
8. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.

9. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
10. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
11. **Jury Instructions.** A trial court generally retains discretion in the wording of jury instructions. However, whenever an instruction from the Nebraska Jury Instructions is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on a particular subject is appropriate, the instruction in the Nebraska Jury Instructions should be used.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

James R. Mowbray and Kelly S. Breen, of the Nebraska Commission on Public Advocacy, and, on brief, Robin W. Hadfield, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

INTRODUCTION

Dwayne Greer appealed his convictions on two counts of burglary, four counts of use of a weapon to commit a felony, and one count each of first degree sexual assault, second degree assault, and first degree false imprisonment. The Nebraska Court of Appeals in *State v. Greer*, 7 Neb. App. 770, 586 N.W.2d 654 (1998), affirmed Greer's convictions for first degree sexual assault and three counts of use of a weapon, but reversed the convictions for the two burglary counts and corresponding use of a weapon charge and remanded those counts for new trial. It also vacated the sentences for second degree assault and first degree false imprisonment and remanded for resentencing on those counts. We granted the State's petition for further review.

STATEMENT OF FACTS

State v. Greer, supra, includes a full factual background of this case. The issues on further review are limited to the jury instruction on the burglary counts and the sentences imposed on the convictions for second degree sexual assault and first degree false imprisonment, and therefore only the facts pertaining to those issues will be related in detail here.

Greer was charged in a nine-count information filed in the district court for Lancaster County, Nebraska. In count I, the State alleged that on or about August 10, 1995, Greer "did willfully, maliciously, and forcibly break and enter any real estate or any improvements erected thereon, located at 1700 'B' Street, Lincoln, Lancaster County, Nebraska, with the intent to commit any felony or with the intent to steal property of any value," in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1995). In count IV, Greer was charged with the same offense, allegedly committed at the same premises on November 3. The remaining offenses with which Greer was charged were also alleged to have occurred on November 3.

The premises located at 1700 B Street consisted of an old house which had been converted into five apartments. In 1995, three women occupied apartment No. 1, which included part of the main floor and part of the basement of the house. Sometime during the summer of 1995, but prior to August, A.L., one of the women who lived in apartment No. 1, talked briefly with three men who were helping other tenants of the building move. At trial, A.L. identified Greer as one of these men.

At approximately 2:30 a.m. on August 10, 1995, H.S. and P.S., the other two residents of apartment No. 1, answered a knock on the door of their apartment. The caller was an African-American man who identified himself as "Dwayne" and inquired about the woman "with the little red car." The women responded that A.L., who owned a maroon car, was not home. H.S. testified that at this point in time, all doors to the apartment were closed and locked.

Later the same day, H.S. discovered that several items of personal property belonging to her were missing from the apartment. These included a portable stereo, a cellular telephone, and a wallet. H.S. did not observe any signs of forced entry. H.S.

reported the missing items to the police on the same day. The wallet was found a few blocks from the apartment, but the $20 it had contained had been removed. Subsequently, the cellular telephone was recovered during a search of an apartment where Greer and his wife resided, and a stereo matching the description of the one which H.S. had reported missing was recovered from a pawnshop where it had been pawned by Greer's wife.

Sometime between 1 and 2 a.m. on November 3, 1995, P.S. returned to the apartment after spending the evening with friends. A.L. was at the apartment when she arrived. P.S. expected a visitor and therefore left a door to the apartment unlocked. When the individual called to say he would not be coming over, P.S. went to bed without locking the door. A.L. retired at about the same time.

Later in the morning, A.L. was awakened by an African-American man standing by her bed. The man, who was wearing a ski mask, ordered her to go to another part of the apartment, where he sexually assaulted her at knifepoint and stabbed her right thigh. When the man left the apartment, A.L. awakened P.S. and called the police. At approximately 4:35 a.m., about 8 minutes before a police officer received a call dispatching him to A.L.'s apartment in response to her report, this officer observed an African-American man purposefully running through a neighborhood approximately 16 blocks away from 1700 B Street. He reported this information to his sergeant. Later that morning, other officers encountered Greer in that neighborhood. They transported Greer to the police station for questioning, and when he refused their request to voluntarily give blood, saliva, and hair samples, they obtained a court order for such evidence. Forensic studies linked blood found on a pair of jeans which were seized from Greer's apartment to A.L. and identified Greer as the probable source of sperm that was present on a vaginal swab taken from A.L. following the assault.

Following the presentation of evidence at Greer's trial, the jury was instructed that regarding the charge of burglary in count I, the elements of the State's case were as follows:

> 1. That the defendant, Dwayne Greer, did willfully, maliciously and forcibly break and enter real estate or any

improvements erected thereon, located at 1700 "B" Street, Lincoln, Lancaster County, Nebraska;

2. That the defendant did so with the intent to commit any felony or with the intent to steal property of any value; and

3. That the defendant did so on or about August 10, 1995.

With regard to the burglary charge in count IV, the jury was instructed that the elements of the State's case were as follows:

1. That the defendant, Dwayne Greer, did willfully, maliciously and forcibly break and enter any real estate or any improvements erected thereon located at 1700 "B" Street in Lincoln, Lancaster County, Nebraska;

2. That the defendant did so with the intent to commit any felony or with the intent to steal property of any value; and

3. That the defendant did so on or about November 3, 1995.

Further, the jury was instructed in instruction No. 9 that " '[b]reaking and entering' means entering a building by any act of physical force, however slight, including opening a door or unhooking a door fastener." The jury returned verdicts of guilty on all charges.

Greer received sentences of not less than 4 nor more than 5 years' imprisonment for the second degree assault conviction and for the first degree false imprisonment conviction, both of which were Class IV felonies at the time of sentencing. See, Neb. Rev. Stat. § 28-309 (Reissue 1995); Neb. Rev. Stat. § 28-314 (Reissue 1995). During the pendency of Greer's appeal, certain amendments to Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1998) became operative. As amended, this statute requires a court to fix the maximum and minimum limits of a sentence for a Class IV felony, and "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term." *Id.*

Greer's assignments of error on appeal included the giving of an erroneous jury instruction on the burglary counts, the imposition of an illegal sentence for the offense of use of a weapon to commit second degree assault, and the imposition of exces-

sive sentences. Relying upon *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994), the Court of Appeals found reversible error in the fact that the jury was not specifically instructed that the removal of an obstacle to entry is necessary in order for there to be a "breaking," as that term is used in the statute defining burglary. The Court of Appeals also held that although Greer's sentences for the second degree assault and first degree false imprisonment convictions were not an abuse of discretion at the time they were pronounced, they did not comply with § 29-2204 when its amendments became operative on July 1, 1998.

ASSIGNMENTS OF ERROR

On further review, the State assigns that the Court of Appeals erred in finding that the burglary instruction given was inadequate to state the elements of the offense and that the sentences imposed for the Class IV felonies must be vacated because of changes in the classification statutes.

STANDARD OF REVIEW

[1,2] In an appeal based upon the claim of an erroneous 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. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). Whether a jury instruction given by a trial court is correct is a question of law. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997).

[3] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. 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

Jury Instruction

[5,6] The offense of burglary is defined in § 28-507(1), which states that "[a] person commits burglary if such person willfully,

maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." For more than a century, this court has held that evidence of any act of physical force, however slight, by which an obstruction to the entry of premises is removed is sufficient to prove the essential element of breaking as used in the statutory offense of burglary. *State v. McDowell, supra*; *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990); *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *State v. Classen*, 216 Neb. 323, 343 N.W.2d 749 (1984); *State v. Campbell*, 190 Neb. 394, 208 N.W.2d 670 (1973); *Hayward v. State*, 97 Neb. 9, 149 N.W. 105 (1914); *Ferguson v. State*, 52 Neb. 432, 72 N.W. 590 (1897); *Metz v. State*, 46 Neb. 547, 65 N.W. 190 (1895).

In *State v. McDowell, supra*, we reversed a burglary conviction on the ground that the defendant's admitted act of climbing a fence in order to steal transmission casings from a storage yard did not constitute a breaking as a matter of law because it did not involve the removal of an obstruction to entry. Although specifically noting that this holding made it unnecessary to reach the contention that the trial court erred in not instructing the jury that breaking requires removal of an obstruction to entry, this court stated in dicta, "When burglary is charged, a jury should be instructed that in addition to the use of physical force, however slight, the removal of an obstacle to entry is necessary to find a breaking." *State v. McDowell*, 246 Neb. 692, 701, 522 N.W.2d 738, 744 (1994).

In its instructions to the jury in the present case, the trial court set forth the statutory elements of the offense of burglary and further instructed that the phrase "breaking and entering" as used in such instructions "means entering a building by any act of physical force, however slight, including opening a door or unhooking a door fastener." Greer's attorney affirmatively stated during the instruction conference that he had no objection to this instruction, and his proposed instruction on the burglary count, which the trial court declined to give, contained no specific language regarding removal of an obstruction to entry. The Court of Appeals did not address Greer's failure to object to the instruc-

tion given or his failure to request an alternate instruction containing the language which he contended was erroneously omitted.

[7-9] Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994); *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992). However, it is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998); *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). Because Greer did not object to the breaking and entering instruction at trial or request an alternate instruction, the issue on appeal is whether the instruction given was so deficient as to constitute plain error, which we have defined as error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997); *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

[10,11] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). A trial court generally retains discretion in the wording of jury instructions. *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). However, whenever an instruction from the Nebraska Jury Instructions is applicable and, from a consideration of the facts and prevailing law, the trial court determines that an instruction on a particular subject is appropriate, the instruction in the Nebraska Jury Instructions should be used. *State v. Stahl, supra.* See, *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992); *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983).

NJI2d Crim. 4.4, entitled "Definitions (Terms for Crimes Against Property)," includes the following definition for the phrase "break and enter": "[T]hat is, entered a building by any

act of physical force, however slight, including opening a door or window." NJI 14.10, predecessor to NJI2d Crim. 4.4, defined "breaking and entering" as "any act of physical force, however slight, by which entrance is gained into a public (or private) building." We characterized this as an "accurate statement of the applicable law" in *State v. Bridger*, 223 Neb. 250, 255, 388 N.W.2d 831, 835 (1986). Neither NJI2d Crim. 4.4 nor its predecessor includes a specific reference to removing an obstruction to entry.

In the present case, the trial court modified the pattern instruction slightly by instructing the jury, "'Breaking and entering' means entering a building by any act of physical force, however slight, including opening a door *or unhooking a door fastener*." (Emphasis supplied.) Both of these examples involve the application of some degree of physical force to remove an obstruction to entry. We have held that the opening of a closed door is a breaking within the meaning of the definition of burglary. *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985). Unlike *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994), the evidence in the present case does not reflect a potential means of entry which did not involve removal of an obstacle. Although it might have been preferable for the trial court to specifically instruct the jury that removal of an obstacle to entry was required to constitute breaking rather than to rely solely upon examples to communicate this concept to the jury, we cannot say that the failure to do so under the circumstances of this case constituted plain error requiring reversal of the burglary convictions. Therefore, we conclude that the Court of Appeals erred in reversing Greer's convictions on the two counts of burglary and one corresponding count of use of a weapon, and we reinstate those convictions.

EXCESSIVE SENTENCE

In its petition for further review, the State further contends that the Court of Appeals erred in vacating Greer's sentences for one count of second degree assault and one count of false imprisonment in the first degree, and remanding for resentencing pursuant to the amendments to § 29-2204 which became

operative on July 1, 1998. As counsel for the State acknowledged at oral argument, this portion of the Court of Appeals' judgment is consistent with our recent holding in *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), filed subsequent to the State's petition for further review, and is therefore affirmed.

CONCLUSION

For the reasons stated, we find no plain error in the jury instructions given by the trial court and therefore reverse that portion of the judgment of the Court of Appeals which reversed Greer's convictions on the two burglary counts (counts I and IV) and the corresponding use of a weapon charge (count V). In all other respects, the judgment of the Court of Appeals is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., concurring.

I concur in the result. I write separately, however, to address the problems with Neb. Rev. Stat. § 28-507(1) (Reissue 1995), which provides that a person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvement erected thereon with intent to commit any felony or with intent to steal property of any value. As written, breaking is an essential element of burglary, and in my opinion, it should not be an essential element.

For more than a century, we have tried to define "breaking" in terms of requiring the removal of an obstruction. We have held that evidence of any act of physical force, however slight, by which an obstruction to the entry of premises is removed is sufficient to prove the essential element of "breaking" as used in the offense of burglary. This, in my opinion, has led to some unreasonable and inconsistent results.

For example, opening a closed door is a breaking, *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990), but walking through an open door is not, *Hayward v. State*, 97 Neb. 9, 149 N.W. 105 (1914). Opening a skylight is a breaking, *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988), but crawling over a closed door and through an open transom is not, *McGrath v. State*, 25 Neb. 780, 41 N.W. 780 (1889). Presumably, opening a gate is a breaking (not yet decided), but crawling over a fence

is not, *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

If a person climbs over a fence, climbs a drainpipe to the roof, walks over the roof, jumps to a balcony from the roof, and then enters through a door or crawls through an open window on the balcony, burglary has not been committed. If, however, the person opens the gate to the fence and then repeats all of the remaining activities, we would conclude that there has been some force to remove the obstruction, i.e., opening the gate, and that burglary has occurred. Clearly, breaking is not an essential element of the crime of burglary and should be eliminated from § 28-507.

In the case at bar, the victim was awakened by a man standing by her bed. The man was wearing a ski mask, and he ordered her to go to another part of the apartment, where he sexually assaulted her at knifepoint and stabbed her right thigh. If the evidence established that the door to the apartment was open, the man who walked through the door would not have committed the offense of burglary. Based on our decision in *McDowell, supra*, the Nebraska Court of Appeals felt compelled to reverse because the jury was not specifically instructed that the removal of an obstacle to entry is necessary in order for there to be a "breaking," as the term is used in § 28-507.

In *McDowell*, we reversed a burglary conviction on the ground that the defendant's admitted act of climbing the fence in order to steal transmission casings from a storage yard did not constitute a breaking as a matter of law because it did not involve the removal of an obstruction to entry. I do not agree with the conclusion in *McDowell* that crawling over a fence is not removal of an obstruction to the entry of the premises and therefore is not a breaking, but that is the current state of the law. It is the province of the Legislature, not the courts, to amend § 28-507 to eliminate the requirement that there be a breaking as an element of the crime of burglary.

At present, climbing over the newly erected fence at the Governor's mansion with the intent to commit any felony is not burglary. Opening and walking through the gate with the same intent is burglary.

It is because of my disagreement with *McDowell* and the problems above illustrated that I concur in the result.

GERRARD and MILLER-LERMAN, JJ., join in this concurrence.

TIPP-IT, INC., A NEBRASKA CORPORATION, APPELLANT, V. MARTIN J. CONBOY, CITY PROSECUTOR, OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

596 N.W.2d 304

Filed July 9, 1999. No. S-98-096.

1. **Constitutional Law: Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).
2. **Obscenity: Appeal and Error.** An appellate court must review the determinations of the trier of fact pursuant to the three-part obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).
3. ____: ____. An appellate court should give appropriate deference to the trier of fact regarding the "prurient interest" test and the "patent offensiveness" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
5. **Obscenity: Appeal and Error.** An appellate court should apply a de novo review in considering the third prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the value of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.
6. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court.
7. **Declaratory Judgments: Proof.** Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence and the burden is to be borne by the plaintiff.
8. **Criminal Law: Proof.** It is the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense.
9. **Obscenity: Proof.** Proof beyond a reasonable doubt is the most appropriate standard in civil obscenity cases, instituted pursuant to Neb. Rev. Stat. § 28-820 (Reissue 1995).

10. **Courts: Obscenity: Appeal and Error.** In determining whether certain material is obscene, both trial courts and appellate courts must make a threshold determination that the material in question is within the range of materials which may be regulated.
11. **Obscenity: Words and Phrases.** Obscenity is defined as those materials which, taken as a whole, appeal to the prurient interest in sex; which portray sexual conduct in a patently offensive way; and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
12. **Obscenity: Expert Witnesses.** Expert testimony is not necessary to enable the trier of fact to judge the obscenity of material which has been placed into evidence.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Alan M. Thelen, Assistant Omaha City Attorney, for appellee.

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

HENDRY, C.J.

I. PROCEDURAL HISTORY

Tipp-It, Inc., a Nebraska corporation, and Terry Tippit, the operator of the "Run Bar" (jointly referred to as "Tipp-It"), brought a declaratory judgment action pursuant to Neb. Rev. Stat. § 28-820 (Reissue 1995), seeking a judgment that certain putative works of art, namely exhibits 1 through 3, were not obscene within the definition of obscenity contained in Neb. Rev. Stat. § 28-814 (Reissue 1995). Martin J. Conboy, the Omaha City Prosecutor, filed an answer and counterclaim generally denying Tipp-It's contentions and affirmatively alleging that the continued exhibition of the works constituted a public nuisance. After a bench trial, the Douglas County District Court declared exhibits 1 through 3 to be obscene. Tipp-It filed a notice of appeal and a petition to bypass. We granted Tipp-It's petition to bypass, see Neb. Rev. Stat. § 24-1106 (Reissue 1995), and now affirm.

II. FACTUAL BACKGROUND

Tipp-It operated a bar located at 1713-15 Leavenworth Street, Omaha, Nebraska, under the name "Run Bar." Tipp-It has operated the Run Bar since August 24, 1994, catering solely to a gay

clientele. The Run Bar has a liquor license covering 1713-15 Leavenworth Street, including the main floor, a loft area, and a basement. The basement contains a full bar, chairs to sit on, and a pool table. The basement is utilized Thursday through Sunday by individuals over 21 years of age from 8 p.m. until 1 a.m. The primary activity of the Run Bar consists of socialization.

The works in question were displayed in the basement of the Run Bar. The matter in question came to light when local fire inspectors examined the basement of the Run Bar pursuant to Tipp-It's request for a certificate of occupancy. The fire inspectors complained to the Omaha Police Division regarding several works being displayed on the walls of the basement. On December 13, 1994, Sgt. Ronald Cole appeared at the Run Bar to investigate the complaint. Cole arrived at approximately 10 p.m., when the bar was open, and walked into the basement. Cole viewed various works displayed in the basement (22 total), seizing 3 works he suspected as violating the obscenity laws for the State of Nebraska (exhibits 1 through 3).

As a result of subsequent discussions between Conboy and Tipp-It's counsel, the parties determined that a declaratory judgment action would be initiated to ascertain whether the works were obscene. The works depicted in exhibits 1 through 3 were then returned to Tipp-It with the understanding that the works would not be displayed pending a resolution of this action.

Tipp-It filed a petition for declaratory judgment on March 9, 1995, and the case proceeded to trial on May 5, 1997. The Douglas County District Court described the works in question as follows:

> (C) Exhibit 1 is a photograph of a drawing or sketch of eight, possibly nine men, all clearly adults. All are either naked or have exposed genitalia. Four of the men display penises which are erect and of exaggerated dimensions. One appears to have just completed anal intercourse with another man. Water or semen appears on the table or bench on which this man rests. In the lower right-hand corner a man appears to be undergoing anal penetration.
>
> (D) Exhibit 2 is a photograph of a drawing or sketch of two men, both of whom are naked and have erect penises which are of exaggerated dimensions. The man who [is]

> seated is performing fellatio on the man who is standing. Semen appears to be dripping from the mouth of the seated man. The standing man is wearing a Civil War-era cap. . . .
>
> (E) Exhibit 3 is a photograph of a display which is itself either a photograph or painting. In it, a bearded man appears to be undergoing anal penetration by a standing man who has a "Mohawk" haircut.

The testimony adduced at trial was provided by Cole; Conboy; Tippit; and Dr. Roger Aikin, an expert witness. On December 29, 1997, the district court entered an order finding exhibits 1 through 3 obscene within the meaning of Neb. Rev. Stat. § 28-807(10) (Reissue 1995). The court ordered exhibits 1 through 3 to be surrendered to the Douglas County sheriff, destroyed, or removed from the state.

III. ASSIGNMENT OF ERROR

Tipp-It's sole assignment of error is that the Douglas County District Court erred in finding exhibits 1 through 3 obscene within the meaning of § 28-807(10).

IV. STANDARD OF REVIEW

The appropriate standard of review for obscenity cases was recently articulated in *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[1-3] In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the trier of fact pursuant to the three-part obscenity standard set forth in *Miller v. California, supra*, and § 28-807(10). In so doing, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of "contemporary community standards" which

are uniquely within the province of the trier of fact. *State v. Harrold, supra.*

[4] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

[5,6] Finally, the appellate court should apply a de novo review in considering the third prong of the *Miller v. California* test, i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review. *State v. Harrold, supra.* In a de novo review, an appellate court reaches a conclusion independent of the trial court. *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

V. ANALYSIS

1. Burden of Proof

Before proceeding with our analysis under *Miller v. California, supra*, we note that this court has never directly determined the appropriate burden of proof to be applied in civil obscenity cases brought pursuant to § 28-820. The district court determined the appropriate burden was proof beyond a reasonable doubt, stating that "given the issues of freedom of speech and freedom of expression at stake, and given that this proceeding arises under the criminal code, the defendant bears a burden of proving beyond a reasonable doubt that Exhibits 1 through 22, or any of them, are obscene." We agree.

Section 28-820 provides, in pertinent part,

> Any person who exhibits . . . or is about to exhibit . . . or is about to acquire possession with intent to exhibit . . . any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city . . . in which the work,

> material, conduct or live performance is located or is intended to be . . . exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene.

Neither the text nor the legislative history of § 28-820 indicates the Legislature's intent regarding the appropriate burden of proof. See *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). We must therefore construe § 28-820 in a fashion which avoids an absurd, unconscionable, or unjust result. See *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

[7] Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence and the burden is to be borne by the plaintiff. See, 2 Walter H. Anderson, Actions for Declaratory Judgments § 375 (2d ed. 1951); 22A Am. Jur. 2d *Declaratory Judgments* § 231 (1988 & Cum. Supp. 1999). At least one court has applied this standard in a civil obscenity case irrespective of the First Amendment issues involved.

In *Penthouse Intern., Ltd. v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984), a magazine publisher brought a civil rights action against the county solicitor general seeking a declaratory judgment to enjoin enforcement of the state obscenity statute with respect to distribution of the magazine. The plaintiff argued that the materials were protected by a presumption of nonobscenity and that the presumption could be defeated only if the materials were found obscene beyond a reasonable doubt. The court rejected this claim and stated:

> On its theory, all plaintiff would have to do in its affirmative action for a declaratory judgment is to show that there is a reasonable doubt that the issues are obscene. Plaintiff thus wants to have its cake and eat it too: it wants to force [the state] to prove [its] case as a defendant instead of as a prosecutor, by the criminal standard instead of by a preponderance of the evidence, in a federal civil action instead of a state criminal prosecution.
>
> Plaintiff's suggestion is untenable. The Supreme Court has squarely held that the "beyond reasonable doubt" standard is not required in a civil proceeding concerning

> obscenity. [*California*] *v. Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981) (per curiam).
>
> Nor does the state bear the burden of proof. The state has not come into this court; plaintiff has. Because [the plaintiff] seeks affirmative and anticipatory relief . . . [plaintiff] must accept the burden that is placed on every civil plaintiff. The Court therefore holds that, as the party seeking relief, plaintiff must carry the burden of proof and meet the usual, preponderance-of-the-evidence standard for civil litigation.

Penthouse Intern., Ltd. v. Webb, 594 F. Supp. at 1195-96.

Despite the suggestion in *Penthouse Intern., Ltd. v. Webb, supra*, that the Supreme Court has squarely ruled on this issue, the Court's holding in *California v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981), stands for nothing more than the proposition that the federal Constitution does not require the beyond a reasonable doubt standard to be applied in civil cases and that "while a State may require proof beyond reasonable doubt in an obscenity case, that choice is solely a matter of state law."

[8] Unlike the court in *Penthouse Intern., Ltd. v. Webb*, we believe the better reasoned approach is to require proof beyond a reasonable doubt. We suggested as much in *Main Street Movies v. Wellman*, 251 Neb. 367, 368, 557 N.W.2d 641, 643 (1997), a declaratory judgment action brought pursuant to § 28-820, in which we stated, "As the issue here is whether the movies in question are obscene . . . we review this matter as a *criminal case at law*." (Emphasis supplied.) We have long held that it is the prosecution's burden in a criminal case to produce proof beyond a reasonable doubt of every element of a charged offense. See, e.g., *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995); *Peyton v. State*, 54 Neb. 188, 74 N.W. 597 (1898). We see no reason to treat civil obscenity cases differently.

In addition, imposing a burden of proof other than beyond a reasonable doubt would be inconsistent with the purpose of § 28-820. Section 28-820 was intended to provide plaintiffs with a mechanism to test the obscenity issue in a civil action prior to

any exposure to criminal prosecution. If the burden of proof was merely a preponderance of the evidence, a finding of obscenity would be of minimal assistance to the issue of whether the material in question is criminally obscene. If such were the case, plaintiffs could gain little by instituting an action under § 28-820. Thus, a plaintiff would be disinclined to institute a declaratory judgment action if he or she may not be able to use the proceeding to evaluate the potential for criminal prosecution.

The Supreme Court has acknowledged the value of this approach to solving the vexing problem of reconciling state efforts to suppress sexually oriented expression with the prohibitions of the First Amendment.

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity.

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957). "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 55, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

Moreover, we believe the hazards to First Amendment freedoms, inhering in the regulation of obscenity, require that even in civil cases, the State must comply with the more exacting standard of proof beyond a reasonable doubt. Given the potential for erroneous judgments and the fundamental interests at stake in First Amendment cases, the fact finder must be almost certain that the materials are not constitutionally protected. The best way to guard against such a threat is to impose the most stringent burden, i.e., proof beyond a reasonable doubt. As Justice Brennan stated in his concurrence in *McKinney v. Alabama*, 424 U.S. 669, 685, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976):

> The uncertainty of that line means that erroneous judgments as to whether material is obscene or not are likely in any event, and are particularly so if the factfinder is only marginally confident that the material falls on the unprotected side of the line. In light of the command of the First Amendment, a standard of proof by a mere preponderance of the evidence poses too substantial a danger that protected material will be erroneously suppressed. . . . [T]he possibility of an erroneous determination is heightened by the fact that the material may never be available to the public and thus need never have truly faced the acid test of acceptance under prevailing community standards. Furthermore, in light of the definition of obscenity—incorporating, as it does under current law, the notion of patent offensiveness to the average member of the community—there is an even greater need for the *judge* operating as sole factfinder to be convinced beyond a reasonable doubt that the material is obscene, for his determination is made without a jury's assessment of community values.

Equally as persuasive is the notion that the possible erroneous imposition of civil sanctions under the preponderance of the evidence standard simply creates too great a risk of self-censorship by those engaged in dissemination or display of materials pertaining to sex. Just as the improper allocation of the burden of proof "will create the danger that the legitimate utterance will be penalized" and may therefore cause persons to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the application of a preponderance of the evidence standard, rather than proof beyond a reasonable doubt, could cause affected persons to be overly careful about the material in which they deal. In this respect, Justice Brennan stated:

> The inevitable tendency of the preponderance-of-the-evidence standard—by forcing persons dealing in marginal material to make hard judgments as to whether such material is obscene in order to avoid civil sanctions—would be to limit the volume of at least the marginal material a bookseller could permissibly handle, and thus "restrict the public's access to forms of the printed word which the

> State could not constitutionally suppress directly." [Citation omitted.] This "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

McKinney v. Alabama, 424 U.S. at 686 (Brennan, J., concurring).

[9] Having determined that proof beyond a reasonable doubt is the most appropriate standard in civil obscenity cases, instituted pursuant to § 28-820, we proceed in analyzing the works in question under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

2. Obscenity

(a) Threshold Determination

[10] The U.S. Supreme Court has indicated that both trial courts and appellate courts must make a threshold determination that the material in question is within the range of materials which may be regulated. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). That is, courts must initially determine, as a matter of constitutional law, whether the particular material is within the "substantive limitations" imposed by the First Amendment. *State v. Harrold, supra*. This review is intended " 'both to be sure that the [material] in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' " *Id.* at 842, 593 N.W.2d at 312 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). Accordingly, if we conclude, as a result of our threshold determination, that a work or material is within the range of patently offensive "hardcore" sexual material defined in *Miller v. California, supra*, the three-prong *Miller* obscenity test must then be utilized to determine if the material is outside the ambit of First Amendment protection.

In *State v. Harrold*, 256 Neb. at 850, 593 N.W.2d at 316, we stated that sexual conduct exceeding customary limits of candor could be considered "patently offensive." In *Miller v. California*, 413 U.S. at 25, the Court gave examples of the type of "sexual conduct" that may be regulated by state law:

It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

(a) Patently offensive representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Subsequent to the Supreme Court's decision in *Miller v. California*, the Nebraska Legislature proscribed the "patently offensive" depiction of certain acts of "sexual conduct," including "acts of . . . homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals . . . ." § 28-807(15).

As described by the district court, and viewed by this court, exhibits 1 through 3 clearly depict conduct involving sexual acts "define[d] for regulation" by § 28-807(10). Exhibits 1 through 3 depict sexual acts of sodomy, anal intercourse, and prolonged physical contact with a person's unclothed genitals. See § 28-807(10). We determine that the sexual acts depicted in exhibits 1 through 3 are within the range of "hardcore" materials as described by *Miller v. California*. Exhibits 1 through 3 depict ultimate sex acts, lewd exhibition of genitalia, ejaculated seminal fluid, and anal intercourse. Such depictions are clearly within the confines of *Miller v. California*. As the Supreme Court determined in *Hamling v. United States*, 418 U.S. 87, 115, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), photographs in a brochure depicting heterosexual and homosexual intercourse, sodomy, ejaculated seminal fluid, and other sexual acts constitute a "form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller*."

We therefore conclude, as a threshold matter, that exhibits 1 through 3 qualify "as possibly obscene." See *State v. Harrold, supra*. See, also, *U.S. v. Various Articles of Obscene Merchandise*, 709 F.2d 132 (2d Cir. 1983). Having determined that exhibits 1 through 3 meet this threshold requirement, we proceed with our analysis under *Miller v. California, supra*.

(b) *Miller v. California* Obscenity Test

[11] The Court in *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), defined obscenity as those materials which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Accord, *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977); *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974) (Brennan, J., concurring in result). Satisfying this definition involves a three-part conjunctive test. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

First, a matter is not obscene under Nebraska law unless, taken as a whole, "an average person applying contemporary community standards would find that the work . . . predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." § 28-807(10)(a). See, also, *Miller v. California, supra.* To decide this question of fact, the trier of fact must look to the work depicting sexual conduct as a whole to determine whether its dominant theme is one which goes substantially beyond customary limits of candor in appealing to a shameful or morbid interest in sex. See, *id.*; *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

Second, even though a matter depicts hardcore sexual conduct, which appeals to the prurient interest, it is not obscene unless, taken as a whole, the work "depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829." § 28-807(10)(b). As discussed above, the Court in *Miller v. California* gave various examples of the type of sexual conduct that may be regulated by state law, and the Legislature took occasion to enumerate similar other acts of "sexual conduct" which may be classified as patently offensive. See § 28-807(15).

Third, even though the material appeals to the prurient interest and is patently offensive, it cannot be obscene, constitutionally, unless the work, as a whole, "lacks serious literary, artistic, political, or scientific value." § 28-807(10)(c). Accord *Miller v. California, supra.* Material dealing with sexual conduct in a

manner which advocates ideas, which contributes to or illustrates scientific discussion, or which adds to the general body of art and literature in our culture is protected by the 1st and 14th Amendments to the U.S. Constitution. See *Miller v. California, supra.* Therefore, appellate courts examine decisions on this third prong more closely in order to ensure that First Amendment protection of ideas, however unpopular, is maintained. See *Smith v. United States, supra.*

(i) Prurient Interest and Patent Offensiveness

We now turn to the first two prongs of the three-part *Miller v. California* test and consider (1) whether the average person, applying contemporary community standards, would find exhibits 1 through 3 appealing to the prurient interest and (2) whether exhibits 1 through 3 depict, in a patently offensive way, sexual conduct specifically defined by the applicable state law.

The district court, sitting as the trier of fact, found exhibits 1 through 3 both appealing to the prurient interest and depicting sexual conduct in a patently offensive way. Based on the standard of review articulated in *State v. Harrold, supra*, we determine that the record amply supports the district court's findings regarding the first two prongs of the *Miller v. California* test.

As described by the district court, exhibit 1 is a sketch or drawing of eight or nine men who are either naked or have exposed genitalia. Four of the men display erect penises of exaggerated dimensions, and one appears to have just completed anal intercourse with another man. Exhibit 2 is a sketch or drawing of two naked men, both of whom have erect penises of exaggerated dimensions. A seated man is performing fellatio on a standing man, and semen appears to be dripping from the mouth of the seated man. Exhibit 3 is a photograph or painting of a bearded man who appears to be undergoing anal penetration by another man.

The district court concluded the pictures "clearly appeal to the prurient interest and the representations of the figures in Exhibits 1, 2 and 3 appear to have been designed to shock the viewer and, indeed, to be offensive." Based on our review of the record and affording the appropriate deference to the trier of fact, we cannot conclude the district court was clearly wrong.

See, *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998); *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

(ii) Value of Works

We next turn to our de novo review of whether exhibits 1 through 3 lack serious literary, artistic, political, or scientific value. Tipp-It claims that the works in question, as "part of a large gay art collection that was displayed in San Francisco, California," including "pencil drawings, pastels, and self-portraits by well known gay artists," possess serious artistic value. Brief for appellant at 22. We disagree.

The district court determined exhibits 1 through 3 lacked any serious artistic value and stated:

> If there is anything that keeps these three exhibits from being obscene, it is that they might be said to have some serious artistic value. It is here that Dr. Aikin's unrefuted opinions become significant. The Court finds credible his opinion that Exhibits 1, 2 and 3 are artistically valueless. The Court thus finds that the defendant has borne its burden of proof as to Exhibits 1, 2 and 3, and that the same are obscene.

The only expert witness called to testify by either party was Dr. Aikin. Dr. Aikin received his bachelor of arts degree from the University of Oregon in 1969 and his doctorate degree from the University of California at Berkeley in 1977, both in art history. He has taught art at Creighton University for 18 years, served as the director of the Creighton Art Gallery for 6 years, and also served as a curator for the Creighton Art Gallery for 6 years. Dr. Aikin is currently the chairman of the Department of Fine and Performing Arts at Creighton University.

Dr. Aikin testified that whether a particular work has serious artistic value can be determined either under a subjective, "four-corners" test by evaluating such criteria as space, composition, design, color, harmony, and form and balance, or under an objective "Dickey" analysis, which considers where the art has been exhibited as well as whether the work, or the putative artist, has achieved a certain degree of respect and recognition in the artistic community. In Dr. Aikin's opinion, exhibits 1

through 3 do not possess any serious artistic value under either analysis.

Dr. Aikin initially analyzed exhibits 1 through 3 under the "four-corners" analysis, concluding that the works lacked "the kinds of things" or "any of the formal qualities" he deemed necessary to constitute serious artwork. When asked to evaluate the exhibits under the Dickey analysis, Dr. Aikin stated that in the absence of "any indication that these works have ever been part of a venue" or that "any serious value had accrued to th[em] as a result of an exhibition or a juried exhibition or a publication, or some kind of dispassionate, neutral judgment by the art world, I would have to say that th[ese] . . . have no value as art on that basis."

[12] Expert testimony is not necessary to enable the trier of fact to judge the obscenity of material which has been placed into evidence. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (stating that " '[i]n the cases in which this Court has decided obscenity cases since *Roth* [*v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)], it has regarded the materials as sufficient in themselves for the determination of the question' "). However, in other cases, courts have considered expert testimony in guiding their decisions regarding serious artistic value. See, *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992); *United States v. Ten Erotic Paintings*, 432 F.2d 420 (4th Cir. 1970).

Consequently, while we are not bound to accept Dr. Aikin's expert testimony, we find his unrebutted, uncontroverted testimony of assistance in our de novo review. Dr. Aikin concluded that exhibits 1 through 3 have no serious artistic value, regardless of the analysis employed. Pursuant to our de novo review of the record, and viewing the works in their entirety, we reach the same conclusion and find beyond a reasonable doubt that exhibits 1 through 3 lack any serious artistic value.

VI. CONCLUSION

Having considered Tipp-It's assignment of error and finding it lacking merit, we affirm the district court's December 29, 1997, order, finding exhibits 1 through 3 to be obscene.

AFFIRMED.

GERRARD, J., concurring.

I reluctantly concur in the result reached in the majority opinion. I write separately to articulate my views regarding the third prong of the test articulated in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "value" of the material at issue. As this determination does not depend upon community standards and is particularly susceptible to appellate review, an appellate court considering this issue conducts a de novo review and reaches a conclusion independent of that of the trial court. See *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

An appellate court's de novo review of the value of the material at issue is appropriate because the appellate court is at least as qualified as the trier of fact to make such a determination. See *id.* While we may be as qualified as the trier of fact, we are not necessarily as qualified to determine the artistic value of a work as is an expert in the field of art, and we are often guided by testimony from such experts in our de novo review.

The trial court and the majority in this case rely upon the opinion of Dr. Roger Aikin, an acknowledged expert in the field of art. I find Aikin's testimony to be marginally persuasive regarding the "four-corners" analysis and not at all persuasive regarding his "Dickey" venue analysis. I do find Aikin's testimony, however, to be essentially uncontradicted, and his qualifications and the foundation for Aikin's opinion have not been challenged on appeal.

Because we are "in all respects confined to the record properly before us, limited to what was presented to the trial tribunal," see *Fremont Joint Stock Land Bank v. Harding*, 130 Neb. 842, 846, 266 N.W. 714, 716 (1936), I join in the judgment of the majority. Even though the appellate court conducts a de novo review, it is most helpful to have meaningful evidence in the record in order to conduct an insightful inquiry into the artistic value of the material at issue. It is not the proper role of an appellate court to become a "super expert," randomly imposing its opinion over those opinions properly admitted in evidence.

With that caveat, I must conclude, after a de novo review of the record before us, that the State met its burden of proving that

the material at issue lacked serious artistic value. Hence, I concur.

MILLER-LERMAN, J., concurring.

Given the applicable standard of review and the record with which we are presented, I must concur.

SHANE E. HERNANDEZ, APPELLEE, V.
REBECCA JEAN BLANKENSHIP, APPELLANT.
596 N.W.2d 292

Filed July 9, 1999. No. S-98-904.

1. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
2. ____: ____. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed.
3. ____: ____. Orders which fall in 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.
4. **Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.
5. **Final Orders: Appeal and Error.** When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right.
6. ____: ____. If an order significantly impinges on a constitutional right, for example, parents' liberty interest in raising their children or a criminal defendant's right not to be subjected to double jeopardy, this affects a substantial right.
7. **Jurisdiction.** A motion to decline jurisdiction under Neb. Rev. Stat. § 43-1207 (Reissue 1998) is most analogous to a forum non conveniens motion, which allows the court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought in another forum.
8. **Appeal and Error.** The fact that a person is subjected to inconvenience by a court's order does not in and of itself entitle one to appeal.
9. **Final Orders: Jurisdiction: Appeal and Error.** An order of a district court overruling a motion to decline jurisdiction under Neb. Rev. Stat. § 43-1207 (Reissue 1998) does not affect a substantial right and is thus not a final, appealable order.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

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

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

HENDRY, C.J.

INTRODUCTION

Shane Hernandez (Hernandez), the biological father of Abrea Hernandez, brought a petition for change of custody in the district court for Dawson County, Nebraska. The child's mother, Rebecca Jean Blankenship, filed a general denial and a pretrial motion asking the district court to decline jurisdiction as an inconvenient forum pursuant to Neb. Rev. Stat. § 43-1207 (Reissue 1998) of the Nebraska Child Custody Jurisdiction Act (NCCJA). The court overruled the motion, finding that while Missouri was the child's home state, the court still had "significant connection" jurisdiction over the matter. Blankenship appealed this decision to the Nebraska Court of Appeals. Pursuant to our authority to regulate the docket of the Court of Appeals, we moved the case to our docket. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We dismiss the appeal because the district court's order was not a final, appealable order.

BACKGROUND

The child involved in this matter was born on October 23, 1992. Hernandez and Blankenship resided in Lexington, Nebraska, when the child was conceived and for 1½ years after the child was born. The couple were never married. In the summer of 1994, Blankenship moved back to her hometown of Joplin, Missouri, with the child and Hernandez.

On October 25, 1994, Hernandez returned to Nebraska with the child, without the knowledge or consent of Blankenship. On October 28, Hernandez filed a petition for custody and establishment of paternity with the district court for Dawson County, Nebraska.

After a hearing held on November 7, 1994, the court placed temporary custody with Blankenship. At a trial held in Dawson

County in March 1995, the court found that Hernandez was the biological father of the child. The court placed permanent custody of the child with Blankenship, subject to visitation by Hernandez. Blankenship did not raise any jurisdictional objections during these proceedings. Since February 1997, Blankenship has resided in St. Joseph, Missouri. Hernandez has continued living in Lexington.

Hernandez has regularly exercised his visitation rights, which allow the child to visit for 1 week each month. In March 1998, when the child was 5½ years old, Hernandez brought a petition for change of custody in the district court for Dawson County. Blankenship has brought no legal action in Missouri. The custody proceeding in the district court was stayed pending the outcome of this appeal.

ASSIGNMENTS OF ERROR

Blankenship assigns, rephrased, the following errors: (1) The court erred in overruling Blankenship's motion asking the court to decline jurisdiction, (2) the court erred in determining that it had continuing jurisdiction over the matter under the NCCJA, (3) the court erred in finding that its continuing jurisdiction over the matter was not affected by the child's residence in another state for 6 months or more, (4) the court erred in finding that the child still had a significant connection to the State of Nebraska, and (5) the court erred in finding that deference to another state's jurisdiction is given only after the child and all of the parties involved have moved out of Nebraska.

STANDARD OF REVIEW

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999).

ANALYSIS

This appeal involves a custody proceeding still pending before the district court. Blankenship has brought an appeal regarding the district court's order overruling a motion to decline jurisdiction. Blankenship's motion asked the district court, inter alia, to decline to exercise its jurisdiction "as this

Court is an inconvenient forum to make the custody determination." Blankenship at oral argument conceded that the district court had jurisdiction to determine the custody issue but argued that the district court should decline to do so as an "inconvenient forum" pursuant to § 43-1207. As a preliminary matter, we must determine whether this appeal is properly before the court as a final order.

[1,2] A party may appeal from a court's order only if the decision is a final, appealable order. Neb. Rev. Stat. § 25-1902 (Reissue 1995) states:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Section 25-1902 sets out three types of final orders. The first category of final orders covers those which determine the action and prevent judgment. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). This category is inapplicable here. Overruling a motion to decline jurisdiction as an inconvenient forum does not determine the action or prevent judgment, because the underlying cause still proceeds.

This first type of final order is sometimes described as a "death knell" order; that is, the decision by the court effectively ends the litigation. This is clearly seen in *Tess*, where the court dismissed a cause of action with prejudice, preventing a judgment regarding that cause of action, and dismissed a defendant, preventing a judgment regarding that defendant.

The third category of final orders in § 25-1902 covers those made on summary application after judgment. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996). This category is also inapplicable here, because there has been no judgment regarding custody.

The only possible category available to Blankenship is the second one. This covers orders "affecting a substantial right made in a special proceeding." § 25-1902. However, because overruling a motion to decline jurisdiction as an inconvenient forum under § 43-1207 does not affect a substantial right, we

hold that the order of the district court was not a final, appealable order.

[3] Orders which fall in 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. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). The substantial right requirement is common to all three categories but has been frequently discussed by this court in the context of the second category. See, *Holste, supra*; *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[4] A substantial right is an essential legal right, not merely a technical right. *Holste, supra*, citing *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

[5,6] When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Holste, supra.* Also, if an order significantly impinges on a constitutional right, for example, parents' liberty interest in raising their children, *In re Interest of R.G., supra*, or a criminal defendant's right not to be subjected to double jeopardy, *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), this affects a substantial right.

The district court's order did not diminish Blankenship's available claims and defenses regarding custody of the child. The district court simply retained jurisdiction of the custody matter. When the matter proceeds to trial, Blankenship will still have at her disposal all possible claims and defenses regarding custody of the child. Blankenship suffers no diminishment of any claim or defense as a result of the district court's decision to retain jurisdiction. Further, the court's order here did not address the custody of the child, as in *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994). While a custody determination affects a substantial right, overruling a motion to decline jurisdiction as an inconvenient forum under § 43-1207 does not.

[7] The district court's order also does not substantially impinge on any constitutional right of Blankenship. A motion to decline jurisdiction under § 43-1207 is most analogous to a

forum non conveniens motion, which allows the court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought in another forum. *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974). Such a motion is not typically reviewable until after final judgment. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988).

[8] Proceeding with a custody case in Missouri may be more personally convenient for Blankenship; however, the fact that a person is subjected to inconvenience by a court's order does not in and of itself entitle one to appeal. See *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953). Here, the record presents no constitutional concerns regarding the appropriateness of litigating this matter before the district court for Dawson County.

An order overruling a motion to decline jurisdiction as an inconvenient forum under § 43-1207 does not diminish any of Blankenship's claims or defenses, nor does it substantially impinge on any constitutional right of Blankenship. Thus, the district court's order did not affect a substantial right of Blankenship. Having made this determination, it is unnecessary for us to address whether a motion under § 43-1207 involves a special proceeding.

CONCLUSION

[9] The order of the district court overruling a motion to decline jurisdiction under § 43-1207 does not affect a substantial right and is thus not a final, appealable order. Because the decision by the district court was not a final, appealable order, it is unnecessary to reach the assignments of error.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ALEXANDER F. KOSELUK, RESPONDENT.

596 N.W.2d 315

Filed July 9, 1999. No. S-98-1196.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, Alexander F. Koseluk, was admitted to the practice of law in the State of Nebraska on February 1, 1985.

As a result of investigations by the Counsel for Discipline of the Nebraska State Bar Association pertaining to three client complaints and a letter of complaint from the Honorable Timothy J. Mahoney, Chief Judge of the U.S. Bankruptcy Court for the District of Nebraska, the Committee on Inquiry of the Second Disciplinary District filed an application for the temporary suspension of respondent from the practice of law on October 16, 1998. The investigation centered on a complaint received on May 20, 1998, from William Melhorn alleging neglect in connection with dissolution and bankruptcy matters; a complaint received on July 27, 1998, from Jill Bryant alleging neglect in connection with a dissolution matter; a complaint received on August 26, 1998, from Donald and Lori Herbolsheimer alleging neglect in connection with a bankruptcy matter; and a complaint received on October 7, 1998, from Chief Judge Mahoney alleging a pattern of neglect and violations of the U.S. Bankruptcy Code generally relating to the proper filing of petitions and filing fees.

An order to show cause was issued on October 21, 1998, to which respondent filed a response on November 12. An order suspending respondent from the practice of law until further order of the court was filed on November 18.

On June 23, 1999, respondent filed a "Voluntary Surrender of License" to practice law. Therein, respondent admits that the Counsel for Discipline of the Nebraska State Bar Association received letters of complaint on May 20, July 27, August 27 (referring to August 26), and October 7, 1998, generally alleging that respondent had neglected clients. Respondent further states that for the purpose of his voluntary surrender of license, he does not desire to contest the allegations of neglect.

Respondent admits that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(5) and (6), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. Respondent has freely and voluntarily consented to the entry of an order of disbarment and has waived his right to notice, appearance, or hearing prior to entry of such an order.

The court, having concluded there is a basis therefor, hereby accepts respondent's surrender of his license to practice law and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

KRISTY LEE FARNSWORTH, APPELLEE, V.
JEFFREY D. FARNSWORTH, APPELLANT.
597 N.W.2d 592

Filed July 16, 1999. No. S-97-159.

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 a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and just result.
3. **Child Custody.** Generally, before a court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
4. ____. In the context of determining the best interests of a child in a case where the custodial parent petitions to move out of the jurisdiction with the minor child, courts may consider such factors as (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents; and (9) the living conditions and employment opportunities for the custodial parent.
5. ____. In determining the legitimacy of a custodial parent's motives for petitioning to move out of the jurisdiction with the minor child, Nebraska does not require the custodial parent to exhaust all possible job leads locally before securing a better position in another state.

6. **Child Custody: Visitation.** Significant career enrichment is a legitimate motive for a custodial parent to petition to move out of the jurisdiction with a minor child, absent some aggravating circumstance or ulterior motive on the part of the custodial parent to frustrate the noncustodial parent's visitation rights.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JAMES A. BUCKLEY, Judge. Judgment of Court of Appeals reversed and cause remanded with directions.

Matthew Stuart Higgins, of Cohen, Vacanti & Higgins, for appellant.

Charles O. Forrest, of Schmid, Mooney & Frederick, P.C., on brief for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

I. INTRODUCTION

Kristy Lee Farnsworth (hereinafter mother) seeks further review of the decision of the Nebraska Court of Appeals reversing an order of the district court which had modified a decree that dissolved her marriage to Jeffrey D. Farnsworth (hereinafter father). *Farnsworth v. Farnsworth*, 6 Neb. App. 597, 576 N.W.2d 476 (1998). In the modification order, the district court allowed the mother to relocate to Denver, Colorado, with the parties' only child, Casey Jay, born August 2, 1991. The district court also increased the father's child support obligation to $525 per month in accordance with the current Nebraska Child Support Guidelines and ordered increased visitation rights for the father. Regarding travel expenses, the parties were ordered to split the expenses for the extended summer, Christmas, and Easter break or spring vacation visits, and the father was ordered to pay the expenses for all other visitations.

The primary issue that the Court of Appeals analyzed in this case is whether the district court abused its discretion in allowing the mother to remove the minor son, Casey, from Nebraska to Colorado. The Court of Appeals determined that the district court abused its discretion when it found that the mother had proved a legitimate reason for leaving the state, and reversed the

judgment of the trial court. We have long held that the court generally will permit the removal of a minor child from the jurisdiction if the custodial parent satisfies the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989). For the reasons that follow, we find no abuse of discretion by the district court in this custodial parent relocation determination; therefore, we reverse the judgment of the Court of Appeals and remand the cause with directions to reinstate the judgment of the district court.

II. FACTUAL BACKGROUND

At the time of the original divorce decree entered May 31, 1995, both the mother and the father resided in Nebraska. The divorce decree granted the mother custody of the couple's now 7-year-old son, Casey, and ordered the father to pay $250 per month in child support. The decree also awarded the father visitation rights, which included: alternating national holidays, alternating birthdays of the child, Father's Day, 1 week beginning on Monday of the second full week of each month, every other weekend from Friday at 6 p.m. through Sunday at 6 p.m., and 6 weeks' extended summer visitation. The father's child support was reduced by 50 percent for the extended summer vacation.

On July 11, 1996, the mother filed an application to increase the father's child support obligation, thereby bringing it into conformity with current Nebraska Child Support Guidelines. The father filed an answer opposing the mother's application. The father also filed a cross-application for modification, seeking an order awarding him and the mother joint custody of Casey or, in the alternative, specific, increased, and extended visitation with Casey. The father also requested that the court prohibit the mother from leaving the local area with Casey. Subsequently, on October 16, the mother filed a motion to remove Casey from Nebraska to Denver. Pursuant to the parties' stipulation, the father had "extended visitation" with Casey during the pendency of the mother's removal motion, from November 1 through 25.

A hearing was held on the pending matters on December 13, 1996. The parties stipulated that the mother is a fit and proper person to have custody of Casey. The father withdrew the portion of his cross-application requesting joint custody of Casey. Both the mother and the father testified at the hearing.

During presentation of her case, the mother testified that she earned $24,500 per year as a corporate leasing agent at Cari Rentals in Omaha. Her job dealt with corporate furniture leasing. The mother stated that she began looking for a new job because there was no opportunity for career advancement at Cari Rentals due to the size of the company. Although she neither submitted resumes to any companies nor contacted any employment agencies in Omaha, the mother testified that she looked in the local want ads every Sunday and made calls to various companies in the area to determine if they had positions in the same line of work. After failing to find openings for identical work at other companies in Omaha, she began searching for corporate leasing opportunities in Denver.

Pursuant to her job search, the mother obtained employment with Cort Furniture Rental (Cort) in Denver. The mother testified that the position at Cort was nearly identical to her position at Cari Rentals, but with significantly more earning and career advancement potential. She testified that her starting pay at Cort would be $24,000 per year and that she expected additional commission earnings of at least $6,000 per year. Given the salary structure at Cort, the mother anticipated earning over $40,000 annually after her first year there. The mother also noted that Cort offered a considerable number of fringe benefits that Cari Rentals did not provide, including paid holidays, health and dental insurance, and a profit-sharing plan. Because Cari Rentals was a small, local company with only one owner and one supervisory-level position above her position—compared to Cort, which is a nationwide business with numerous levels of management—the mother said she saw much more potential for promotion in Denver.

The mother further testified that she always wanted to live in Denver and that she was drawn there because her boyfriend of 9 months, her best friend, and three of her first cousins reside in that area. The mother stated that she did not have plans to marry

her boyfriend but that their relationship could develop into a more meaningful one in time. While her parents live approximately 2½ hours away from Omaha by car, the mother stated that she has no other relatives and only one close friend in Nebraska. However, Casey does have family in Omaha on his father's side, including grandparents, one uncle, one aunt, and two cousins.

The mother also testified that there were several potential activities in the Denver area that she thought would benefit Casey. For example, the mother stated that her cousins and her boyfriend's parents each own an acreage and horses near Denver, suggesting that Casey would be able to enjoy horseback riding there. Beyond that, the mother stated that Casey would have access to a wide range of outdoor activities in Denver in which she was anxious to get him involved, such as skiing, golfing, camping, hiking, canoeing, and kayaking. The mother said that she did not feel living in Omaha would afford Casey as much potential to experience these activities. Although the father's parents also have an acreage and access to horses in Nebraska, the father acknowledged that he has never taken Casey horseback riding there.

The father testified that he was opposed to the mother's application to remove Casey to Colorado because his visitation with Casey would be inhibited. The father testified that he had never missed any scheduled visitation and that he spent time with Casey throughout the year equal to approximately one-half of all the days in the year. The father does not want Casey to leave the state. He stated at the modification hearing, "I want to be a part of my son's life. I want him to be a part of my family's life. I hate to miss out on him starting little league, him starting school, being at the parent-teacher conferences; basically, seeing my son grow up."

The father also testified that the mother had told him that he had "no rights" and "no say" and that she "gave [him] all the rights [he] had regarding [Casey]." The mother had been asked about this earlier in cross-examination. She had responded, "I don't recall. I — in what — I don't believe I did. I don't think I did." A follow-up question was asked: "Could that be something

that you would have said, you have no rights, you have what you're going to get, something to that effect?" Her answer was "No, I don't — please —." A recess was then taken. A tape recording was produced that showed that in fact this remark was made by the mother in a telephone conversation with the father.

The father also offered the testimony of Gerry Phaneuf, the director of career services at Creighton University. Phaneuf testified that his experience in the career services field included employment at Creighton University, the University of Nebraska-Lincoln, and Texas Tech University in Lubbock, Texas. His responsibilities have included organizing workshops specifically for women searching for employment. Both parties stipulated that Phaneuf is an expert in the area of employment opportunities in Nebraska.

Phaneuf testified that there were abundant job opportunities in the Omaha corporate rental industry for which the mother was qualified. Further, Phaneuf said that the pay in those jobs would be comparable to that at Cort in Denver. He also noted the cost of living in Omaha was slightly less than in Denver. However, Phaneuf allowed that the positions he spoke of were in related fields, such as leasing business products and equipment, and not the mother's specific expertise in the area of corporate furniture rentals.

After hearing the evidence and observing the witnesses, the district court entered an order granting the mother leave to remove Casey from Nebraska to Denver, increasing the father's support obligation to $525 per month, expanding the father's visitation to include 1 week during the Christmas holiday season and at least 1 week during every other Easter break or spring vacation. In addition, the district court ordered that certain travel expenses be equally shared by the parties. The father timely appealed the modification order to the Court of Appeals.

In a two-to-one decision, the Court of Appeals reversed the district court's removal order, reinstated the previous visitation schedule, and affirmed the district court's order for an increase in the father's child support obligation. *Farnsworth v. Farnsworth*, 6 Neb. App. 597, 576 N.W.2d 476 (1998). We granted the mother's petition for further review.

III. ASSIGNMENTS OF ERROR

In her petition for further review, the mother contends, in summary, that the Court of Appeals erred in (1) determining that the district court abused its discretion when it found that the mother had proved a legitimate reason for leaving the state and that it was in the minor child's best interests to continue to live with the mother, (2) determining that the mother produced no evidence to conclude that the Omaha Public Schools are inadequate or that the Denver Public Schools are superior, and (3) setting forth a five-prong test for the determination of what is in the best interests of a minor child by utilizing factors that had not been set forth by the Nebraska Supreme Court at the time of the trial.

IV. STANDARD 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. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and just result. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

[3] Generally, before a court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994).

V. ANALYSIS

Of all the disputes that courts are called upon to resolve, parental relocation cases such as this one are among the most complicated and troubling. That is because the interests of the custodial parent, who often has legitimate, sound reasons for wanting to move to a distant state, are mutually exclusive to the interests of the noncustodial parent, who commonly has a compelling desire to continue frequent, regular contact with the child. Complicating matters further, courts must ultimately per-

form the difficult task of weighing the best interests of the child, which may or may not be consistent with the personal interests of either or both parents. See, generally, e.g., *Harder v. Harder, supra* (reciting child's-best-interests rule and stating that mother had legitimate interest in moving to Arizona, father had close relationship with child, and guardian ad litem concluded that both parties were fit and proper persons to have custody).

1. CURRENT APPROACH

To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Id.* After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.* Of course, whether a proposed move is in the best interests of the child is the paramount consideration. *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995).

Despite the child's best interests being the central concern, we have never explicitly set forth factors to be considered in determining a child's best interests in a removal case. See *Farnsworth v. Farnsworth*, 6 Neb. App. 597, 576 N.W.2d 476 (1998). Given that, the Court of Appeals utilized, and the mother complained of, a five-pronged test synthesized from approaches in other jurisdictions. *Id.* While the Court of Appeals took a commendable, groundbreaking approach, we nonetheless find it necessary to independently consider all the appropriate factors to apply in cases such as this. In determining which factors to include in the analysis of a child's best interests, we examine persuasive decisions from other jurisdictions, in the absence of any contrary intention being expressed by our Legislature.

2. THREE CONSIDERATIONS

Although sometimes articulated differently, other jurisdictions employ three broad considerations in deciding whether removal is in a child's best interests. First, the courts typically examine each parent's reasons for seeking or opposing the move. Second, the courts assess the potential that the move holds for enhancing the quality of life for the child and the custodial parent. Finally, the courts examine the impact such a move will have on contact between the child and the noncusto-

dial parent (when viewed in the light of reasonable visitation arrangements). See, e.g., *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996); *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994); *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993); *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985); *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984), *modified, Holder v. Polanski*, 111 N.J. 344, 544 A.2d 852 (1988).

(a) Each Parent's Motives

As stated earlier, the legitimacy of the custodial parent's motive for moving is already a threshold question in our state. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). However, we recognize the wisdom in having both parents' motives play a further role in ascertaining a child's best interests. Thus, if a trial court finds the custodial parent's motives for moving are legitimate, the court should go on to consider the motives of each parent, in proposing and resisting the move, in its analysis of the child's best interests. While some legitimate motives might seem less compelling than others—for example, meeting the demands of a second marriage as compared to accommodating a specific health concern—none should be summarily rejected at this stage of the analysis without weighing the other considerations and how they all come to bear on the overall impact on the child.

(b) Child's Quality of Life

[4] There are a number of factors that may assist trial courts in assessing the second consideration regarding the potential for enhancing the quality of life for the child and the custodial parent. For instance, courts have considered: (1) the emotional, physical, and developmental needs of the child, *Yannas v. Frondistou-Yannas, supra*; (2) the child's opinion or preference as to where to live, *id.*; (3) the extent to which the custodial parent's income or employment will be enhanced, *Jones v. Jones, supra*; (4) the degree to which housing or living conditions would be improved, *id.*; (5) the existence of educational advantages, *id.*; (6) the quality of the relationship between the child and each parent, *Tropea v. Tropea, supra*; (7) the strength of the child's ties to the present community and extended family there,

id.; (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parents, *id.*; and (9) the living conditions and employment opportunities for the custodial parent, because the best interests of the child are interwoven with the well-being of the custodial parent. See, e.g., *Yannas v. Frondistou-Yannas, supra*; *Cooper v. Cooper, supra*. This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.

(c) Impact on Noncustodial Parent's Visitation

Obviously, the range of impacts that a move will have on the contact between the child and the noncustodial parent is as wide as the distance from Maine to Hawaii. Therefore, this consideration focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship. *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). When looking at this consideration, courts typically view it in the light of the potential to establish and maintain a reasonable visitation schedule. See, e.g., *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984).

Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Id.* Of course, the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness. *In re Marriage of Herkert*, 245 Ill. App. 3d 1068, 615 N.E.2d 833, 186 Ill. Dec. 29 (1993). Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994).

In addition to the noncustodial parent's loss of access and the reasonableness of a modified visitation schedule, another factor to be considered is the noncustodial parent's interest in securing custody, as well as the feasibility and desirability of a change in custody. Where the ties between a child and the noncustodial parent and the extended family or community are so strong as to make a long distance move undesirable, transferring custody may be a realistic alternative to forcing the custodial parent to

remain in the state. *Tropea v. Tropea, supra*. Similarly, where the custodial parent's motives for relocating are legitimate and compelling and the move would enhance the quality of life for the child, the court in a proper case may examine the feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility. *Id.*

(d) Summary of Approach

We conclude that the foregoing considerations and factors would be helpful to trial courts in determining what is in a child's best interests. Any list of suggested criteria is not meant to be exhaustive, nor will every factor be present in each case. However, these considerations and factors serve as appropriate guideposts to trial courts in determining what is in the child's best interests, and we adopt the approach for use in parental relocation cases.

3. Application to Present Case

Applying the criteria set forth above to the instant case, we determine that the district court did not abuse its discretion in granting the mother's request for removal. First, the mother met the threshold requirement of proving a legitimate interest in moving. We have recognized that job-related changes are legitimate reasons for moving where there is a "reasonable expectation of improvement in the career or occupation of the custodial parent," *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987), and where the custodial parent's new job included a small increase in salary and increased potential for salary advancement, *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979). The evidence certainly suggests that the move would advance the mother's career.

[5,6] The mother testified to conducting an unsuccessful search for better employment in Omaha. Having failed to uncover such opportunities, she turned to Denver, where she obtained a job with greater income, benefits, and career-advancement potential than in her present position. Of course, there was conflicting evidence regarding Omaha job opportunities by way of Phaneuf's testimony. Nevertheless, we have never required a custodial parent to exhaust all possible job

leads locally before securing a better position in another state. Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate motive in and of itself. We determine that the district court did not abuse its discretion in crediting the mother's testimony and in finding that she proved a legitimate interest in moving.

(a) Each Parent's Motives

Next, our de novo review of the record does not lead to a conclusion that the district court's findings were clearly untenable insofar as determining that Casey's move to Denver, with his custodial parent, is in the child's best interests. Regarding the first consideration, it appears that the mother and the father each have quite valid reasons for taking their respective positions on the child's removal from Nebraska. On the one hand, the mother desires to better her career, which we have determined is a legitimate and compelling motive.

On the other hand, there is no evidence to suggest that the father's resistance to removal was brought in bad faith or for manipulative purposes. In fact, the father's visitation record indicates that he is primarily concerned with maintaining frequent and regular contact with Casey. This, too, is a compelling motive and, indeed, a central concern. Thus, it appears that the motives of each party are equally balanced.

(b) Child's Quality of Life

Moving on to the next consideration, the record suggests that the move will enhance the quality of life for the mother and Casey. To begin with, the mother's testimony indicates that her new job presents greater income and career-advancement potential, which are two avenues toward a better standard of life.

The mother also testified that Denver provides better housing conditions, as she would live on the third floor of an apartment building in a neighborhood that she regarded as safe and nicer than the one where she lived in Omaha. While the mother acknowledged that there are neighborhoods in Omaha as nice as the one in Denver, she noted that they are more expensive. Moreover, the mother discussed how moving to Denver would improve living conditions for her and Casey insofar as they

would have access to a wider variety of outdoor activities and professional sporting events. Although access to outdoor activities and sporting events is commendable, the quality and quantity of access to such events is not significantly greater in Denver than in Omaha; thus, this factor was given little weight in our de novo review.

Next, the mother claimed that her proposed residence in Denver would present educational advantages for Casey. Although the mother cited generalized research she had performed as support for her opinion, the evidence is not compelling enough one way or the other to determine whether Denver schools are in some ways superior to Omaha schools. This factor was given little or no weight in our de novo review.

As for the quality of the relationship between Casey and each parent, the record suggests that both the mother and the father enjoy a close, nurturing relationship with Casey. Both spend roughly equal amounts of time with Casey, and each involves him in healthy activities when they are together. For example, the father takes Casey to dinner and movies and has him spend time with his extended family. Meanwhile, the mother bakes cookies and plays outside with Casey, and entertains his friends at her house.

In summary, the improved housing, living, and employment factors do not suggest that the district court abused its discretion on this second consideration.

(c) Impact on Noncustodial Parent's Visitation

Reviewing the final consideration, it appears that the district court fashioned a reasonable visitation schedule that will maintain a meaningful parent-child relationship between the father and Casey. Of course, the frequency of the father's visitation will be somewhat curtailed by a move from Omaha to Denver. Still, the distance between Omaha and Denver is not one that prevents the father from seeing Casey on a regular basis. Moreover, the district court ordered that the total number of days that the father spends with Casey be increased during the Christmas and spring vacations to partially make up for the diminished frequency of visits.

We determine that the district court fashioned as reasonable a visitation schedule as possible given the fact that one parent

resides in Omaha and the other parent resides in Denver. There was no abuse of discretion in the district court's consideration of this factor.

VI. CONCLUSION

Parental relocation issues are among the most difficult issues that trial courts face in postdivorce proceedings. Once broken by divorce, a family cannot be put back together in precisely the same way. Among other things, the relationships between the child and each of the parents and the parents to each other are necessarily different. As such, it is often difficult for courts to balance the noncustodial parent's accustomed close involvement in a child's everyday life with the custodial parent's chance to embark on a new or better life or to form a new family unit. It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given great deference absent an abuse of discretion.

To assist the trial courts in making these difficult decisions, we have established guideposts for determining the child's best interests in parental relocation cases. In the present case, we are cognizant that the district court did not make particularized findings on the legitimacy of the mother's motives or on the considerations we have established in determining Casey's best interests. Nevertheless, our de novo review of the record finds abundant support for the trial court's determination.

As such, it cannot be said that the district court abused its discretion or deprived the noncustodial parent of a substantial right or just result in the instant case. Therefore, we reverse the judgment of the Court of Appeals and remand the cause with directions to reinstate the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., not participating.

MICHELLE PHILLIPS, APPELLANT, V. INDUSTRIAL MACHINE AND NICHOLAS CUSICK, APPELLEES.

597 N.W.2d 377

Filed July 16, 1999. No. S-97-1263.

1. **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.
2. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
3. **Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing a verdict on these facts and issues, the party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured.
4. **Expert Witnesses.** Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.
5. ____. Where there is no sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the expert's opinion is to be stricken.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Vincent M. Powers and Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellant.

Stephanie Frazier Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Following a jury verdict in favor of Michelle Phillips, the trial court determined that the testimony of Phillips' expert had been erroneously admitted. Thus, the trial court granted a motion for new trial, and Phillips appeals.

SCOPE OF REVIEW

[1] 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. *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998).

[2] A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

FACTS

Phillips sued Industrial Machine and Nicholas Cusick, one of its owners, to recover damages allegedly sustained when a vehicle owned by Industrial Machine and driven by Cusick collided with Phillips' vehicle. Cusick admitted liability, and a jury trial was held to determine the nature and extent of the damages sustained by Phillips as a result of the accident.

Dr. Daniel R. Ripa, an orthopedic surgeon who treated Phillips, testified by videotape deposition that Phillips suffered a posttraumatic cervical strain as a result of the collision. Ripa stated that 3 years after the collision, Phillips continued to suffer from a mild amount of restriction in the extremes of her mobility of the neck. In other words, she still did not have a full range of motion in the neck. Given the fact that after 3 years, there were still objective findings of restricted mobility and subjective complaints of discomfort, Ripa opined to a reasonable degree of medical certainty that Phillips' cervical strain was permanent. However, Ripa stated that he had never been asked to place any restrictions on Phillips' work activities.

Phillips testified that prior to the accident, she had worked at the Lancaster Office of Mental Retardation and at Dillard's department store. After the accident, certain tasks such as lifting or dressing a client at the office of mental retardation made her physically uncomfortable and she became uncomfortable during extended shifts at Dillard's. As a result, Phillips eventually left those jobs and at the time of the trial was operating a day-care business out of her home. Phillips testified that she continued to experience heightened discomfort in her neck and headaches from doing too much housecleaning and other activities.

At the time of the trial, it had been approximately 1 year since Phillips had seen a doctor regarding her injuries. Her hospital and medical bills stemming from the accident totaled $2,236.82. She had not incurred any loss of wages and had no claim for property damage.

Alfred J. Marchisio, Jr., a vocational rehabilitation counselor and consultant, also testified on Phillips' behalf. Outside the presence of the jury, Marchisio stated that Phillips reported to him that she had difficulty with postures of the neck insofar as she experienced increased discomfort when moving the neck repeatedly or quickly and when her neck was tilted forward for any period of time. She also experienced increased discomfort in the neck area when carrying heavy objects. Marchisio stated that personal histories from clients were reasonably relied upon by experts in the vocational rehabilitation field in forming their opinions and that his opinion with respect to Phillips' condition and employability was based on Phillips' medical records and the self-report she provided. In addition, Marchisio explained that he relied upon the "New Work Life Expectancy Tables" published by "Vocational Econometrics," which tables were reasonably relied upon by vocational experts, and upon the definitions for disabilities used within the "State Vocational Rehabilitation Systems" as well as the definition used in the Americans with Disabilities Act. Marchisio said these definitions were reasonably relied upon by experts in the vocational field and that, in essence, they define a disability as "a physical and mental impairment that interferes with a person's ability to do certain functions of their major lifestyles, which include the normal type of things of walking, seeing, hearing, talking, as well as work activities or recreational activities."

A voir dire examination was conducted in which Marchisio stated that he relies upon medical doctors, physical therapists, and input from the client to determine the client's medical restrictions or limitations. Marchisio stated that he has no medical training, that he does not personally diagnose or formulate opinions concerning limitations that should be placed upon a client's work activities, and that he was not aware that any medical doctor had placed a work restriction on Phillips or determined a disability rating. He explained, however, that even without a restriction placed on a client's work activities or a disability rating, he could perform a functional capacity evaluation based upon the information the client gave him, so long as a physician had diagnosed some type of medical condition.

Marchisio stated that a worklife expectancy table is a statistical comparison between the worklife expectancy of a healthy portion of the work force and the "disabled" portion of the work force. Under the tables, the term "disabled" refers to a broad continuum of disabilities spanning from mild or transitory conditions to conditions that result in total dependence on others for care. He admitted that no physician had determined Phillips was disabled as the term is used in the tables.

When direct examination was continued, still outside the presence of the jury, Marchisio stated that his primary conclusion regarding Phillips was that she was not going to be in the work force as long as a healthy person of the same age. He opined that based upon statistical probabilities, the worklife expectancy for a healthy 24-year-old female with the same education as Phillips was to age 54.2, while a disabled 24-year-old female with the same education had a worklife expectancy to age 38.9. He stated that these probabilities were generally relied upon by experts in his field and reiterated that the statistical probability table used did not distinguish between severities of disability. In addition, Marchisio explained that the tables did not distinguish whether the disability had any effect on the ability to work in the person's prior occupation. His opinion as to Phillips' worklife expectancy was based on his understanding that her condition was chronic.

Over defense counsel's objection, the trial court allowed Marchisio to continue his testimony in front of the jury. Marchisio reiterated his testimony concerning Phillips and his reliance upon the New Work Life Expectancy Tables, again explaining that included in the category of disabled persons under the tables were persons with very mild disabilities that did not affect their work, as well as persons with catastrophic disabilities. He opined within a reasonable degree of professional probability that Phillips was not going to stay in the work force as long as another healthy white female her age and that she would exit the job market most likely before the maximum age of a healthy person. Marchisio explained that under table 3 of the New Work Life Expectancy Tables, there was a statistical probability that a disabled person of Phillips' age and education

would have a worklife expectancy to age 38.9, while a healthy person would be expected to work to age 54.2 years. However, due to her positive attitude and motivation, she might be in the work force longer than the statistical average for disabled persons of her age and education.

On cross-examination, Marchisio admitted that no work restrictions had been placed upon Phillips by a physician, that he personally had no medical training, and that he relied upon medical doctors and physical therapists to determine the medical restrictions or limitations that should be placed on a particular individual. Marchisio stated that he was not aware of any physician who had specifically determined Phillips to be disabled as defined by the New Work Life Expectancy Tables, but relied in part upon Ripa's assessment that Phillips' cervical strain injury was a permanent condition. Marchisio was unable to render an opinion as to Phillips' loss of earning capacity given the facts that she was close to completing a bachelor's degree in horticulture and that her previous employment consisted of interim jobs.

The jury was instructed, inter alia, that if it returned a verdict for Phillips, then it must decide how much money would fairly compensate her for her injury. Included among the list of things the jury was instructed to consider was "(3) [t]he reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future . . . ." The jury returned a verdict in favor of Phillips in the amount of $102,236.82.

In granting Cusick's motion for new trial and ordering that the verdict be vacated, the trial court concluded that Marchisio was not qualified by either knowledge, skill, experience, training, or education to provide what amounted to expert medical testimony that Phillips was disabled as a result of her cervical strain. The court found there was no medical evidence that any doctor or medical professional had placed any restrictions whatsoever on Phillips' work or other activities as a result of her cervical strain and no medical evidence that Phillips' functional capacity was impaired as a result of her injury. The court stated that Marchisio's opinion regarding Phillips' reduced worklife expectancy was premised upon his own factually unsupported and inadmissible conclusion that Phillips was disabled and that the opinion lacked the necessary and proper foundation and for

that reason should have been excluded. In addition, the court concluded that given the broad definition of a disabled person as used in the New Work Life Expectancy Tables and Marchisio's vague conclusion that Phillips would work "less" as a result of her disability, the testimony "was so generic and lacking in certainty that it failed to make the existence of a disputed fact more or less probable, and was of no value to the jury." Given Marchisio's qualifications, the court concluded it was error to permit him to provide what amounted to a medical opinion. The court also concluded that Marchisio acted as a "human conduit" for the admission of inadmissible hearsay and that the instruction on future earning capacity was erroneous because it was predicated on Marchisio's inadmissible, uncertain, and unquantifiable opinion testimony.

ASSIGNMENTS OF ERROR

In summary, Phillips asserts that the trial court abused its discretion (1) in granting Cusick a new trial, because the court erred in finding that Marchisio's opinion lacked the necessary and proper foundation; (2) in finding that Marchisio's opinion was irrelevant; (3) in finding that Marchisio's testimony was inadmissible hearsay; (4) in finding that the evidence was insufficient to instruct the jury as to the loss of future earning capacity; (5) in granting a new trial without specifically finding that a substantial right of Cusick's had been prejudiced; and (6) in failing to find that the errors, if any, were harmless.

ANALYSIS

The issue is whether the trial court abused its discretion in ordering a new trial. 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. *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998).

[3] It is well established, however, that where a party has sustained the burden and expense of a trial and has succeeded in securing a verdict on these facts and issues, that the party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured. Thus, a motion for new trial is to be granted only when error prejudicial to the

rights of the unsuccessful party has occurred. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

Whether the trial court abused its discretion in granting a new trial depends upon the admissibility of Marchisio's testimony and the effect of such testimony. Expert testimony is permitted pursuant to Neb. Rev. Stat. § 27-702 (Reissue 1995): "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[4] Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998). Our review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. See *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997).

One of the bases for granting the new trial was the trial court's conclusion that Marchisio's testimony "was so generic and lacking in certainty that it failed to make the existence of a disputed fact more or less probable, and was of no value to the jury." The court noted that the definition of "disabled" as used in the New Work Life Expectancy Tables made no differentiation between people with minor disabilities and those with serious disabilities or between people with disabilities which affect their work and those with disabilities which have no effect on their work. The court explained that under these broad statistics, Marchisio "could present virtually the same opinion testimony he presented in this case in any courtroom, with any injured plaintiff, without modifying the opinion at all." (Emphasis omitted.) We agree.

[5] Where there is no sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the expert's opinion

is to be stricken. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). In *Anderson/Couvillon*, the plaintiff's economics expert testified as to the plaintiff's loss of future earning capacity based on another expert's opinion that the plaintiff was unlikely to attend college. We held that it was not error for the district court to determine that the testimony was speculative where there was no evidence that the plaintiff, who was 7 years old, would have attended and graduated from college in the absence of the injury. We explained that damages for permanent impairment of future earning capacity may not be based on speculation, probability, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. We determined that the district court did not err in concluding that it was not " 'reasonably certain' " that the plaintiff would have graduated from college absent the injury. *Id.* at 822, 572 N.W.2d at 369.

In *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988), the plaintiff's expert projected her future earning capacity to be $215,280. The expert testified that in reaching this conclusion, he assumed the plaintiff was 46 years of age and he considered her past employment history and earnings, which were that she managed a family pharmacy that had never made a profit and that she was employed briefly as a manager at $5.75 per hour. He computed her annual income, using $5.75 per hour as a base, to be $11,960 and multiplied that figure by 18, being her employable years to age 65. No factors regarding the extent or permanency of her impairment were considered or used. Upon cross-examination, the expert stated that if the plaintiff went back to work and she could handle the job, she would have no loss, but if she did not return to work, the figure of $215,280 represented her future earning capacity.

Although the defendant failed to object to the testimony, we concluded that the testimony was subject to objection when adduced and to a later motion to strike for the following reasons: (1) The purpose was to give an opinion on impairment of future earning capacity, which requires the elements of a shown impairment, the extent the earning capacity has been diminished, and the degree of permanency of the impairment to earn-

ing capacity (citing *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972)); (2) the witness must be shown to possess competent facts and underlying data to give such an opinion, otherwise it should not be received and is subject to being stricken (citing *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979)); (3) the only evidence in the record of the extent and degree of permanency of the impairment was speculative and indefinite and, at most, presented a fact question for the jury, but in any event, such factors were either not considered or unknown to the witness; and (4) the witness assumed the plaintiff was employable, but his opinion was in terms of total impairment, which was described as not going back to work. We explained that the result of the expert's testimony was that he made a mathematical computation that was within the capabilities of a layperson, which he improperly described as impairment of future earning capacity. This produced speculation and confusion in the evidence.

In *Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth*, 205 Neb. 567, 288 N.W.2d 729 (1980), we held that it was error to introduce the testimony of an expert witness who had relied on questionnaires in order to express an opinion as to the salaries of like employees in other cities. We explained that the questionnaires listed minimum and maximum salaries for the position, but there was no indication as to whether the salaries listed were actually being paid or under what conditions employees would be entitled to receive the maximum salaries. We stated that since there was a lack of foundation evidence to establish the source and reliability of the information in the questionnaires and the questionnaires were the basis for the expert testimony, the court should have sustained an objection to that testimony. We explained that an expert witness should not be allowed to express an opinion where the evidence shows there is no adequate basis for the opinion. See, also, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992) (although results of DNA profile test are generally accepted by scientific communities, probative value must also be considered and whether prejudicial effect exceeds probative value).

In addition, we agree with the trial court's conclusion that Marchisio was not qualified to testify that Phillips was disabled

as a result of her cervical strain simply because Ripa had diagnosed her condition as permanent. The fact that a medical condition is permanent does not equate with a medical opinion that a person is disabled. "Regardless [of] how impressive the background of a witness, his area of expertise should match fairly closely the subject matter of his testimony." Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 7.5 at 721 (1995). Without any evidence that Phillips was in fact disabled, Marchisio's opinion, which relied on the conclusion that Phillips was disabled, lacked foundation and probative value.

In summary, Marchisio concluded that Phillips was disabled because her injury was permanent. Because he concluded that she was disabled, he applied the New Work Life Expectancy Tables, which do not discern between minor and serious disabilities or take into consideration whether such disability affects an individual's ability to work. Marchisio's opinion lacked probative value. For the foregoing reasons, we conclude the trial court did not abuse its discretion when the court determined that it was error to have admitted Marchisio's testimony.

The next question is whether the erroneous admission of this evidence prejudiced Cusick. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). Only an error which is prejudicial to the rights of the unsuccessful party justifies a new trial. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). What constitutes unfair prejudice is a matter the Nebraska Evidence Rules entrust to the discretion of the trial judge. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993).

We cannot say that the trial court abused its discretion in finding the testimony of Marchisio unfairly prejudicial. This testimony was offered to assist the trier of fact to determine a fact in issue. Marchisio testified that there was a statistical probability that a disabled person of Phillips' age and education would work 15.3 years less than a nondisabled person and that it was his opinion that as a result of her injury, Phillips would not be in the work force as long as she would have otherwise. Marchisio's

testimony lacked foundation and unfairly permitted the jury to infer that Phillips should be compensated for this loss of employment. We therefore affirm the order granting a new trial.

AFFIRMED.

GERRARD, J., concurring.

I concur in the majority's determination that the district court's order granting a new trial should be affirmed. I write separately, however, because the time has come to reexamine our analytical framework for the evaluation of expert opinion testimony.

INTRODUCTION

Judge Learned Hand observed nearly a century ago that "[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best." Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901). The question posed by Judge Hand has, during the subsequent decades, repeatedly confronted appellate courts in every jurisdiction, including Nebraska.

The most significant recent developments in this area of law have resulted from the decision of the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). In that case, the Supreme Court held that the "general acceptance" test for the admissibility of testimony about scientific evidence, as set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), had been superseded by the adoption of the Federal Rules of Evidence. *Daubert, supra.* The Supreme Court rejected the *Frye* test and redefined the standard for the admission of expert testimony in the federal courts. *Id.*

Subsequently, many states with evidentiary rules modeled after the Federal Rules of Evidence began to adopt the *Daubert* standards. See, generally, Heather G. Hamilton, *The Movement from Frye to Daubert: Where do the States Stand?*, 38 Jurimetrics J. 201 (1998). This court, however, has rejected the adoption of *Daubert* and continued to rely on the *Frye* test. See, *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *over-*

ruled on other grounds, State v. Freeman, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In light of the subsequent development of the *Daubert* standards and the need to set forth a more comprehensive framework for the evaluation of expert testimony, our decisions in *Carter, supra*, and *Dean, supra*, should be reexamined.

ANALYSIS

FRYE AND *DAUBERT*

This court has described the *Frye* test as setting out a "general acceptance" test for the admissibility of testimony about scientific evidence. *Carter, supra*. Under the *Frye* test, "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014.

Nebraska has relied on the *Frye* test where scientific evidence is concerned. See, e.g., *Carter, supra*. In other areas of expertise, as noted by the majority, we have simply stated that the admissibility of expert testimony is based on (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998). Our review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. See *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). In other words, while we have applied the *Frye* test in attempting to discern the reliability of scientific evidence, we have not required an inquiry into the reliability of testimony relating to other areas of expertise.

The abrogation of the *Frye* test by the Federal Rules of Evidence was recognized in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.

Ed. 2d 469 (1993). The *Daubert* Court determined that the "austere" standard of general acceptance, "absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." 509 U.S. at 589.

Instead, the *Daubert* Court determined that the Federal Rules of Evidence, particularly those rules specifically relating to expert testimony, Fed. R. Evid. 701 through 706, had created a new standard for the admissibility of scientific evidence. It should be noted that the Federal Rules of Evidence relating to expert testimony are essentially identical to their Nebraska counterparts. See, Neb. Evid. R. 701 through 706; Neb. Rev. Stat. §§ 27-701 through 27-706 (Reissue 1995).

Under *Daubert*, when faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert, supra.*

The Court also set out a list of considerations that a trial court may use to evaluate the validity of scientific testimony. *Id.* These include: (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "general acceptance" of the theory or technique. *Id.* Thus, the Court did not completely sweep away the *Frye* test, but simply determined that it was to be one of a myriad of possible considerations in determining the validity of evidence.

The *Daubert* Court emphasized that this was not to be a definitive checklist, as many other factors could bear on the inquiry into validity in particular cases. The Court stated that the inquiry was to be a "flexible" one, for which the "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." 509 U.S. at 594-95. "The focus, of course, must be

solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595.

Subsequent Supreme Court decisions have further developed the standards first set forth in *Daubert, supra.* In *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), the Court determined that in reviewing the evidentiary rulings of a trial court regarding expert opinion testimony, abuse of discretion is the proper standard of appellate review. Compare *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999) (admission of evidence reviewed for abuse of discretion where Nebraska Evidence Rules commit evidentiary question to discretion of trial court).

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Supreme Court determined that "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."

It has been written of Fed. R. Evid. 702, which is identical to Neb. Evid. R. 702, that it

> applies to expert testimony involving scientific, technical, and specialized knowledge that might be helpful to a jury. These three categories of knowledge are commonly defined as follows. "Scientific knowledge" refers to the "systematic knowledge of the physical or material world gained through observation and experimentation." "Technical knowledge" refers to practical knowledge or special skills relating to, primarily, the mechanical or industrial arts or the applied sciences. "Specialized knowledge" is a catch-all category that refers to any knowledge focused on a particular field of study, occupation, profession, or experience.

Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-*Daubert *World*, 84 Geo. L.J. 1985, 2026 (1996).

The Court made it clear that the *Daubert* standards were to apply not only to "scientific" knowledge but to all types of expert testimony that are admitted pursuant to rule 702. *Kumho Tire Co., supra.* The Court also emphasized that the list of factors for consideration set forth in *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), did not necessarily or exclusively apply to all experts or in every case. *Kumho Tire Co., supra*. The Court stated that

> the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.
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> . . . .
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> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in [*General Electric Co. v. Joiner, supra*] makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." [Citation omitted.] That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.

(Emphasis in original.) *Kumho Tire Co.*, 526 U.S. at 152.

In short, under *Daubert, supra*, and *Kumho Tire Co., supra* (*Daubert/Kumho Tire*), analysis, a trial court must, when faced with a proffer of expert testimony, determine if the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid, and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* The conclusions of the trial court will be affirmed absent an abuse of discretion. *Id.*; *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

CURRENT STATE OF LAW

In *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), this court discussed two reasons for continued adherence to the *Frye*

test: (1) that the *Daubert* standards were relatively undeveloped and uncertain and (2) that *Daubert* might fail to exclude unreliable "junk science." These concerns were, at the time, entirely reasonable. The experience of the intervening years, however, has put those concerns to rest.

Since the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the standards set forth in that opinion have become the majority rule in the United States in analyzing expert opinion testimony. Currently, 27 states have held that the *Daubert* standards are either helpful or controlling in their determinations regarding the admissibility of expert opinion evidence. See, *State v. Coon*, 974 P.2d 386 (Alaska 1999); *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242 (1993); *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997), *cert. denied* 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998); *Nelson v. State*, 628 A.2d 69 (Del. 1993); *State v. Fukusaku*, 85 Haw. 462, 946 P.2d 32 (1997); *McGrew v. State*, 682 N.E.2d 1289 (Ind. 1997); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999); *Mitchell v. Com.*, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds, Fugate v. Com.*, No. 98-SC-313-MR, 1999 WL 401667 (Ky. Aug. 24, 1995); *State v. Foret*, 628 So. 2d 1116 (La. 1993); *State v. MacDonald*, 1998 Me. 212, 718 A.2d 195 (1998); *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994); *State v. Moore*, 268 Mont. 20, 885 P.2d 457 (1994), *abrogated on other grounds, State v. Gollehon*, 274 Mont. 116, 906 P.2d 697 (1995), and *City of Billings v. Bruce*, 290 Mont. 148, 965 P.2d 866 (1998); *State v. Hungerford*, 142 N.H. 110, 697 A.2d 916 (1997); *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993); *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995); *Breding v. State*, 1998 N.D. 170, 584 N.W.2d 493 (1998) (Meschke, J., concurring specially); *Miller v. Bike Athletic Co.*, 80 Ohio St. 3d 607, 687 N.E.2d 735 (1998); *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995); *State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995); *State v. Morel*, 676 A.2d 1347 (R.I. 1996); *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997), *cert. denied* 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157 (1998); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d

549 (Tex. 1995); *State v. Crosby*, 927 P.2d 638 (Utah 1996); *State v. Brooks*, 162 Vt. 26, 643 A.2d 226 (1993); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied* 511 U.S. 1129, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994); *Springfield v. State*, 860 P.2d 435 (Wyo. 1993).

Eleven states have specifically rejected *Daubert, supra*, in favor of retaining the standards enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See, *Turner v. State*, No. 1952024, 1998 WL 12625 (Ala. Jan. 16, 1998); *State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486 (1998); *People v. Leahy*, 8 Cal. 4th 587, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Armstead v. State*, 342 Md. 38, 673 A.2d 221 (1996); *Gleeton v. State*, 716 So. 2d 1083 (Miss. 1998); *Carter, supra*; *State v. Harvey*, 151 N.J. 117, 699 A.2d 596 (1997); *People v. Wesley*, 83 N.Y.2d 417, 611 N.Y.S.2d 97, 633 N.E.2d 451 (1994); *Com. v. Blasioli*, 552 Pa. 149, 713 A.2d 1117 (1998); *State v. Copeland*, 130 Wash. 2d 244, 922 P.2d 1304 (1996). Five states have rejected *Daubert* in favor of their own unique evidentiary standards. See, *Norfolk Southern Railway Co. v. Baker*, 237 Ga. App. 292, 514 S.E.2d 448 (1999); *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998), *rehearing denied* 973 P.2d 842 (1999); *State v. Council*, No. 24932, 1999 WL 184099 (S.C. Apr. 5, 1999); *State v. Peters*, 192 Wis. 2d 674, 534 N.W.2d 867 (Wis. App. 1995), *review denied* 537 N.W.2d 572 (Wis.).

Of the seven states that have not yet decisively addressed the question, one continues to rely on its own unique standard. See *Spencer v. Com.*, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied* 493 U.S. 1036, 110 S. Ct. 759, 107 L. Ed. 2d 775 (1990). The remaining jurisdictions continue to rely on *Frye, supra*. See, *Brooks v. People*, 975 P.2d 1105 (Colo. 1999); *People v. Miller*, 173 Ill. 2d 167, 670 N.E.2d 721, 219 Ill. Dec. 43 (1996), *cert. denied* 520 U.S. 1157, 117 S. Ct. 1338, 137 L. Ed. 2d 497 (1997); *State v. Chastain*, 265 Kan. 16, 960 P.2d 756 (1998); *People v Peterson*, 450 Mich. 349, 537 N.W.2d 857 (1995); *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993).

It is evident, then, that in the United States, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), has become the majority rule, and *Frye, supra*, has become an ever-shrinking minority view. Given the number of jurisdictions that have adopted the *Daubert* standards, and the extensive development of the *Daubert/Kumho Tire* standards in the state and federal courts, it can no longer be said that the nature and implications of *Daubert/Kumho Tire* are unknown. Compare *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

In fact, to the extent that this consideration is still relevant, it militates in favor of adopting the *Daubert/Kumho Tire* standards. Nebraska courts risk losing the benefit of helpful and persuasive authority from other jurisdictions on newly presented evidentiary issues by its continued reliance on a test that is increasingly removed from the jurisprudential mainstream.

The concern about "junk science" expressed in *Carter, supra*, now also weighs in favor of adopting the *Daubert/Kumho Tire* standards. The "gatekeeper" function exercised by trial courts under the *Daubert/Kumho Tire* analysis is, in fact, a more effective means of excluding unreliable expert testimony than is the *Frye* test. The experience in jurisdictions which have adopted the *Daubert* standards suggests that the admission of so-called "junk science" evidence is a minimal risk. As the Supreme Court of Alaska has stated:

> We are not convinced that "junk science" is more likely to be admitted under *Daubert* than under *Frye*. Post-*Daubert* reported decisions suggest that courts are acting with restraint, and are giving rigorous consideration to the reliability of scientific evidence. Furthermore, *Frye* also potentially permits admission of unreliable scientific evidence, because a methodology that has been generally accepted might nonetheless have been discredited during a *Daubert* inquiry.

State v. Coon, 974 P.2d 386, 397 (Alaska 1999).

Furthermore, there is cause to question one of the assumptions underlying this court's decision in *Carter, supra*: that the *Frye* test provides a more critical assessment of the reliability of

proffered evidence than does the *Daubert* analysis. See *Carter, supra*. As the Supreme Court of Alaska noted:

> *Frye* is potentially capricious because it excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny. Because the *Frye* test potentially excludes evidence that should be admitted under our rules, and also potentially admits evidence that should be excluded under our rules, we conclude that it is both unduly restrictive and unduly permissive.

Coon, 974 P.2d at 393-94.

In practice, in other jurisdictions, the *Daubert* standards have proved to be more accepting of newly developed but well-reasoned theories, but more critical of older, more well-established theories that are vulnerable to a searching inquiry. As one writer has noted:

> To say that *Daubert* is less restrictive of expert evidence, to say that it opens the door for the introduction of expert evidence that would not have been admissible under the *Frye* test, is not to say that *Daubert*'s test is an easier test. It may be more lenient in that it allows more — and more novel — science into evidence, but it can be much more difficult in that the *Daubert* test can require a more exacting, expensive, and time consuming foundation.
>
> . . . .
>
> "On the one hand, more science comes in. Science does not have to be generally accepted by other scientists to be admissible in court; the universe of admissible science is expanded by doing away with the general acceptance requirement. On the other hand, less science comes in. The trial judge is to act as gatekeeper and is to scrutinize carefully the proffered scientific evidence and to keep out what is not good science. The universe of science actually admitted may be contracted by the close scrutiny judges are supposed to give this evidence. While it may be that most science generally accepted in the relevant scientific community will be good science, it is not necessarily so."

(Citation omitted.) G. Michael Fenner, *The* Daubert *Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939, 953 (1996). See, also, *Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997).

As Professor Fenner states, the shift from *Frye* to *Daubert/Kumho Tire* allows the admission of more expert testimonial evidence, but specifically forecloses the admission of testimony that is unreliable. Under the *Daubert/Kumho Tire* analysis, the question is not whether the evidence is generally accepted, but whether the evidence is, in fact, reliable. This gatekeeper function, in my opinion, provides a more effective way of ensuring that unreliable testimony is properly excluded from evidence.

The gatekeeper function is particularly important in light of the inordinate weight and deference that jurors are often inclined to afford expert testimony. See, generally, Daniel W. Shuman et al., *Assessing the Believability of Expert Witnesses: Science in the Jurybox*, 37 Jurimetrics J. 23 (1996); Daniel W. Shuman et al., *Juror Assessments of the Believability of Expert Witnesses: A Literature Review*, 36 Jurimetrics J. 371 (1996). The Supreme Court of Connecticut has stated that

> a gatekeeping role for trial judges in relation to scientific evidence is appropriate. Although the extent to which juries give scientific evidence undue deference is uncertain, the potential risk can be greatly reduced simply by allowing the judge, as the participant in the judicial process with both the greater access and ability to gather relevant information, to exclude wholly invalid scientific testimony altogether. Moreover, a trial judge who does admit scientific evidence will be in a better position, by virtue of the knowledge gained during the preliminary assessment, to conduct the trial and instruct the jury in such a way as to minimize the risk that jurors will give that evidence undue deference.

State v. Porter, 241 Conn. 57, 73, 698 A.2d 739, 749 (1997).

The court in *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), noted that one of the primary objectives of the *Frye* test was to shield jurors from misleading or prejudicial scientific testimony because of the weight and deference generally accorded

by jurors to expert testimony. As the Supreme Court of Connecticut observed, the gatekeeper function of the trial court performing the *Daubert/Kumho Tire* analysis accomplishes this goal more effectively than does the *Frye* test.

Moreover, as the U.S. Supreme Court noted in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), this gatekeeper function for the trial court retains its utility and imperative regardless of whether the testimony at issue is "scientific" or otherwise. The evidentiary rationale that underlies the *Daubert/Kumho Tire* gatekeeping responsibility is not limited to scientific knowledge. As the Court stated,

> it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. . . .
>
> Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony will often rest "upon an experience confessedly foreign in kind to [the jury's] own." *Ibid.* The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Kumho Tire Co., 119 S. Ct. at 1174-75.

Despite the evident wisdom of applying the trial court's gatekeeper function to all varieties of specialized expert testimony, Nebraska's reliance on the *Frye* test and the limitation of that test to scientific evidence precludes the trial court from acting as

gatekeeper where technical or other specialized knowledge is concerned. Adoption of the *Daubert/Kumho Tire* standards, on the other hand, both encourages the trial court to act as gatekeeper and places that function in the context of a sensible and uniform scheme for the evaluation of all types of expert opinion testimony.

Finally, as was noted in the *Daubert* opinion, Fed. R. Evid. 702, which is identical to § 27-702, does not establish " 'general acceptance' as an absolute prerequisite to admissibility," and "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the [rules of evidence] and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). While the U.S. Supreme Court's interpretation of a federal statute is not binding with reference to a state statute, *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), it is persuasive where the state statute is identical to the federal law at issue. In this instance, I believe that the U.S. Supreme Court was correct in noting the tension between rule 702 and the *Frye* test and that the Court's determination is equally applicable to the corresponding Nebraska statute.

Ultimately, ensuring the relevance and reliability of expert testimony is the intent of an inquiry pursuant to *Daubert/Kumho Tire* or *Frye*, and *Daubert/Kumho Tire* is the better-reasoned and more effective means of accomplishing this end. I believe that we should join the vast majority of jurisdictions in the United States in adopting the standards enunciated in *Daubert/Kumho Tire* as the appropriate criteria for evaluating the admissibility of expert opinion testimony in the courts of Nebraska.

MARCHISIO'S TESTIMONY UNDER *DAUBERT/KUMHO TIRE*

The parties do not contest that Marchisio was qualified to testify as an expert in vocational rehabilitation. Evidence presented at trial established that Marchisio has a master's degree in guidance and counseling and a bachelor's degree in sociology, and was, at the time of trial, president of Midlands Rehabilitations Consultants, Inc. Marchisio has extensive experience in the field of vocational rehabilitation, was licensed by the Nebraska

Department of Health and Human Services as a certified professional counselor and as a mental health practitioner, and was certified by the Nebraska Workers' Compensation Court as a vocational rehabilitation counselor and job placement specialist.

As the majority notes, the issues presented on appeal relate to the foundation presented for certain opinions to which Marchisio testified. Specifically, the majority addresses two aspects of Marchisio's opinion: (1) his description of Phillips as "disabled" and (2) his determination that Phillips' worklife expectancy had been reduced from 54.2 years to 38.9 years.

I do not agree with the majority's conclusion that Marchisio's opinion lacked foundation because Marchisio was not qualified to determine that Phillips was disabled. The majority assumes that the word "disability" is uniquely associated with a medical diagnosis, such that only a qualified medical expert may use the term. This, in fact, is not the case.

The Supreme Court of South Dakota addressed a similar situation in *Marnette v. Morgan*, 485 N.W.2d 595, 598 (S.D. 1992). The court stated: "We continue to hold that a disability may be established through testimony other than a doctor. There is a distinction between a *disability rating* and an *impairment rating*." (Emphasis in original.) The court articulated that distinction as follows:

> "Although the *medical impairment* rating given by a doctor is an important factor, the extent of *loss of use* does not necessarily equal the extent of medical impairment. . . ."
>
> . . . .
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> "Permanent medical impairment is related directly to the health status of the individual, *whereas disability can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements* that the individual *is unable to meet as a result of the impairment*."

(Citation omitted.) (Emphasis in original.) *Id.*

In *Marnette*, the court determined that the vocational rehabilitation expert's testimony lacked foundation because there was no medical testimony establishing that the plaintiff suffered any medical impairment. This result was entirely proper, as medical

impairment can be established only through properly qualified medical testimony.

In the present case, however, Ripa testified that Phillips suffered from "restriction in the extremes of her mobility of the neck" such that she did not have full range of motion in her neck. Ripa further testified that it was his opinion, within a reasonable degree of medical probability, that Phillips' injury was permanent. In addition, Phillips herself testified regarding the discomfort and limitations she suffered as a result of the injury. Finally, Marchisio testified that in preparing his opinion, he also relied on his interview of Phillips and an examination of Phillips' medical records.

Based on this evidence, Marchisio could appropriately determine that Phillips was disabled. The testimony of Ripa, Phillips herself, and Phillips' self-report and medical records provided an adequate assessment of Phillips' medical impairment. Given that assessment, Marchisio could conclude that Phillips was disabled, *as that term is used in the field of vocational rehabilitation*, by determining the effect of Phillips' physical impairment in the context of her "personal, social, and occupational demands." See *Marnette, supra*.

I agree, however, with the majority's conclusion regarding Marchisio's opinion that Phillips' worklife had been reduced by the specific figure of 15.3 years. This testimony, when subjected to a *Daubert/Kumho Tire* analysis, lacks the validity required under the Nebraska rules of evidence, and the district court did not abuse its discretion in determining that the erroneous admission of this evidence was prejudicial error requiring a new trial.

Based on the testimony of Phillips and Ripa and Ripa's examination of Phillips and her medical records, as summarized above and in the majority opinion, Marchisio could appropriately offer his opinion regarding Phillips' reduced functional capacity and reduced earning capacity. As a vocational expert, Marchisio would be qualified by education, training, and experience to address how Phillips' physical limitations might affect her employability status.

The specific figure regarding Phillips' reduced worklife expectancy, however, was derived entirely from the "New Work Life Expectancy Tables" published by "Vocational Economet-

rics." Marchisio's reliance on this questionable data is the methodological flaw in his analysis.

The usual foundation for expert reliance on external data, and the guarantee that such data is trustworthy, is generally that it is of the kind that is normally relied upon by experts in the particular field at issue. See § 27-703. Nonetheless, the gatekeeping responsibility of the trial court still requires it to determine whether the basis of an expert's opinion meets minimum standards of reliability before that expert's opinion is admissible. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). If the underlying data are so lacking in reliability that no reasonable expert would rely on them, then an opinion that is derived entirely from them must be excluded from evidence. See *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied, General Electric Co. et al. v. Ingram et al.*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995).

> [I]t is the judge who makes the determination of reasonable reliance, and . . . for the judge to make the factual determination under [Fed. R. Evid.] 104(a) that an expert is basing his or her opinion on a type of data *reasonably* relied upon by experts, the judge must conduct an independent evaluation into reasonableness. The judge can of course take into account the particular expert's opinion that experts reasonably rely on that type of data, as well as the opinions of other experts as to its reliability, but the judge can also take into account other factors he or she deems relevant.

(Emphasis in original.) *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d at 748.

Marchisio testified that the New Work Life Expectancy Tables were reasonably relied upon by experts in his field. However, Marchisio's opinion about "reasonable" reliance is not determinative. A court must conduct an independent assessment of the data to determine if reliance upon them is indeed reasonable.

Many courts have addressed the reliance of expert witnesses on worklife expectancy tables that are published by the U.S. Department of Labor, Bureau of Labor Statistics, and have

stated that such tables are generally considered to be reliable. See, e.g., *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18 (2d Cir. 1996); *Mealey v. Slaton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cir. 1975); *Sales v. Republic of Uganda*, 828 F. Supp. 1032 (S.D.N.Y. 1993); *Earl v. Bouchard Transp. Co., Inc.*, 735 F. Supp. 1167 (E.D.N.Y. 1990), *aff'd in part and in part rev'd, and remanded on other grounds*, 917 F.2d 1320 (2d Cir.). But see *In re Air Crash Disaster at Charlotte, N.C.*, 982 F. Supp 1101 (D.S.C. 1997) (U.S. Department of Labor worklife expectancy tables not persuasive because they ignore demographic changes made since 1986).

Even if those courts approving of the U.S. Department of Labor tables were correct, however, their determinations are not persuasive in the present case. The New Work Life Expectancy Tables, used in this case, were not published by the U.S. Department of Labor and contain such broadly defined classifications that reliance on them is not reasonable.

The New Work Life Expectancy Tables represent a statistical model that attempts to compare the worklife expectancy of the healthy segment of the work force with the "disabled" segment. The tables attempt to quantify how long a "disabled" person usually remains in the work force as opposed to a healthy person.

For purposes of the tables, however, the term "disabled" refers to a broad continuum of disabilities, from mild or transitory conditions to conditions that result in total dependence on others for care. In other words, the tables measure and average together the experiences of individuals within a tremendously diverse range of occupations and injuries such that, for statistical purposes, a police officer with a broken arm is equivalent to an attorney who develops a hearing impairment, who is in turn equivalent to a surgeon who becomes a paraplegic.

The flaw in this methodology is apparent. The degree of an individual's unique disability obviously has an effect on how long that individual will remain in the work force. The nature of a person's disability, relative to his or her particular occupation, will also have a commensurate effect on that person's employability status and worklife expectancy. A statistical average of such a broad range of disabilities, applied to an equally broad

range of occupations, renders the result almost meaningless when attempting to determine what effect a disability will have on an individual person under particular circumstances. The use of actuarial tables in determining worklife expectancy should be rejected where the tables do not sufficiently relate to the unique circumstances of the person under evaluation.

In the present case, evidence was presented of facts specific to Phillips, and for Marchisio to render an opinion supported by these facts was not error. Marchisio's opinion specifically quantifying Phillips' reduced worklife expectancy, however, was not based on any facts particular to her but was based solely on data that were too generic to support a reliable opinion.

The use of statistical data by an expert in reaching an opinion is, of course, permissible, but can result in admissible evidence only where the basis for the opinion includes evidence particular to the case, demonstrating the pertinent applicability of the statistical data to the circumstances. That foundation was not present in this case. Marchisio's "reasoning and methodology" were not valid, as the New Work Life Expectancy Tables could not "properly . . . be applied to the facts in issue." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Consequently, it was error to admit Marchisio's opinion that Phillips' worklife expectancy had been reduced by 15.3 years. The *Daubert/Kumho Tire* requirement that an expert's conclusions be supported by good grounds for each step in the analysis means that any step that renders the analysis unreliable under the *Daubert/Kumho Tire* factors renders the expert's testimony inadmissible. See *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

Given our standard of review, I cannot say that the district court abused its discretion in determining that the admission of Marchisio's testimony was error, or in determining that the error was prejudicial and required a new trial. It is for these reasons that I concur in the judgment.

HENDRY, C.J., and MILLER-LERMAN, J., join in this concurrence.

VICKY L. LEVANDER, APPELLANT, V. THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND SUNBEAM CORPORATION, A DELAWARE CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

596 N.W.2d 705

Filed July 16, 1999. No. S-98-419.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
4. **Workers' Compensation: Employer and Employee: Negligence.** An employee cannot normally maintain a negligence suit against his or her employer regarding an injury arising out of and in the course of employment; his or her sole remedy is a claim for workers' compensation, and all disputed workers' compensation claims shall be submitted to the Nebraska Workers' Compensation Court.
5. **Workers' Compensation.** If an accident does not arise out of and in the course of employment, there is no coverage under the Nebraska Workers' Compensation Act, and the parties are not subject to it.
6. **Witnesses: Testimony.** If a party, without reasonable explanation, changes his or her testimony concerning material facts on a vital issue, such change being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded.
7. **Trial: Witnesses: Testimony: Evidence: Juries.** Where a party's testimony was not changed to meet the exigencies of the case, in that the change is satisfactorily explained, or the changed version at trial is corroborated by other evidence in the record providing an adequate basis for the jury's findings, a question of credibility for the jury is presented.
8. **Actions: Parties.** The propriety of adding a new defendant depends in part upon whether the cause of action otherwise remains the same.
9. ____: ____. In determining whether a new cause of action results from adding a new defendant, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

Robert J. Parker, Jr., of Seiler, Parker & Moncrief, P.C., for appellant.

John J. Schirger and Patrick E. Brookhouser, Jr., of McGrath, North, Mullin & Kratz, P.C., for appellee Benevolent and Protective Order of Elks.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellee Sunbeam.

Randall L. Goyette, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Manchester Tank & Equipment.

Terrance O. Waite and Keith A. Harvat, of Murphy, Pederson, Waite & McWha, for appellee Bosselman.

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

WRIGHT, J.

NATURE OF CASE

Plaintiff, Vicky L. Levander, appeals from the trial court's order granting summary judgment in favor of defendant, The Benevolent and Protective Order of Elks of the United States of America (Elks).

SCOPE OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

On June 18, 1995, at approximately 2 p.m., the outdoor barbecue grill at the Elks lodge in Hastings, Nebraska, caught fire,

and Levander was injured as a result. On that date, the lodge was holding a golf tournament, and Levander, a long-time "Doe/Elks [m]ember," was grilling hamburgers outdoors.

From September 1994 through June 18, 1995, Levander worked at the lodge on weekends, usually from 8 a.m. until noon, but occasionally, she agreed to work later than noon. Her duties included opening the lodge clubhouse, bartending, accepting green fees from golfers, and cleaning.

Levander was always paid in cash for her weekend work at the rate of $5 per hour. There were no state, federal, or FICA tax deductions made by the lodge from the money paid to Levander. She never received a W-2 statement or a 1099 tax form, and the lodge never included her wages in computations for workers' compensation coverage. The clubhouse manager, Helyn Jane Quick, exercised little control or supervision over Levander's activities.

During her 13 years as a member of the Elks, Levander performed various volunteer activities, including grilling hamburgers for golf tournaments, working during "beer and burger nights," bringing in food and cleaning up after the men's meetings at the lodge, and working with the female auxiliary of the lodge on their Christmas project and the "Exalted Ruler's" dinner.

Grilling hamburgers at the lodge's golf tournaments was a common volunteer activity for Elks members. From 1989 to June 18, 1995, no person had ever been paid to grill hamburgers at the tournaments.

On June 18, 1995, Levander opened the clubhouse, cleaned, and tended bar, but she did not take green fees because of the golf tournament. Sometime after 12:30 p.m., Levander went outside and started to grill hamburgers for the tournament. A full-time lodge employee was originally scheduled to work that day, but did not do so.

The clubhouse manager testified that Levander was not required to grill hamburgers on June 18, 1995, as a part of her employment and that Levander could have left the lodge at any time. The manager stated that if Levander had not grilled hamburgers that day, the manager would have asked another member of the lodge to grill or help with the bar because "everybody

out there helps everybody." There was no specific discussion between Levander and the manager with regard to whether Levander would be paid for grilling hamburgers. Levander stated that she did not ask to be paid for grilling hamburgers and that it was her understanding that she was volunteering and donating her time to the lodge while she was grilling.

After the accident, in August 1995, the clubhouse manager paid Levander for her work on June 18. The manager stated that she decided on her own to pay Levander $40 for a full 8 hours' work on June 18, notwithstanding the fact that Levander did not work 8 hours that day. Pay records classified Levander's payment as miscellaneous bar labor and marshaling.

Levander did not receive any workers' compensation benefits as a result of the June 18, 1995, accident, and the lodge did not file a first report of alleged occupational injury or illness with the Workers' Compensation Court until March 24, 1997.

Levander commenced this negligence action against the Elks to recover damages for injuries sustained on June 18, 1995. The Elks' answer asserted, inter alia, that it was not a proper party defendant and that the Workers' Compensation Court had exclusive jurisdiction over the matter.

The Elks subsequently commenced a third-party action against Sunbeam Corporation and Sunbeam Leisure Products Company (Sunbeam), the alleged manufacturers of the grill; Manchester Tank & Equipment Company (Manchester), the alleged manufacturer of the spare propane cylinder stored under the grill; and Bosselman, Inc., the company that allegedly filled the spare propane cylinder.

On March 25, 1998, Levander applied for leave to join Sunbeam, Manchester, Bosselman, and The Benevolent and Protective Order of the Elks, Lodge No. 159 (local Elks), as additional defendants and sought leave to amend her petition accordingly. On the same date, the trial court entered an order granting summary judgment in favor of the Elks.

On April 6, 1998, the trial court entered an order denying Levander's application to join Sunbeam, Manchester, Bosselman, and the local Elks as additional parties defendant. Levander filed her notice of appeal on April 22.

ASSIGNMENTS OF ERROR

Levander asserts that the trial court erred in (1) granting the Elks' motion for summary judgment, because a material question of fact exists as to whether Levander was an employee and, if so, whether her injury arose out of and in the course of her employment; (2) striking portions of exhibits 4 and 5; and (3) denying Levander's application to add the local Elks as a defendant to her cause of action.

ANALYSIS

We first consider whether the trial court erred in granting summary judgment against Levander. The Elks assert that summary judgment was proper because, as a matter of law, the Nebraska Workers' Compensation Act is Levander's exclusive remedy. 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. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

[3,4] The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). Therefore, an employee cannot normally maintain a negligence suit against his or her employer regarding an injury arising out of and in the course of employment; his or her sole remedy is a claim for workers' compensation, and all disputed workers' compensation claims "'shall be submitted to the Nebraska Workers' Compensation Court.'" *Id.* at 356, 591 N.W.2d at 529.

[5] A finding that one party is an employer and a finding that the other relevant party is an employee are necessary to bind the parties to the compensation schedule of the Nebraska Workers' Compensation Act. See *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999). In addition, if an accident does not arise out of and in the course of employment, there is no coverage under the Nebraska Workers' Compensation Act, and the

parties are not subject to it. See *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975).

The focus of our inquiry is, therefore, to determine whether an issue of fact exists as to the status of Levander's employment at the time she was injured. The record shows that the Elks sent interrogatories to Levander, seeking to determine where Levander was employed prior to the accident on June 18, 1995, and seeking the basis of her assertion that the claim was not barred by workers' compensation law. In response to interrogatory No. 2, "[d]escribe your employment since high school," Levander responded that she had worked at the lodge in Hastings 5 to 8 hours per week and that in the spring of 1995, the clubhouse manager and Carlie Cleveland were her supervisors.

Interrogatory No. 11 requested that if Levander contended that her claim was not barred by workers' compensation law, then she was to set forth every fact she believed supported such a contention. Levander responded that she was asked to volunteer her time in assisting with the golf tournament and that she did not receive any compensation, wages, or pay for the time she volunteered on June 18, 1995. Levander stated that she had volunteered to help with this tournament for 2 or 3 years and that on the date of the accident, she did not show up with the intention of cooking hamburgers. An employee of the Elks apparently was to have been paid to cook the hamburgers that day, but that employee did not come in to work. Levander stated that both she and her husband had been volunteers for the Elks in excess of 13 years and that they both volunteered and assisted in the weekly "beer and burger nights," where Levander assisted with making salads and setting up tables. Levander also donated her time in helping set up banquets and other golfing events.

There is evidence that on the date of the injury, Levander was grilling hamburgers after her morning shift was over and that grilling hamburgers was not part of her job with the Elks. The grilling took place on the golf course, which was outside Levander's regular place of work in the clubhouse. There was evidence that Levander's work grilling hamburgers had always been a part of her volunteer activities as a member of the Elks.

Generally, acts that are nothing more than the discharge of a person's duties as a good citizen or member of the community

are not within the course of employment. 2 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 27.03[4][a] (1999). However, the Elks rely on *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983), to claim that even if Levander was acting as a volunteer, she was acting within the scope of her employment.

In *Brown*, a laborer went to the home of one of the partners of the business for which he worked and asked if there was any work for him that day. The laborer was told that there was not, but he waited at the home in order to pick up his paycheck. While waiting, he volunteered to help his coworkers with some of the work they were doing, and he was subsequently injured. We affirmed the Workers' Compensation Court's finding that the laborer was within the course of his employment. We explained that although he was a volunteer, he was in the process of assisting coworkers perform work for the employer, and the labor was done in a good-faith attempt to assist fellow employees.

Brown is distinguishable because (1) Levander was not physically assisting a coworker, but, apparently, filling in for someone who was not there; (2) grilling hamburgers had never been a part of the scope of Levander's employment with the Elks; and (3) there is evidence to indicate that the job Levander was doing was strictly understood to be part of her volunteer work as a member of the Elks lodge, as opposed to the assistance of coworkers.

From our review, we conclude that a material issue of fact exists whether Levander was an employee acting in the scope of employment at the time of the accident. Levander regularly volunteered her time to the Elks by grilling hamburgers and doing other activities for the lodge before and after she started being paid for certain work done at the clubhouse. The work for which Levander was paid included marshaling, cleaning, and helping at the bar, but had never included grilling hamburgers for a tournament. The evidence established that it was not unusual for members of the lodge to help with grilling at golf tournaments or on "beer and burger nights," and none of the other members were paid during these activities. For this reason, the trial court erred, and summary judgment should not have been granted.

[6] We next address whether the trial court erred in striking portions of exhibits 4 and 5, the affidavits of Levander and her husband, respectively. The court granted the motion to strike those portions which contained assertions that Levander was an independent contractor, rather than an employee, of the Elks. The Elks' motion to strike was based upon *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), wherein we explained that if a party, without reasonable explanation, changes his or her testimony concerning material facts on a vital issue, such change being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. See, also, *Converse v. Morse*, 232 Neb. 925, 442 N.W.2d 872 (1989); *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983); *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959). The Elks assert that Levander's prior answers to interrogatories admitted that she was an employee and that, thus, any subsequent assertions to the contrary were properly struck. In support of this assertion, the Elks point out that Levander's prior answers to interrogatories listed the Elks as one of several past "employers," and Levander did not specifically assert that she was an independent contractor.

[7] The important considerations in discrediting testimony as a matter of law are that the testimony pertains to a vital point, that it is clearly apparent the party made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony. *Momsen v. Nebraska Methodist Hospital, supra.* Where a party's testimony was not changed to meet the exigencies of the case, in that the change is satisfactorily explained, or the changed version at trial is corroborated by other evidence in the record providing an adequate basis for the jury's findings, a question of credibility for the jury is presented. *Converse v. Morse, supra.* We conclude that the evidence is insufficient to support a finding that Levander clearly changed her testimony in order to meet the exigencies of the pending litigation. Thus, the district court also erred in granting the Elks' motion to strike.

[8,9] Lastly, we address the assignment of error that the trial court erred in denying Levander's application to add the local Elks lodge as a defendant. The propriety of adding a new

defendant depends in part upon whether the cause of action otherwise remains the same. See *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997). In determining whether a new cause of action results from adding a new defendant, the test is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. See *id.* By amending her pleading so as to add the local Elks as an additional party defendant, Levander's cause of action otherwise remains unchanged. Since we have reversed the judgment and remanded the cause for further proceedings, we believe it would be an abuse of discretion to deny Levander's application to add the local Elks as a defendant.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. DAN SANCHEZ, APPELLANT.
597 N.W.2d 361

Filed July 16, 1999. No. S-98-660.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Rules of Evidence: Other Acts: Appeal and Error.** 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 Neb. Evid. R. 404(2) and 403, Neb. Rev. Stat. §§ 27-404(2) and 27-403 (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion.
3. **Sexual Assault: Evidence.** Nebraska's rape shield law, Neb. Rev. Stat. § 28-321(2) (Reissue 1995), provides that evidence of a sexual assault victim's past sexual behavior shall not be admissible unless such evidence is (a) evidence of past sexual behav-

ior with persons other than the defendant, offered by the defendant upon the issue of whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to semen, injury, blood, saliva, and hair or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

4. ____: ____. The purpose of the rape shield law is to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicits evidence of questionable relevance to the case being tried.
5. **Rules of Evidence: Other Acts: Proof.** The admissibility of what has been characterized as "other crimes" or "similar acts" evidence is governed by Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. 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.
6. **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.
7. **Rules of Evidence: Other Acts: Proof.** Before the prosecution may offer other crimes evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), in a criminal case, it must first prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.
8. **Rules of Evidence: Other Acts.** Evidence of prior uncharged crimes is inadmissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), unless, had the other crimes been charged, there is evidence sufficient to warrant submission to a jury that the crimes were actually committed and that the defendant committed them.
9. **Evidence.** It is axiomatic that only relevant evidence is admissible.
10. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
11. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. Stated another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
12. **Evidence: Other Acts.** The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.
13. **Rules of Evidence: Other Acts: Words and Phrases.** Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admis-

sible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Evidence that is offered for a proper purpose is often referred to as having "special relevance" or "independent relevance," which means its relevance does not depend upon its tendency to show propensity.

14. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
15. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), shall, upon objection to its admissibility, be required to 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.
16. **Evidence: Jury Instructions.** Any limiting instruction given upon receipt of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), should likewise identify only those specific purposes for which the evidence was received.
17. **Sexual Assault: Intent.** Intent is not an element of first degree sexual assault as defined by Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995).
18. **Criminal Law: Intent: Sexual Assault: Circumstantial Evidence: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act. Although motive is not an element of first degree sexual assault, it may constitute strong circumstantial evidence against the defendant.
19. **Criminal Law: Pleas: Proof.** A plea of not guilty challenges all elements of the crime charged, requiring the State to prove the identity of the perpetrator.
20. **Evidence.** The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of the fact from the ultimate issues of the case.
21. **Evidence: Other Acts.** Other crimes evidence must be so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused.
22. ____: ____. Other crimes evidence may have probative value where there are overwhelming similarities between it and the charged offense, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
23. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded for a new trial.

Dave B. Eubanks and Maren Lynn Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

Don Stenberg, Attorney General, and Donald J.B. Miller for appellee.

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

STEPHAN, J.

Dan Sanchez appeals from his conviction of first degree sexual assault following a jury trial in the district court for Box Butte County. We conclude that the district court erred in admitting testimony regarding uncharged criminal acts occurring prior to the charged offense and, therefore, reverse, and remand for a new trial.

I. FACTS AND PROCEDURAL BACKGROUND

Sanchez was charged under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995) with sexually assaulting 13-year-old A.S. at some time during the period of December 25, 1996, to February 24, 1997. On June 16, 1997, A.S. reported the incident to her mother, who notified law enforcement authorities on the same date. Prior to trial, Sanchez filed a notice of intent to offer evidence of A.S.' prior sexual behavior pursuant to Neb. Rev. Stat. § 28-321 (Reissue 1995) and requested an in camera hearing on this issue. Also prior to trial, the State filed a notice of its intent to offer "other acts" evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), in order to establish that Sanchez had engaged in sexual contact, including penetration, with his biological daughters and former wife while they were under the age of 16. Sanchez filed motions in limine to exclude this evidence pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

1. RULE 404(3) HEARING

On April 16, 1998, the district court conducted a pretrial evidentiary hearing on the State's proposed offer of "other crimes" evidence as required by rule 404(3). At this hearing, the State called L.G., who had been married to Sanchez from 1976 until 1983, and Au.G. and A.G., children of this marriage.

Au.G., whose date of birth is May 16, 1980, testified that Sanchez sexually assaulted her repeatedly during a 2-week sum-

mer visitation in 1984 or 1985 at an apartment in Texas where Sanchez then resided. She testified that Sanchez fondled her and that on one occasion, she felt cold and pain in her vaginal area while Sanchez was on top of her. On cross-examination, Au.G. said she was confused when, approximately 1 to 2 months prior to the hearing, she reported that the incidents had occurred in Alliance, Nebraska. She further stated that memories of the assault came back to her in dreams and flashbacks.

A.G., whose date of birth is March 30, 1976, also testified that she was sexually assaulted by Sanchez when she was a young child but expressed uncertainty as to whether the events actually happened or were a part of a dream.

L.G., whose date of birth is September 7, 1961, married Sanchez in 1976 when she was 14 years old. She testified that she first met Sanchez when she was 13 and had accompanied a friend, Sanchez' sister, to the Sanchez home after school. She was introduced to Sanchez, who was 22 years old at the time, and accompanied him to his room to view his sports trophies and awards. She stated that when Sanchez' sister left the room, he sexually assaulted her, achieving vaginal penetration. She testified that Sanchez subsequently subjected her to oral and vaginal penetration on multiple occasions prior to their marriage in 1976. When the marriage was dissolved in 1983, L.G. obtained custody of A.G. and Au.G., and Sanchez was given visitation rights. L.G. testified that when Au.G. told her of the molestation by Sanchez during the visitation in Texas, she attempted to obtain a court order terminating Sanchez' visitation rights but was unsuccessful in that effort. L.G. remarried, and in September 1985, Sanchez relinquished parental rights to Au.G. and A.G., who were adopted by L.G.'s new husband.

Sanchez called three witnesses at the pretrial hearing. Katie Sanchez, who was married to Sanchez from 1990 to 1998, testified that she was living in Garland, Texas, with Sanchez in 1985 and stayed with friends during a 2-week period when Sanchez' daughters came for a summer visit. However, she observed Sanchez with his children during this visitation and stated that the girls appeared happy. Sanchez' brother testified that he and his wife transported A.G. and Au.G. back to their home after a visitation with Sanchez in Texas in the summer of 1985. He

stated that he did not notice anything unusual about their behavior during this trip other than that they were "fidgety," which he attributed to the fact that they were not familiar with his family. Sanchez' sister-in-law testified that nothing unusual happened during the journey. Sanchez' mother testified that L.G. came to their home "constantly" in 1975 to see Sanchez and that for the initial 2 months of this period, there was an open doorway with no door between Sanchez' room and the adjacent kitchen.

Sanchez also offered certain documentary evidence which was received by the court, including transcripts of depositions of L.G., Au.G., and A.G.; a videotape containing interviews of the same persons; and certain pleadings, motions, and orders from the proceedings in the district court for Box Butte County dissolving the marriage of Sanchez and L.G. and determining custody and visitation rights. On May 4, 1998, the district court entered an order granting the State's motion to present "other acts" evidence through the testimony of L.G. and Au.G., but denying the motion as to the testimony of A.G.

2. Section 28-321(2) Hearing

Immediately following the rule 404(3) hearing, the district court conducted an in camera hearing pursuant to § 28-321(2) on Sanchez' motion to offer evidence of A.S.' past sexual behavior. Sanchez offered the depositions of A.S. and her mother, taken October 10, 1997, and the deposition of Alliance police officer Craig Dvorak, taken September 17, 1997. The parties also stipulated that the last day of the 1996-97 school year in Alliance was June 4, 1997.

In her deposition, A.S. testified that she was asleep at Sanchez' home on New Year's Eve 1996 and was awakened by pelvic pain caused by Sanchez' penetrating her with his finger. She also testified that in June 1997, she was attending a drive-in movie with her 13-year-old boyfriend when her boyfriend briefly touched her vaginal area under her clothing but did not penetrate her. Dvorak testified that during his initial investigation, A.S. told him that her boyfriend had touched her crotch area over her clothing. A.S.' mother recalled that A.S. had mentioned to Dvorak that she resisted a boy's attempt to place his hand under her shirt and that she kissed him. In its pretrial order

of May 4, 1998, the district court denied Sanchez' motion to present this evidence at trial.

3. TRIAL

A jury trial was held on April 27 and 28, 1998. A.S. testified that Sanchez was her godfather and that for a period of time, she visited the Sanchez home once or twice a week and spent the night almost every other week. When asked the specific date when the assault occurred, she replied, "I think it was New Year's but I'm not sure." She said that the assault occurred some time after her 13th birthday on December 21, 1996, but before she visited a doctor in February 1997. She stated that when the assault occurred, she was at the Sanchez residence watching television in a first-floor room. Katie Sanchez, Sanchez' wife at the time, and one of his three sons were watching television with A.S. for a time, but they then left. A.S. testified that she got bored and went to a second-floor room in the home where the other two Sanchez boys were asleep on a couch and Sanchez was sitting in a recliner watching television. She sat down on the right arm of the chair next to Sanchez and fell asleep.

A.S. testified that she was awakened by a sharp pain in her vaginal area. She then felt someone kissing her on the mouth, and when she opened her eyes, she saw that it was Sanchez. She also saw a part of his hand coming out of her shorts. A.S. told him to stop and then left the room and went back downstairs, where she fell asleep.

Sanchez made an offer of proof regarding A.S.' encounter with her boyfriend, which the court overruled based upon its finding that the evidence was irrelevant and inadmissible under § 28-321.

A pediatrician testified that he examined A.S. on February 24, 1997, because of A.S.' complaints of painful and frequent urination. He referred A.S. to a licensed nurse practitioner, who conducted a genital examination and diagnosed a vaginal yeast infection. She testified that A.S.' hymen was intact and stated that pressure on the hymen could cause pain. The pediatrician and the nurse practitioner both testified that the absence of physical injury does not rule out the occurrence of a sexual assault.

The State called Au.G. as a witness at trial. When the prosecutor began questioning her about her visit with Sanchez in

Texas when she was 5 years old, Sanchez objected on the ground that the evidence was inadmissible under rule 404. The district court overruled the objection but gave the following limiting instruction before permitting Au.G. to testify:

> Ladies and gentlemen of the jury, we are now going to hear some evidence that is being received for a specified limited purpose. Evidence of other crimes or acts is admitted for the limited purpose of showing that proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Such evidence is not admissible to prove the character of the defendant or that the defendant acted in conformity with that prior offense in the same offense that he is charged with in this court. The evidence that the defendant committed other crimes or acts may be considered by you only for the limited purpose of showing that the defendant had motive, opportunity, intent, preparation, plan, or knowledge to commit the offense that he is charged with in this case or to establish the identity or absence of mistake or accident, the evidence may be considered by you for no other purpose.

Au.G.'s subsequent testimony was generally consistent with that which she gave at the rule 404(3) hearing.

The State also called L.G. as a witness at trial. The court overruled Sanchez' timely rule 404(2) objection and instructed the jury: "I gave you a limiting instruction when [Au.G.] testified. That same limiting instruction is in effect in regard to any testimony by this witness in regard to prior acts." L.G. then testified to the matters which were the subject of her testimony at the rule 404(3) hearing, adding the detail that during their initial sexual encounters, Sanchez pinched her nipples violently and penetrated her with his finger before having intercourse.

Testifying on his own behalf, Sanchez denied sexually abusing Au.G. Regarding A.S., he stated that on New Year's Eve 1996, he worked until 6 p.m. and then went home and watched football on television. He stated that A.S. was not present at his home on that evening and that on other occasions when she had been in his home, he had never observed her in the second-floor den where she alleged that the assault had occurred. Sanchez denied assaulting A.S.

Katie Sanchez, who was married to Sanchez from 1990 to 1998, also testified that A.S. was not present at the Sanchez' home on New Year's Eve 1996. She stated that on other occasions when A.S was present in their home, she was not allowed to go into the second-floor den if Sanchez was there because it was "his space." Katie Sanchez also testified that A.S. accompanied her on a trip to Katie Sanchez' parents' home in March 1997, but that Sanchez did not go along.

Included in the court's instructions to the jury at the close of the case was the following:

> During the trial I told you that certain evidence was received for a limited purpose. The testimony that Sanchez sexually assaulted [L.G.] and [Au.G.] was received for the limited purpose of proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or lack of mistake or accident. You must consider this evidence only for that limited purpose and no other.

The jury returned a verdict of guilty, and Sanchez was sentenced to a period of incarceration of not less than 5 nor more than 7 years, with credit for time served. He then perfected this appeal, which we removed to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts.

II. ASSIGNMENTS OF ERROR

Sanchez asserts, restated, that the trial court erred in (1) precluding him from offering evidence regarding the victim's past sexual behavior and (2) allowing the State to present evidence regarding prior bad acts allegedly committed by Sanchez.

III. STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). Where, as here, the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is

reviewed for an abuse of discretion. See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

[2] 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 rules 404(2) and 403, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

IV. ANALYSIS

1. Victim's Past Sexual Behavior

[3] Nebraska's rape shield law, § 28-321(2), provides in part that evidence of a sexual assault victim's past sexual behavior shall not be admissible unless such evidence is

> (a) [e]vidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

[4] The purpose of the rape shield law is to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicits evidence of questionable relevance to the case being tried. *State v. Earl, supra*; *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986); *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985). Under this statute, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions; i.e., source of physical evidence or consent. *State v. Earl, supra.*

We agree with the determination of the district court that the evidence which Sanchez sought to present at trial regarding A.S.' past sexual behavior does not fit within either of these exceptions. Sanchez does not seriously dispute this determination but argues that the evidence is nevertheless admissible because its exclusion would violate his rights to confrontation and compulsory process pursuant to the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ." Article I, § 11, of the Nebraska Constitution provides:

> In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

This court has not decided a case in which evidence inadmissible under § 28-321 was found to be admissible on constitutional grounds. Although this theory of admissibility was argued in *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997), we did not reach the constitutional issue because we concluded that the defendant "did not adduce evidence of sufficient relevance, i.e., evidence establishing that [the victim] had prior knowledge of the same kind of sexual activities of which the defendant is accused." *Id.* at 134, 560 N.W.2d at 497. In *Earl*, the defendant was charged with first degree sexual assault of a 6-year-old boy. The specific acts alleged to constitute the assault included fondling and fellatio. He sought to introduce evidence that prior to the alleged assault, the victim and his 5-year-old female cousin, who herself had been a victim of sexual assault, had been observed " 'playing husband and wife' " and "pretending to have sex while they were totally nude." *Id.* at 135, 560 N.W.2d at 497. The defendant argued that this evidence was relevant to establish an alternative source of the victim's sexual

knowledge in order to rebut the inference that a child of tender years could not possess the explicit sexual knowledge he had but for the alleged assault. In rejecting this argument, we reasoned that even if this conduct between the children had occurred, it could not have provided the victim with knowledge of the specific conduct involved in the alleged assault. We concluded that the evidence of the victim's prior sexual behavior did not fall within the statutory exceptions provided for in § 28-321 and that it was not "so relevant and probative that Earl's constitutional right to present it would be triggered." *State v. Earl*, 252 Neb. at 135, 560 N.W.2d at 497.

Sanchez interprets this language as suggesting that "there may well be instances where evidence of prior sexual behavior is so relevant and so probative that it triggers a defendant's constitutional right to present it, regardless of whether it meets either criterion provided in NEB. REV. STAT. §28-321." Brief for appellant at 8. From this premise, he argues that evidence concerning A.S.' conduct with her boyfriend should have been admitted "for the purpose of showing that the conduct attributed to Sanchez had, in fact, been committed by another male." Brief for appellant at 5. In this regard, he relies upon *Com. v. Spiewak*, 533 Pa. 1, 617 A.2d 696 (1992), in which the defendant was accused of sexually assaulting his 15-year-old stepdaughter. He admitted having sexual relations with the victim after she reached the age of 16. The prosecution established that the victim had confided to her boyfriend that she had experienced oral intercourse with "an older man" prior to her 16th birthday, and, in her trial testimony, she identified that person as the defendant, describing the act in specific detail. Relying upon Pennsylvania's rape shield law, the trial court precluded the defendant from cross-examining the witness with her previous sworn testimony that she had similar sexual contact with a different "older man" prior to her 16th birthday. The Supreme Court of Pennsylvania reversed the district court's decision based upon its conclusion that excluding the evidence abridged the defendant's constitutional right to confrontation. It reasoned that once the prosecution offered evidence which raised an inference that the complainant had a single sexual contact with an "older man" prior to her 16th birthday, the defendant had a

basic constitutional right to establish, on cross-examination, that she had previously and under oath identified that person as someone other than himself. *Id.*

Sanchez also relies on *People v. Hill*, 289 Ill. App. 3d 859, 864, 683 N.E.2d 188, 192, 225 Ill. Dec. 244, 248 (1997), in which the court stated that "under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge," notwithstanding the Illinois rape shield law. However, the court also stated that the "prior sexual conduct must be sufficiently similar to defendant's alleged conduct to provide a relevant basis for its admission. It must engage the same sexual acts embodied in the child's testimony." *Id.* The court concluded that while the 6-year-old female victim clearly possessed age-inappropriate knowledge concerning the specific sexual act with which the defendant was charged, evidence that the victim had previously reported similar contact with a young boy was properly excluded because it was lacking in detail and could not fully rebut the inference that the child's knowledge was derived from the defendant. *Id.*

We find Sanchez' authority on this issue distinguishable and his arguments unpersuasive. Assuming, without deciding, that there may be circumstances in which the accused's constitutional right to confrontation would require admission of evidence concerning a victim's prior sexual behavior which would be inadmissible under the rape shield law, no such circumstances exist here. This is not a case where the victim displays sexual knowledge inappropriate for her age. The conduct which A.S. attributed to her teenage boyfriend differed significantly from that which she attributed to Sanchez in that it did not involve penetration. The fact that she disclosed both incidents to a sister in the same conversation does not lead to an inference that one incident occurred and the other did not. It is clear from the offer of proof that A.S. described two separate and distinct incidents, distinguishing the boyfriend's touching from Sanchez' alleged penetration. We conclude that the district court did not abuse its discretion in excluding evidence of the boyfriend's conduct.

2. Evidence of Prior Uncharged Sexual Assaults

[5] Sanchez' remaining assignments of error relate to the trial court's denial prior to trial of his motion in limine to exclude the testimony of L.G. and Au.G. that they had been sexually assaulted by Sanchez 22 years ago and 11 to 12 years ago, respectively, and the trial court's admission at trial of such testimony over Sanchez' objection. The admissibility of what has been characterized as "other crimes" or "similar acts" evidence is governed by rule 404(2), which 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.

[6] The admissibility of other crimes evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

[7,8] Before the prosecution may offer other crimes evidence pursuant to rule 404(2) in a criminal case, it must first prove to the trial court, out of the presence of the jury, "by clear and convincing evidence that the accused committed the crime, wrong, or act." Rule 404(3). Sanchez argues that the State failed to meet this burden because of inconsistencies in the testimony of L.G. and Au.G. at the pretrial hearing held pursuant to rule 404(3). We have not specifically defined the phrase "clear and convincing evidence" as it is used in this rule. However, we have stated that under rule 404(2), evidence of prior uncharged crimes cannot be admissible "unless there is sufficient evidence that the crimes were actually committed and that the defendant committed them, to warrant submission to a jury if the other crimes had been charged." *State v. Timmerman*, 240 Neb. 74, 87, 480 N.W.2d 411, 419 (1992). In this case, L.G. and Au.G. testified that they were sexually assaulted at the ages of 13 and 5, respectively, and positively identified the assailant as Sanchez. L.G. testified that she gave birth to A.G. at the age of 14, after being impregnated by Sanchez. This evidence describes criminal conduct and would have been sufficient to warrant submission to a

trier of fact if Sanchez had been charged with such crimes. We conclude that the State met the threshold requirement imposed by rule 404(3) and therefore turn our consideration to the issue whether evidence of the uncharged prior crimes was admissible in this case under rule 404(2).

[9-12] It is axiomatic that only relevant evidence is admissible. *State v. McManus, ante* p. 1, 594 N.W.2d 623 (1999); *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. Accord *State v. McManus, supra.* However, rule 404(2) prohibits the admissibility of relevant evidence for the purpose of proving "the character of a person in order to show that he or she acted in conformity therewith." Stated another way, rule 404(2) "prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner." *State v. McManus, ante* at 6, 594 N.W.2d at 628. See, also, *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998); *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis. *State v. McManus, supra.* The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is " 'deeply rooted in our jurisprudence.' " *Id.* at 7, 594 N.W.2d at 628, quoting *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998).

[13] However, evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). "Evidence that is offered for a proper purpose is often referred to as having 'special' or 'independent relevance,' which means its relevance does not depend on its tendency to show propensity." *State v. McManus, ante* at 8, 594 N.W.2d at 629.

[14] In *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), the U.S. Supreme Court stated that the protection against admission of unduly prejudicial other crimes evidence emanates from four sources: (1) from the

requirement of Fed. R. Evid. 404(b) that the evidence be offered for a proper purpose; (2) from the relevancy requirement of Fed. R. Evid. 402; (3) from the assessment that the trial court must make under Fed. R. Evid. 403 to determine whether the probative value of the other crimes evidence is substantially outweighed by its potential for unfair prejudice; and (4) from the requirement of Fed. R. Evid. 105 that the trial court shall, upon request, instruct the jury that the other crimes evidence is to be considered only for the purpose for which it was admitted. We first recognized this analytical framework for reviewing the admissibility of other crimes evidence under the corresponding provisions of the Nebraska Evidence Rules in *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), and have applied it in subsequent cases. See, e.g., *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998); *State v. Freeman, supra.* Recognizing that the first and second elements of this test are necessarily interrelated in that "independent relevance" is synonymous with "proper purpose," we restated the test in *State v. McManus, ante* at 9, 594 N.W.2d at 629, as follows:

> [T]his court's rule 404(2) analysis considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

We apply this analysis in reviewing the admissibility of other crimes evidence in the present case.

In addressing the initial question of whether the evidence of other crimes was relevant for some purpose other than that prohibited by rule 404(2), we are hampered by the fact that the purpose for which this evidence was offered and received in this case is not clear from the record. In its "Notice of Intent to Present 404 Evidence," the State expressed its intent to present evidence of other acts of the defendant pursuant to rule 404(2), but did not state the purpose for which such evidence would be offered. Likewise, the record of the hearing held pursuant to rule

404(3) does not disclose the purpose for which the evidence was offered, and in its order, the trial court did not identify the purpose for which it would be received, stating only that "[t]he State is allowed to present such evidence . . . within the bounds set by Neb. Rev. Stat. § 27-404(2)."

A similar ambiguity of purpose was addressed by the court in *U.S. v. Murray*, 103 F.3d 310 (3d Cir. 1997), in which other crimes evidence was offered and received pursuant to Fed. R. Evid. 404(b), which is substantially similar to Nebraska's rule 404(2), without a clear statement of its purpose. The U.S. Court of Appeals stated that trial judges should "exercise particular care" in admitting other crimes evidence for two reasons:

> First, the line between what is permitted and what is prohibited under Rule 404(b) is sometimes quite subtle. Second, Rule 404(b) evidence sometimes carries a substantial danger of unfair prejudice and thus raises serious questions under Fed.R.Evid. 403. Therefore, it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact "that is of consequence to the determination of the action." [Citation omitted.] And it is likewise advisable for the trial court to place on the record a clear explanation of the basis for its ruling on the admission of the evidence. Not only do these procedures help to ensure that sensitive Rule 404(b) rulings are made with care (and thus to diminish the likelihood that these rulings will result in reversals), but these procedures greatly assist the process of appellate review.

U.S. v. Murray, 103 F.3d at 316. Similarly, the Sixth Circuit requires that the specific purpose of other crimes evidence be stated by its proponent so that the trial court can make a determination of its materiality. *U.S. v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996). See, also, 2 Joseph M. McLaughlin, Weinstein's Federal Evidence § 404.23[5][b] at 404-138-39 (2d ed. 1999) ("court should require the proponent of [other crimes] evidence to identify the specific purpose for which the evidence is offered" and if purpose is not clear, "should not hesitate to press counsel to provide a clear explanation at sidebar").

[15,16] We agree with these authorities and therefore hold that henceforth, the proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to 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. See *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). Any limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received. See *U.S. v. Merriweather*, 78 F.3d at 1077 (finding reversible error in limiting instructions which recited all permissible purposes of other crimes evidence set forth in Fed. R. Evid. 404(b), stating trial court must " 'clearly, simply, and correctly' instruct the jury as to the *specific* purpose for which they may consider the evidence," quoting *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994)). See, also, NJI2d Crim. 5.3, comment (limiting instruction "must call the jury's attention to the particular evidence being limited to a particular use"). In the present case, we will consider only those purposes for the other crimes evidence which are urged in the State's brief: intent, opportunity, motive, and identity.

(a) Intent

[17] We have held that other crimes evidence may be offered for the purpose of proving intent where intent is an element of the charged offense. See, e.g., *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). However, intent is not an element of first degree sexual assault as defined by § 28-319(1)(c), the offense with which Sanchez was charged. See, *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). To obtain a conviction in this case, the State needed to prove only that Sanchez subjected A.S. to sexual penetration at a time when he was over the age of 19 and she was under the age of 16. See § 28-319(1)(c). The intent with which the charged act was committed was therefore not a fact that is of consequence to the determination of this action and cannot provide a basis for independent relevance of the other crimes evidence.

(b) Opportunity

In *State v. Newman*, 250 Neb. 226, 241, 548 N.W.2d 739, 750 (1996), we held that because other crimes evidence placed the defendant "in the area where the sexual assault occurred near the time it occurred," it was properly offered for the purpose of showing that the defendant had the opportunity to commit the crime in question. Here, the assault occurred in Sanchez' home, where it is undisputed A.S. frequently visited. The contested issue is not whether Sanchez had an opportunity to assault A.S., but, rather, whether he in fact did commit the assault. We conclude that because opportunity was not a fact of consequence in this case, it is not a basis upon which independent relevance of other crimes evidence can be asserted under rule 404(2).

(c) Motive

[18] Motive is defined as that which leads or tempts the mind to indulge in a criminal act. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). In *State v. Sherrod*, 229 Neb. 128, 132, 425 N.W.2d 616, 619-20 (1988), we held that while motive need not be proved in a prosecution for first degree sexual assault, it constituted "strong circumstantial evidence against a defendant" and therefore could be a subject of proof by other crimes evidence. However, we subsequently held that " '[w]hile proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element.' " *State v. McBride*, 250 Neb. at 651, 550 N.W.2d at 671, quoting *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). While there may be circumstances where intent is not an element of the charged offense but motive is nevertheless a fact of consequence to the determination of the action, we perceive no such circumstances in this case.

The State argues that the other crimes evidence served to prove Sanchez' "motive to obtain sexual gratification from young girls" which is "foreign to most adults who are not sexually attracted to children." Brief for appellee at 33. The State further argues that "many adults find it hard to believe that there are people who are sexually attracted to kids." *Id.* Aside from its dubious assertion that adult members of our society are gener-

ally unaware of the existence of pedophiles, this argument illustrates that under the guise of motive, the State is really attempting to prove propensity, i.e., that one who in the past was motivated to seek sexual gratification from children is likely to do so again. While the facts underlying this conclusion are logically relevant, they lack independent relevance and are thus inadmissible for this purpose under rule 404(2). The State has not articulated a legitimate explanation of why motive was a fact of consequence to the determination of Sanchez' guilt, and we therefore conclude that the other crimes evidence cannot have independent relevance with respect to motive.

(d) Identity

[19] A plea of not guilty challenges all elements of the crime charged, requiring the State to prove the identity of the perpetrator. *State v. Sherrod, supra.* Thus, identity was a fact of consequence in this case which could serve as a basis for independent relevance of other crimes evidence, provided that such evidence had probative value as to the identity of the person who committed the crime with which Sanchez was charged.

[20,21] The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of the fact from the ultimate issues of the case. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). In evaluating other crimes evidence in criminal prosecutions, we have stated that it must be so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

[22] In *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), we agreed with the reasoning of *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), that other crimes evidence may have probative value as to identity where there are

overwhelming similarities between it and the charged offense, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. In *State v. Freeman, supra*, a prosecution for eight counts of first degree sexual assault, we concluded that evidence regarding a previous sexual assault committed by the defendant was properly admitted on the issue of identity where the manner in which it was committed and certain statements made by the assailant to the victim during its commission bore marked similarities to each of the charged offenses.

In both *State v. Carter, supra*, and *State v. Freeman, supra*, there was physical evidence that a sexual assault had occurred but no eyewitness identification of the assailant, thus leaving open the possibility that someone other than the defendant had committed the crime. In each of those cases, the other crimes evidence was held to be probative on the issue of the identity of the assailant and therefore properly admitted for that purpose. In the present case, there is no physical evidence of penetration necessary to establish first degree sexual assault, although there is medical testimony that the absence of such evidence does not mean that such an assault did not occur. The only evidence of the assault is the testimony of A.S., who described what happened and unequivocally identified Sanchez as the assailant. There is no evidence upon which the jury could have concluded that the assault occurred but that someone other than Sanchez committed it. Thus, assuming without deciding that the other crimes evidence bears the requisite similarity to the charged offense, it could have no probative value on the issue of identity under the facts of this particular case. If the jury believed the testimony of A.S. that the acts which constitute first degree sexual assault occurred, it would have no basis for identifying anyone other than Sanchez as the assailant and his prior conduct would prove nothing necessary for conviction. On the other hand, if the jury did not believe the testimony of A.S. regarding the occurrence of the assault, it would be left with no evidence that a crime had been committed and thus no assailant to identify. Sanchez' prior acts could not fill this evidentiary void.

[23] For the reasons stated, we conclude that the other crimes evidence in this case lacked the independent relevance which is

a prerequisite to admissibility under rule 404(2). We therefore need not address the second and third analytical steps set forth in *State v. McManus, ante* p. 1, 594 N.W.2d 623 (1999), in order to reach our conclusion that the trial court abused its discretion in receiving such evidence. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to the defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Buechler, supra*; *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). The testimony of A.S., if believed by the jury, was sufficient to obtain a conviction, but given the absence of physical evidence and Sanchez' testimony denying the assault, the evidence of guilt was certainly not overwhelming. Accordingly, we cannot conclude that the erroneous admission of other crimes evidence was harmless beyond a reasonable doubt, and we therefore reverse, and remand for a new trial.

V. CONCLUSION

The trial court did not err by refusing to admit evidence regarding A.S.' sexual history predating the charged offense. However, the admission of evidence regarding Sanchez' prior uncharged criminal conduct constituted an abuse of discretion and reversible error because such evidence was not relevant for a purpose other than showing Sanchez' character or actions in conformity therewith, and was thus inadmissible under rule 404(2). The judgment of conviction is therefore reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

DALE E. HAGELSTEIN, APPELLANT, V. SWIFT-ECKRICH DIVISION OF CONAGRA, APPELLEE.

597 N.W.2d 394

Filed July 23, 1999. No. S-98-363.

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

2. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
5. **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.
6. ___: ___. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
7. **Appeal and Error.** An appellate court may consider agreed circumstances presented to it in brief or argument.
8. **Judicial Notice.** Judicial notice may be taken at any stage of a proceeding, and this includes judicial action in an appeal.
9. ___. Judicial notice may be taken whether or not it is requested by a party.
10. **Words and Phrases.** Adjudicative facts within the meaning of Neb. Rev. Stat. § 27-201 (Reissue 1995) are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally.
11. **Records: Rules of Evidence: Judicial Notice.** As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1995), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.
12. **Judges: Courts.** The death, disqualification, or absence of a judge will not deprive the surviving or remaining judges of authority to hold court and transact the business of the court, and in fact to exercise all functions pertaining to the particular court, provided, however, that the number of the court is not reduced below that legally required for the transaction of its business.
13. **Words and Phrases.** A quorum is defined as the number of persons that are members of a body when assembled who are legally competent to transact the business of such a body.
14. **Workers' Compensation.** The plain and ordinary meaning of the quorum requirement of Neb. Rev. Stat. § 48-156 (Reissue 1998) is that review of a disputed claim must be conducted by no fewer than three judges of the Workers' Compensation Court.
15. **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.
16. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed, and cause remanded for further proceedings.

James F. Fenlon, P.C., for appellant.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

GERRARD, J.

NATURE OF CASE

Dale E. Hagelstein appeals from the Workers' Compensation Court's denial of his petition seeking total disability benefits or, in the alternative, vocational retraining. The initial question presented to this court is whether a review panel of the Workers' Compensation Court is properly constituted when only two judges participate in the decision. Because we conclude that it is not and that as a consequence we lack appellate jurisdiction, we dismiss Hagelstein's appeal and remand the cause for further proceedings.

FACTUAL BACKGROUND

Hagelstein was injured on January 28, 1991, while in the employ of the appellee, the Swift-Eckrich Division of ConAgra (Swift-Eckrich). The Workers' Compensation Court, on December 26, entered an order granting Hagelstein temporary total disability benefits and ordering Swift-Eckrich to pay Hagelstein's injury-related medical expenses.

On March 6, 1996, Hagelstein filed a petition in the Workers' Compensation Court, alleging that he remained totally disabled but that Swift-Eckrich had been paying only partial disability benefits since 1995. Hagelstein also alleged that Swift-Eckrich had not paid certain medical expenses that he claimed were incurred because of his work-related injury. Hagelstein also sought, in the event that the court rejected his total disability claim, to be awarded vocational rehabilitation benefits.

In a modification of award dated January 27, 1997, a single judge of the Workers' Compensation Court rejected Hagelstein's

total disability claim. The single judge found that Hagelstein had reached maximum medical improvement in 1995 and had since suffered a 35-percent loss of earning power and that Hagelstein did not require vocational rehabilitation. The single judge further found that Swift-Eckrich should pay certain medical expenses claimed by Hagelstein.

Hagelstein sought Workers' Compensation Court review of the modification of award. On March 18, 1998, a review panel of the Workers' Compensation Court entered an order affirming the order of the single judge. The order of affirmance, however, was not signed by three judges; only two signatures are shown on the order. No third judge is shown as participating in the decision.

Hagelstein timely appealed the decision of the review panel to the Nebraska Court of Appeals, and we granted his petition to bypass that court and remove the case to our docket.

ASSIGNMENTS OF ERROR

Hagelstein assigns that the lower court erred in finding that he (1) reached maximum medical improvement on April 24, 1995, (2) suffered a 35-percent permanent loss of earning power after April 24, (3) is not entitled to vocational rehabilitation benefits, and (4) ceased being permanently totally disabled on or about April 24.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

[2] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Pier v. Bolles, ante* p. 120, 596 N.W.2d 1 (1999).

ANALYSIS

In his petition to bypass, Hagelstein stated that his appeal to the review panel was heard on oral argument by a three-judge review panel on June 5, 1997, but that on October 20, one of the three judges died. The remaining two judges, according to Hagelstein, signed their order of affirmance nearly 5 months after the death of the third judge. Hagelstein's original appellate brief assigned error to the Workers' Compensation Court regarding the failure of a third judge to sign the order of affirmance. After Hagelstein filed his petition to bypass, however, he filed a second amended brief that purported to withdraw his arguments regarding the absence of a third judge on his Workers' Compensation Court review panel.

[4] Hagelstein's withdrawal of his argument does not resolve the issue for this court. Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999). See, also, *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998). The participation of only two judges in the decision of the review panel raises jurisdictional issues, for the review panel and for this court on appeal, which we are dutybound to consider.

[5,6] 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. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

JUDICIAL NOTICE

[7] The first issue confronting this court in resolving this jurisdictional question is the determination of what facts to consider in our analysis. Hagelstein brought the matter of the death of a judge of his review panel to our attention in his appellate brief and petition to bypass, but there is no evidence in our record on appeal which indicates this fact, other than the pres-

ence of only two signatures on the review panel order of affirmance and the absence of a concurrence or dissent from a third judge. When questioned at oral argument, however, both parties conceded the death of a review panel member and the nonparticipation of a third judge. An appellate court may consider agreed circumstances presented to it in brief or argument. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999); *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

[8,9] It is also provided by Neb. Rev. Stat. § 27-201 (Reissue 1995) that a court may take judicial notice of "adjudicative facts," given certain statutory limitations. It is also well established that judicial notice may be taken at any stage of a proceeding, see § 27-201(6), and that this includes judicial action in an appeal, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Judicial notice may be taken whether or not it is requested by a party. See, § 27-201(3); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

[10] "Adjudicative facts" within the meaning of § 27-201 are simply the facts developed in a particular case, as distinguished from "legislative facts," which are established truths, facts, or pronouncements that do not change from case to case but apply universally. See, e.g., *U.S. v. Hernandez-Fundora*, 58 F.3d 802 (2d Cir. 1995), *cert. denied* 515 U.S. 1127, 115 S. Ct. 2288, 132 L. Ed. 2d 290; *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976) (cases applying Fed. R. Evid. 201, upon which § 27-201 is based). See, also, generally, 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 201.03[1] and [2] (1999); Fed. R. Evid. 201 advisory committee's notes. " 'Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. . . .' " *United States v. Gould*, 536 F.2d at 219. Accord *Van Meter v. Hellwege*, 356 N.W.2d 541 (Iowa 1984).

In order to address the jurisdictional issue presented in this appeal, a factual basis for our analysis must be established, i.e.: (1) the identities of the three judges assigned to Hagelstein's review panel, (2) that no other judge participated in the decision of that review panel, and (3) that one of the judges died before participating in the decision by that review panel. By the stan-

dards set forth above, these would clearly be adjudicative facts, as they relate to the unique circumstances of this particular case, and these are the facts to which we must apply the law defining the review panel's, and our own, jurisdiction.

As the facts necessary to our disposition of this issue are adjudicative facts, they are subject to the requirements of § 27-201. Section 27-201(2) provides that we may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

With reference to the composition of Hagelstein's review panel, we note that the records of the Workers' Compensation Court show that three judges were assigned to the review panel in Hagelstein's case: Judges Laureen Van Norman, Paul LeClair, and Ronald Brown. The records of the compensation court do not indicate the assignment of another judge to consider the review of Hagelstein's case. The signatures of Judges Van Norman and Brown appear on the order of affirmance contained in our appellate record; neither our record nor the records of the compensation court contain any indication of Judge LeClair's participation in the final adjudication of the review panel.

[11] It is well established that as a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with § 27-201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997). See, also, *Rhodes v. Crites*, 173 Neb. 501, 113 N.W.2d 611 (1962) (holding judicial notice is properly taken of judges, justices, and other court officials within state, and judicial notice is properly taken of public officers and their official positions and authority within jurisdiction of court).

Accordingly, it is appropriate for us to take judicial notice of the facts contained in the records of the Workers' Compensation

Court regarding the instant appeal: that Judge LeClair was assigned to Hagelstein's review panel and that neither he nor any other third judge participated in the March 18, 1998, decision of that review panel.

We additionally note that the State of Nebraska Department of Health has on file a death certificate for Judge Paul LeClair of the Workers' Compensation Court. The certificate was filed on October 30, 1997, and shows that Judge LeClair died on October 20, 1997. These are sources the accuracy of which cannot be reasonably questioned, and we may properly take judicial notice of the fact contained therein: that Judge LeClair died on October 20, 1997, nearly 5 months before the filing of the order of affirmance in Hagelstein's case.

In short, the evidence iterated above reveals that Judge LeClair was the third judge assigned to Hagelstein's review panel, that he died before participating in the decision of that review panel, and that the review panel which rendered that decision was composed of only two compensation court judges.

Quorum Requirement

[12] Having determined that only two Workers' Compensation Court judges participated in the order of affirmance in Hagelstein's review, the jurisdictional question presented is whether the review panel of the Workers' Compensation Court was properly constituted of only two judges. The Pennsylvania Supreme Court correctly set forth the applicable rule in *Commonwealth v. Petrillo*, 340 Pa. 33, 48, 16 A.2d 50, 58 (1940), as follows:

> "It may be stated as the general rule that the death, disqualification or absence of a judge will not deprive the surviving or remaining judges of authority to hold court and transact the business of the court, and in fact to exercise all functions pertaining to the particular court, *provided, however, that the number of the court is not reduced below that legally required for the transaction of its business.*"

(Emphasis supplied.)

The question of how many Workers' Compensation Court judges are necessary to act as a review panel is addressed by Neb. Rev. Stat. § 48-156 (Reissue 1998), which provides:

> A majority of the judges of the Nebraska Workers' Compensation Court shall constitute a quorum to adopt rules and regulations, as provided in sections 48-163 and 48-164, to transact business, except when the statute or a rule adopted by the compensation court permits one judge thereof to act, *and three judges shall constitute a quorum for the review of any disputed claim for compensation.* The act or decision of a majority of the judges constituting such quorum shall in all such cases be deemed the act or decision of the compensation court.

(Emphasis supplied.)

[13] Our determination rests on the effect of the word "quorum" as used in § 48-156. It is well established that a "quorum" is defined as "the number of persons that are members of a body when assembled who are legally competent to transact the business of such a body." *Davidson v. State*, 248 Ind. 26, 28, 221 N.E.2d 814 (1966), *cert. denied* 387 U.S. 911, 87 S. Ct. 1696, 18 L. Ed. 2d 631 (1967). Accord, *Matter of McGovern (Olson)*, 291 N.Y. 104, 51 N.E.2d 666 (1943); *Snider v. Rinehart*, 18 Colo. 18, 31 P. 716 (1892); *Heiskell vs. Mayor, &c., of Baltimore*, 65 Md. 125, 4 A. 116 (1886); *People v. Dale*, 79 Cal. App. 2d 370, 179 P.2d 870 (1947).

The commonly recognized definition of a quorum is that it is such a number of a body as is competent to transact business in the absence of the other members. *Slush v. Patterson*, 201 Miss. 113, 29 So. 2d 311 (1947). Accord, *Morton v. Talmadge*, 166 Ga. 620, 144 S.E. 111 (1928); *The State ex rel. Cline v. Wilkesville Township*, 20 Ohio St. 288 (1870).

"Quorum" has also been defined as " '[t]he number of members who *must* be present . . . before business may be transacted.' " (Emphasis in original.) *Appeal of Net Realty Holding Trust*, 127 N.H. 276, 278, 497 A.2d 865, 867 (1985) (quoting Black's Law Dictionary 1130 (5th ed. 1979)). Accord, *Photo-Sonics, Inc. v. N. L. R. B.*, 678 F.2d 121 (9th Cir. 1982); *Bray v. Barry*, 91 R.I. 34, 160 A.2d 577 (1960). Compare *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982); *Busboom v. Southeast Nebraska Tech. Community College*, 194 Neb. 448, 232 N.W.2d 24 (1975).

The U.S. Court of Appeals for the Fifth Circuit interpreted a statute similar to § 48-156 in *Tobin v. Ramey*, 206 F.2d 505 (5th Cir. 1953), *cert. denied, Hughes Construction Co. v. Secretary of Labor*, 346 U.S. 925, 74 S. Ct. 310, 98 L. Ed. 418 (1954). In interpreting a federal statute establishing a quorum requirement for the U.S. Court of Appeals, the Fifth Circuit concluded that "[t]he word *quorum* as therein used means such a number of the members of the court as may legally transact judicial business." (Emphasis in original.) 206 F.2d at 507. Accord, *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230 (2d Cir. 1998); *Photo-Sonics, Inc. v. N. L. R. B., supra.*

[14,15] We agree with the foregoing authority. The plain and ordinary meaning of the quorum requirement of § 48-156 is that review of a disputed claim must be conducted by no fewer than three judges of the Workers' Compensation Court. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[16] Consequently, a review panel of the compensation court must be composed of no less than three judges in order to have authority to act under the statutes. As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Miller v. M.F.S. York/Stormor, ante* p. 100, 595 N.W.2d 878 (1999); *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998).

The record in this case shows that Judge LeClair participated in oral argument in this case but died before a decision was rendered. This fact, however, is of no consequence. The "review of any disputed claim for compensation," as stated in § 48-156, must at least include participation, either concurring or dissenting, in the review panel's ultimate decision.

In facing a similar situation relating to a three-judge panel hearing an application to enjoin an order of the Interstate Commerce Commission, the U.S. Supreme Court concluded:

> [W]e cannot say that the failure of the third judge to participate in the determination of a case, where the other two

> are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge. . . .
>
> . . . While all three judges of the specially constituted court heard the oral argument, only two of them participated in the determination of the case. The findings of fact, the conclusions of law and the judgment were all entered without the approval, concurrence or dissent of the third judge. He thus missed the very essence of the judicial function in this case—the actual adjudication of the issues of law and fact. All that we have here is an adjudication by two judges. But under the statute it is not enough that there be an adjudication by two judges. They lack any statutory authority to hear and determine [the case].

Ayrshire Corp. v. United States, 331 U.S. 132, 139, 67 S. Ct. 1168, 91 L. Ed. 1391 (1947). Accord *State v. Fry Roofing Co.*, 263 Or. 300, 502 P.2d 253 (1972). But see *Dickinson State Bank v. Ogden*, 624 S.W.2d 214 (Tex. Civ. App. 1981), *overruled on other grounds* 662 S.W.2d 330 (Tex. 1983). We agree. The very purpose of multijudge panels is to seek the input and opinion of experienced jurists during the critical juncture of an appellate case—the actual adjudication of the issues of law and fact. It does not suffice to have the adjudication of two judges under § 48-156.

JURISDICTION ON APPEAL

We must, therefore, conclude that the review panel was without authority to enter its order of affirmance. Moreover, absent such an order, we are without jurisdiction to consider Hagelstein's appeal. This court held in *Schmidt v. Shoftstall Alfalfa*, 239 Neb. 248, 475 N.W.2d 523 (1991), that direct appeal could not be taken to this court from the order of a single judge of the compensation court, as there were neither provisions in the statutes nor any procedures for such an appeal. While the statute at issue in that case, Neb. Rev. Stat. § 48-185 (Reissue 1988), has since been amended to address review rather than rehearing of disputed cases, see § 48-185 (Reissue 1998), the holding of *Schmidt v. Shoftstall Alfalfa, supra*,

remains valid and applicable in the instant case: The statutes as currently written do not provide for appeal to this court or the Court of Appeals without a properly constituted review by the compensation court.

We note that after our disposition of the case, the compensation court may still review Hagelstein's claim despite the delay occasioned by these unusual circumstances, as Hagelstein seasonably filed his application for review. See *Tatara v. Northern States Beef Co.*, 230 Neb. 230, 430 N.W.2d 547 (1988).

CONCLUSION

Two compensation court judges participating in the review panel decision to affirm the single judge's order were insufficient to satisfy the quorum requirement of § 48-156, and the review panel was without authority to enter an order on review. Without such a review, we are without jurisdiction to consider the instant appeal. For these reasons, Hagelstein's appeal is dismissed, and the cause is remanded for further proceedings consistent with this opinion.

APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY and STEPHAN, JJ., not participating.

NECO, INC., A NEBRASKA CORPORATION, AND NASCO, INC., A NEBRASKA CORPORATION, APPELLANTS, V. LARRY PRICE & ASSOCIATES, INC., A NEBRASKA CORPORATION, AND LARRY PRICE, APPELLEES.

597 N.W.2d 602

Filed July 23, 1999. No. S-98-553.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.

3. **Fraud.** Generally, fraud cannot be based on predictions or expressions of mere possibilities in reference to future events.
4. ____. Fraud may be predicated on the representation that an event, which is in control of the maker, will or will not take place in the future, if the representation as to the future event is known to be false when made or is made in reckless disregard as to its truthfulness or falsity and the other elements of fraud are present.
5. **Limitations of Actions: Fraud.** Pursuant to Neb. Rev. Stat. § 25-207(4) (Reissue 1995), an action for fraud must be brought within 4 years of when the cause of action accrues. Such action does not accrue, however, until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.
6. **Limitations of Actions: Words and Phrases.** As used in reference to a statute of limitations, "discovery" means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
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. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
9. **Fraud: Juries.** The time of the discovery of a fraud is a question of fact and is to be determined, as are other disputed questions of fact, by the jury.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Randall V. Petersen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Timothy R. Engler and Shana Q. Wright-Avery, of Harding, Shultz & Downs, for appellees.

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

HENDRY, C.J.

INTRODUCTION

NECO, Inc., and NASCO, Inc., brought suit for fraudulent and/or negligent misrepresentation against Larry Price & Associates, Inc., and Larry Price, individually (collectively Price). The district court granted Price's motions for summary judgment, finding that the action was barred by the statute of

limitations. NECO and NASCO appealed this decision to the Nebraska Court of Appeals. We removed the case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Viewing the evidence in a light most favorable to NECO and NASCO, we find summary judgment to be inappropriate. We therefore reverse, and remand for further proceedings.

BACKGROUND

This case involves an unsuccessful commercial real estate agreement between Price and Don Nielsen, the president of NECO and NASCO. NECO is a family-owned corporation that provides and monitors fire safety and security systems, while NASCO serves as the administrative arm of NECO. (Hereinafter, we will refer to appellants collectively as Nielsen, since Nielsen controls and acts for NECO and NASCO.) After executing a purchase agreement, Nielsen refused to complete the agreement because the subject property was not located in a building with a complete fire sprinkler system. Nielsen brought a fraud claim against Price, asserting that he had represented to them that the building would have a complete sprinkler system, when in fact he knew he would be installing only a partial system.

In 1985, Price purchased and began renovating the Stuart Building, located on the southeast corner of 13th and P Streets in Lincoln, Nebraska. The building was renamed "University Towers." Price was granted permission from the city of Lincoln to complete the renovation in stages. This renovation involved converting several floors of a 12-story commercial building into residential units, making University Towers a combination of commercial and residential spaces.

On February 22, 1990, Nielsen executed an agreement to purchase units Nos. 130, 901, 902, and 903 in University Towers. The purpose of the purchase was to allow NECO to move its monitoring headquarters for all of its operations to University Towers and additionally, to have NECO provide the monitoring for the fire safety system in University Towers.

In 1986, when the remodeling process began, Price contracted with NIFCO Mechanical Systems, Inc. (NMSI), to

install the building's sprinkler system. A written memorandum was created, based on a meeting between NMSI and the Lincoln Fire Prevention Bureau. The memo is dated April 1, 1986, and was written by either Mark Long or Mike Coon, employees of NMSI. The memo states, "Sprinkler entire building, with these exceptions: 1. University Club dining area, restrooms, public areas. 2. Space above 10th floor if not combustible. 3. Theater seating areas or restrooms. 4. Barrymore's fly gallery if it is above 55' and it is." This document did not surface until the pretrial discovery process.

Nielsen initiated discussions with Price about relocating NECO to University Towers as early as 1987 or 1988. Nielsen testified in his deposition that during this time, he discussed the sprinkler system with Price and Price's architect, Bob Gibb.

Price gave Nielsen some articles published for promotional purposes concerning University Towers. These articles discuss the fire safety sprinkler system as a selling point for the facility. In particular, one article states, "It was not required that we install [fire] sprinklers . . . . However, the best possible fire control is the water sprinkler system, which we chose." Another article states, "Fire service people across the country have found that a totally operable and fully sprinklered facility has never had multiple loss of life."

Also included in the articles was a signed statement by Price stating,

> Our City Code did not require me to install a sprinkler fire system. When I purchased the Stuart Building and started to plan how I would refurbish the structure, the first decision that I made was to do everything possible to make it fire safe. . . . I would have never considered selling apartments without this fire system.

Gibb also wrote a letter to Nielsen stating that "the building has a new sprinkler system." Based on all of this information, Nielsen concluded that Price had voluntarily chosen to sprinkler the entire building. Nielsen asserts that Price's decision to sprinkler the entire building was a key factor in Nielsen's decision to purchase the units. In contrast, Price asserts in his deposition that the two parties never spoke about NECO's sprinkler needs during negotiations.

In 1989, Nielsen submitted information on University Towers to NECO's insurance provider, Underwriters Laboratories, Inc. (UL). Based on the provided information, UL determined that the new location would be satisfactory for NECO's main operations, in part because the building would have a complete sprinkler system.

After the discussions with Price and the positive response from UL, Nielsen entered into the purchase agreement in 1990. The total purchase price was $260,872.33 for units Nos. 130, 901, 902, and 903. Nielsen paid a $20,751.70 downpayment and $5,616.07 in closing costs. Nielsen also paid condominium fees and real estate taxes of $34,338.22. The remainder of the purchase price was set out in the agreement to be paid in three equal payments due in August 1990 and February and August 1991.

In early 1991, Nielsen visited the building to install an entryway security system. He noticed that the sprinkler system was not yet finished but testified that he was not concerned because he knew the sprinkler system was being added on an ongoing basis. As of 1992, and possibly later, NMSI was still installing portions of the sprinkler system at University Towers.

On April 18, 1991, Price sent a letter to Nielsen asking him to make a payment on the promissory note secured by the four units. Price had also sent a similar letter in November 1990. In response to Price's April 18 letter, Nielsen wrote back that he would do what he could to "allow for an earlier occupancy" and that "there would be no problem in moving up the payment schedule." Nielsen testified that their understanding was that "as soon as . . . we get to the point where we can beneficially start some activity about moving into the building, that [sic] we'll get it paid."

As a result of a series of communications with Price about the timetable for NECO's relocation, Nielsen sent Price a letter on November 12, 1991. This letter set out a timetable for the remodeling of units Nos. 901, 902, and 903; a final walk-through inspection by UL; and the actual relocation date of NECO as December 1992. At the bottom of the letter, Nielsen noted his concerns regarding the sprinkler system. The letter stated that there were certain areas of the building that had not yet been sprinklered and that approval for the site from UL was

based on the information that the building would be fully sprinklered. Nielsen describes completing the sprinkler system as "the only point I am now aware of that needs to be addressed prior to the UL pre-construction visit."

According to Nielsen, from November 1991 to the fall of 1992, several conversations took place between Price and Nielsen regarding the building and the need to complete the sprinkler system. Price asserts, however, that he was unaware that the sprinkler system was holding Nielsen back from completing the agreement until a conversation at the University Club that took place sometime between September and December 1992. During this conversation, Price told Nielsen that the building was not going to be fully sprinklered. Nielsen agrees that sometime in the fall of 1992, a conversation took place in which Price made it clear he would not install sprinklers in the entire building.

On October 1, 1992, Nielsen wrote a letter to Price confirming his decision to discontinue the plans to relocate NECO to University Towers. The letter stated, "This will confirm our several recent discussions and the disappointing decision to discontinue plans to relocate NECO central-station operations in University Towers." The letter noted the reason for Nielsen's decision, namely that the "extension of fire sprinkler system coverage to several unsprinklered areas in order to meet our occupancy specification becomes more and more unrealistic with the passage of time and changing circumstances."

At this point, Price and Nielsen attempted to negotiate a settlement. Ultimately, the parties were unable to reach an agreement, and all four units were sold to another purchaser under a deed of trust in 1993. On November 1, 1995, Nielsen instituted this suit, seeking damages for the downpayment, closing costs, condominium fees, real estate taxes, and general damages. The district court granted Price's motion for summary judgment, based on its finding that Nielsen's claim was barred by the applicable statute of limitations. The court found that Nielsen knew or should have known prior to November 1, 1991, that the entire building would not be covered by the sprinkler system. In particular, the court focused on the fact that Nielsen had visited

University Towers in 1990 and 1991 and had observed that the sprinkler system was not installed in certain areas.

ASSIGNMENT OF ERROR

Nielsen assigns as error the district court's order in granting Price's motion for summary judgment for the reason that genuine issues of material fact exist.

STANDARD OF REVIEW

[1] In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999).

[2] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997).

ANALYSIS

[3,4] The primary issue involved in this matter is when Nielsen's cause of action accrued. Before we address this issue, however, we must first determine whether this cause of action is predicated on a promise concerning a future event. Generally, fraud cannot be based on predictions or expressions of mere possibilities in reference to future events. *Pawnee County Bank v. Droge*, 226 Neb. 314, 411 N.W.2d 324 (1987), citing *In re Estate of Hesemann*, 214 Neb. 842, 336 N.W.2d 568 (1983). Nevertheless, fraud may be predicated on the representation that an event, which is in control of the maker, will or will not take place in the future, if the representation as to the future event is known to be false when made or is made in reckless disregard as to its truthfulness or falsity and the other elements of fraud are present. *Pawnee County Bank, supra*; *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). See, also,

Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 390 N.W.2d 487 (1986).

The fraud, as alleged in the first amended petition in this case, is predicated on Price's promise to Nielsen that the entire building known as University Towers would be sprinklered. Such a promise could be found to be within the control of the maker, Price, and as such could fall within the *Pawnee County Bank, supra*, exception.

We now turn to whether Nielsen's claim was barred by the applicable statute of limitations. The district court held that Nielsen's claim accrued more than 4 years prior to instituting this cause of action because Nielsen had sufficient facts prior to November 1, 1991, which should have placed him on notice of the alleged fraud. Specifically, the court found that Nielsen visited the building in early 1991 and saw that the sprinkler system was not installed in the entire building, yet Nielsen waited until November 1, 1995, to bring his claim. Nielsen contends, however, that there are disputed facts as to when he knew or should have known that not all the building was going to be sprinklered.

[5,6] Pursuant to Neb. Rev. Stat. § 25-207(4) (Reissue 1995), an action for fraud must be brought within 4 years of when the cause of action accrues. Such action does not accrue, however, until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 562 N.W.2d 714 (1997). As used in reference to a statute of limitations, "discovery" means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993), citing *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

[7,8] 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. *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591

N.W.2d 578 (1999); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). In reviewing an order granting 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. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999); *Smith v. Paoli Popcorn Co.*, 255 Neb. 910, 587 N.W.2d 660 (1999).

The facts in this case, and the reasonable inferences to be drawn from them, are disputed as to when Nielsen "discovered" facts sufficient to place him on actual notice or inquiry notice of the fraud. The actual process of installing a sprinkler system, and when it typically occurs in a piecemeal renovation project such as this one, is not set out in the record. The record does show, however, that the schedule for completing the sprinkler system was set by Price and NMSI. Nielsen was in no way responsible for the installation or completion of the sprinkler system.

In early 1991, when Nielsen saw that the sprinkler system was incomplete, one possible inference is that he was put on notice that Price was not going to fully sprinkler the building. However, Nielsen had knowledge that the city had given Price special permission to complete the renovation in stages. Considering the evidence in a light most favorable to Nielsen, an equally reasonable inference is that when he visited the building in 1991, Nielsen simply observed what progress had been made in the ongoing piecemeal process of installing the sprinkler system. This is supported by the record, which shows that the installation of the sprinkler system continued into 1992, well after Nielsen visited the building in 1991.

The facts are also disputed as to exactly what conversations Price and Nielsen had regarding the sprinkler system. Price asserts that not until 1992 did Nielsen express any concerns about fully sprinklering the building. However, in a letter to Price dated November 12, 1991, Nielsen refers to the sprinkler system and his concern that the building needs to be fully sprinklered. Further, Nielsen contends that Price always represented to him that the entire building would be sprinklered, and not until the fall of 1992, when renovation was still occurring, did Price inform him that a sprinkler system for the entire building

was not feasible. Price, on the other hand, claims that he never represented at any time that the entire building would be fully sprinklered.

Additionally, Price asserts that Nielsen refused to make the scheduled payments on the promissory note because he had actual knowledge that the building was not fully sprinklered. However, Nielsen's uncontested testimony indicates that the understanding of the agreement between Price and Nielsen was that payment would be made in full when NECO actually moved into University Towers and that the payment schedule was tentative.

[9] Clearly, there are disputed issues regarding when Nielsen discovered the alleged fraud. The time of the discovery of a fraud is a question of fact and is to be determined, as are other disputed questions of fact, by the jury. *Vrbsky v. Arendt*, 119 Neb. 443, 229 N.W. 337 (1930). The determination of when Nielsen knew or should have known that the building would not be fully sprinklered was a disputed question of fact. As such, summary judgment was inappropriate.

CONCLUSION

For the aforementioned reasons, we find that the district court was clearly wrong, for purposes of summary judgment, in determining that this action was barred by the statute of limitations. We therefore reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD WELLS, APPELLANT.
598 N.W.2d 30

Filed July 23, 1999. No. S-98-824.

1. **Rules of Evidence.** In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.

2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Self-Defense.** Justification defenses are premised upon Neb. Rev. Stat. § 28-1406 et seq. (Reissue 1995). Justification, otherwise known as the choice of evils, is an affirmative defense.
4. **Self-Defense: Proof.** Where the justification or choice of evils defense is properly before the finder of fact, the defendant has the initial burden of going forward with evidence of the defense. Such evidence must consist of facts showing that he or she (1) acted to avoid a greater harm; (2) reasonably believed that the particular action was necessary to avoid a specific and immediately imminent harm; and (3) reasonably believed that the selected action was the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.
5. **Criminal Law: Self-Defense: Property.** In property crimes, the defense of justification is available only in limited circumstances.
6. **Sentences: Probation and Parole.** Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
7. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1995) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.
8. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 1995), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.

Appeal from the District Court for Antelope County: RICHARD P. GARDEN, Judge. Affirmed in part, sentence of restitution vacated, and cause remanded with directions.

Richard M. Black for appellant.

Don Stenberg, Attorney General, and Amber Fae Herrick for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard Wells, appellant, was convicted by a jury of three counts of criminal mischief, a Class IV felony, in violation of Neb. Rev. Stat. § 28-519(2) (Reissue 1995). Wells appeals his convictions and sentences. We affirm Wells' convictions, we

affirm the portions of the sentences imposing incarceration, and we vacate the portions of the sentences regarding restitution and remand the cause to the district court with directions.

FACTS

Wells did not testify to the jury at trial. However, before trial and in his testimony, Wells admitted to the salient facts in connection with his offer of proof regarding certain exhibits which were excluded by the trial court. The facts are derived from these sources and from evidence at trial.

Wells is a farmer in Antelope County, Nebraska. According to Wells, in mid-September 1997, a construction site adjoining his farm caused soil erosion to his farm and generated ambient dust and sand, resulting in various damages to his farming operation and livestock. Wells testified that the dust and sand generated by the construction site sickened him and his livestock and clogged the engines on Wells' farm machinery, including center-pivot irrigation systems and a corn dryer.

Work at the construction site was performed principally by the John Prouty Construction Company (Prouty Construction). Wells testified that he repeatedly attempted to speak with the construction site's manager about the dust and erosion problems, but he met with no success. Wells testified that his efforts to work with elected town and county officials to correct the dust and erosion caused by the construction also proved fruitless. Wells testified that as construction proceeded, the problems he experienced on his farm as a result of the construction increased and he felt the options available to him diminished.

Just before midnight on October 17, 1997, Wells, accompanied by Allen Vraspir, a young local man whom Wells employed as a farm laborer, and Matthew Braband, a friend of Vraspir's, went to the construction site. According to Wells, their objective was to damage the construction equipment and temporarily disable it. Wells estimated that he, Vraspir, and Braband were at the construction site for less than 10 minutes. During that time, they flattened the tires of trucks, earthmovers, and bulldozers. They shot out headlights and windows in much of the equipment and damaged the radiators. They shot through the tanks of fuel and chemical trucks on the premises, creating leaks. After Wells,

Vraspir, and Braband damaged the equipment, construction at the site was halted for approximately 2 to 3 weeks while Prouty Construction repaired and replaced the damaged equipment. We make no further comment regarding Vraspir or Braband or legal proceedings involving them, as consideration thereof is unnecessary to our decision.

In an information filed on March 2, 1998, in the district court for Antelope County, Wells was charged with three counts of felony criminal mischief, in violation of § 28-519(2). The charges against Wells were tried to a jury in June 1998.

Prior to trial, the State moved in limine for an order preventing Wells from testifying and offering exhibits which, inter alia, would demonstrate that Wells believed he was justified in damaging the construction equipment in order to prevent allegedly illegal conduct at the construction site. Specifically, Wells wished to show that the generation of ambient dust and dirt exceeded legally acceptable limits. The proferred documents consisted of correspondence between state regulators and the owners of the construction site regarding, inter alia, construction permits, refuse disposal, silt and sediment barriers, drainage patterns, regulatory standards, and compliance therewith. The trial court sustained the State's motion in limine.

In an offer of proof at trial made outside the jury's presence, Wells testified that he believed the dust, sand, and erosion generated by the construction were beyond legal limits and that because his efforts to ameliorate these problems by political and regulatory means were unsuccessful, he was legally justified in using force to compel reduction of the sand, dust, and erosion by disabling the construction equipment. In connection with the offer of proof, Wells described the efforts he had undertaken to force compliance. Wells stated, inter alia, that he and other area farmers had considered hiring an attorney to challenge the construction but concluded it would be costly. The trial court disallowed presentation of the proffered evidence to the jury and similarly refused Wells' proffered jury instruction regarding his proposed justification defense. The jury convicted Wells of all three counts of criminal mischief.

A sentencing hearing was conducted on August 4, 1998. John Prouty, proprietor of Prouty Construction, which owned most of

the equipment damaged by Wells, testified regarding the cost of repair and replacement of the damaged construction equipment. Douglas Derscheid, president and general manager of Central Farmers Cooperative, Nonstock, which owned the fuel truck damaged by Wells, testified about the cost of repair to the truck. Testimony by Prouty and Derscheid is detailed in the sentencing discussion below.

The trial court sentenced Wells to a term of 20 months' to 5 years' imprisonment on count I, and to a term of 20 months' to 5 years' imprisonment on count II, to be served concurrently with the sentence for count I. Wells was also sentenced to 18 months' to 4 years' imprisonment on count III, to be served consecutively to his imprisonment for counts I and II.

As part of the sentences imposed upon Wells, the trial court also ordered Wells to pay restitution to Prouty and its insurer in the amount of $87,173.37 on count I; restitution of $408.10 payable to the insurers of the cooperative on count II; and restitution of $1,285.65 payable to the cooperative and its insurer on count III. The trial court ordered that Wells pay all restitution amounts "forthwith." This appeal followed.

ASSIGNMENTS OF ERROR

Wells has assigned nine errors on appeal. Wells claims, consolidated and restated, that the trial court erred in refusing to allow him to present evidence regarding his proposed justification defense and that the sentences he received are excessive.

STANDARD OF REVIEW

[1] In proceedings where Nebraska statutes involving the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. White*, 256 Neb. 536, 590 N.W.2d

863 (1999); *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999).

ANALYSIS

Exclusion of Evidence.

Wells claims that the trial court erroneously excluded evidence which he offered to support his proposed defense that he was justified in disabling and damaging the construction equipment. We find no merit to this claim.

Wells was charged with three counts of violating § 28-519(2), which provides, inter alia, that criminal mischief is a Class IV felony if an actor intentionally causes pecuniary damage in excess of $300 to another's property. Wells admitted that he vandalized the equipment at the construction site. He maintained that he was justified in damaging the construction equipment to slow or halt the project and that evidence of a failure in regulatory compliance and enforcement at the site was relevant to prove his justification defense. The evidence which Wells contends was wrongly excluded consists of 15 pieces of correspondence and related attachments exchanged between representatives of the Nebraska Department of Environmental Quality and the owners and representatives of the property upon which the construction was taking place.

Wells argued at the hearing on the State's motion in limine that he intended to offer this evidence to prove that state regulators were concerned about the environmental impact of the construction project, that the construction was ongoing without proper regulatory compliance, and that despite the state regulators' concerns, state officials did not take action to halt the construction so as to bring the project into regulatory compliance. Wells testified in connection with the offer of proof at trial about his conversation with a local town official whom Wells believed sympathized with his concerns but who did not act to curb the erosion and pollution that were the source of Wells' complaint.

[3,4] Justification defenses are premised upon Neb. Rev. Stat. § 28-1406 et seq. (Reissue 1995). Justification, otherwise known as the choice of evils, is an affirmative defense. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). Where the justification or choice of evils defense is properly before the finder

of fact, the defendant has the initial burden of going forward with evidence of the defense. *Id.* Such evidence must consist of facts showing that he or she (1) acted to avoid a greater harm; (2) reasonably believed that the particular action was necessary to avoid a specific and immediately imminent harm; and (3) reasonably believed that the selected action was the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur. *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove. *State v. Kinser, supra.* However, where the record shows there is no legally cognizable defense of justification, the issue of justification will not be submitted to the finder of fact. *Id.*

[5] In property crimes, the defense of justification is available only in limited circumstances. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986). Section 28-1415 provides generally that conduct involving appropriation of, seizure of, destruction of or damage to, intrusion on, or interference with property is justifiable under circumstances which would otherwise establish a defense of privilege in a civil action based thereon, such as where an actor uses reasonable force to defend his or her superior right to the property as against an interloper. See, e.g., *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994). See, also, *State v. Korf*, 201 Neb. 64, 266 N.W.2d 86 (1978) (holding that invitation or license may constitute privilege).

The trial court excluded Wells' proffered justification evidence on the basis that it was irrelevant, see Neb. Rev. Stat. § 27-401 (Reissue 1995), or if relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, see Neb. Rev. Stat. § 27-403 (Reissue 1995). In connection with its ruling excluding the evidence, the trial court stated that "in the time that it took the defendant . . . to go to the construction site and to cause the damage that the defendant caused, he could have had drafted a petition for an injunction to be filed," which the court noted "would have resulted, in all likelihood, in the issuance of a temporary restraining order."

We understand the trial court's ruling to be a determination that Wells' offer of proof failed to support a legally cognizable theory of the affirmative defense of justification. *State v. Kinser, supra.* See, also, *State v. Cozzens, supra*; *State v. Clayburn, supra.* We agree with this determination. Accordingly, the trial court correctly ruled that Wells' justification evidence was irrelevant and properly excluded such evidence.

In his offer of proof and motion at trial that the trial court reconsider its ruling excluding the justification evidence, Wells testified that before he vandalized the construction equipment, he had conferred with an attorney about civil means by which the erosion and pollution caused by the construction could be controlled. Wells testified that he and other area farmers considered hiring the attorney to challenge the construction, but they concluded it would be costly, and "I didn't feel like I should have to go fight the battle for everybody in that area, although I'm getting hit the worst."

Wells' testimony regarding his exploration of civil remedies defeats an inference that he reasonably believed that vandalizing the construction equipment was necessary to avoid the harm caused by construction and that vandalism was the least harmful alternative available to him to avoid such harm. See *State v. Cozzens, supra.* Wells' testimony clearly indicates that the erosion and pollution had become an ongoing problem and not an immediately imminent harm about to befall him. See, e.g., *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978) (holding that general fear of future harm which is not specific and imminent is insufficient basis for justification defense).

Following our review of the record, we note there is nothing in the record on appeal which suggests that Wells' conduct was legally justified or that it would be privileged in a civil action. See § 28-1415. Wells testified that he and his farming operation were harmed by soil erosion and pollution generated by the construction which were allegedly unlawfully created due to failures in regulatory compliance and enforcement. Confronted with this situation, Wells had several unexercised lawful civil courses of potential resolution available, including, as the trial court observed, an action seeking as relief a temporary restraining order and injunction, see Neb. Rev. Stat. § 25-1062

et seq. (Reissue 1995), or, inter alia, a mandamus action to compel the proper governing authority to enforce regulatory standards if the authority had a duty to do so, see Neb. Rev. Stat. § 25-2156 et seq. (Reissue 1995).

The trial court correctly determined that Wells did not have a legally cognizable theory of justification as a defense and that Wells' evidence regarding the affirmative defense of justification was inadmissible. We affirm the trial court's ruling excluding this evidence.

Excessive Sentences.

Wells claims generally that the sentences imposed upon him are excessive. In particular, Wells argues that sentences of probation should have been ordered. We see no error in connection with the portions of the sentences imposing periods of incarceration.

[6] As to the sentences of imprisonment which are detailed in the facts above, each sentence is within the statutorily defined minimum and maximum terms for Class IV felonies prescribed by Neb. Rev. Stat. § 28-105 (Reissue 1995), and we find no abuse of discretion in connection with the terms of incarceration imposed on Wells. In so concluding, we are aware, as Wells points out, that at the time of his crime, Wells had lived in Antelope County for many years and had no prior criminal convictions. However, whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990). We find no abuse of discretion in the imposition of sentences of incarceration imposed upon Wells. However, we reach a different result with respect to the trial court's sentencing orders of restitution.

The trial court ordered Wells to pay an aggregate sum of $88,867.12 in restitution, as follows: $87,173.37 on count I for damages sustained by Prouty Construction, to be divided between Prouty and its insurer, which had indemnified Prouty for some of the damage; $408.10 on count II, payable to the insurer for the cooperative for sums paid to the cooperative to repair damage caused by Wells; and $1,285.65 on count III, for

damages sustained by the cooperative to be divided between the cooperative and its insurer for the remaining damage. The trial court ordered Wells to pay all of the restitution "forthwith."

[7] Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1995) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted. *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990). Section 29-2281 provides the following parameters for imposing a sentence of restitution:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. . . . The court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later. Restitution payments shall be made through the clerk of the court ordering restitution. The clerk shall maintain a record of all receipts and disbursements.

[8] Pursuant to § 29-2281, before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying. The amount of actual damages and the amount of restitution a criminal defendant is capable of paying shall be based on sworn information which may be documentary in nature. In the instant case, the trial court determined that restitution was an appropriate part of the sentences imposed upon Wells. There is no challenge to the appropriateness of restitution in this case, if properly imposed.

At Wells' sentencing hearing, the State introduced sworn testimony and documentary evidence from representatives of

Prouty Construction and the cooperative regarding losses each had sustained as a result of Wells' vandalism. The trial court allowed Wells to cross-examine these witnesses and challenge their damage claims, all of which were made part of the evidentiary record consistent with the rule set forth in *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991) (holding that statements regarding victim's damages which are unsworn and uncorroborated are insufficient basis for restitution order). The amount of actual damages was properly established.

The record in this case is void, however, of the trial court's meaningful consideration of Wells' ability to pay the restitution ordered and to pay it "forthwith." By "forthwith," we understand that the order of restitution was to be paid "immediately," as that term is used in § 29-2281. With respect to Wells' ability to pay restitution, we note that § 29-2281 provides, inter alia, that "[t]he court *shall* consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim." (Emphasis supplied.) The trial court's consideration of these factors is mandatory. The absence from the record of sworn and meaningful information regarding Wells' ability to pay and the trial court's resultant inability to meaningfully consider the statutory factors regarding Wells' ability to pay necessitates reversal of the restitution order. See, generally, *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990).

In *Yost*, the defendant was convicted of aiding and abetting the commission of second-degree arson. His sentence included an order of $105,000 restitution. Restitution was imposed without a separate hearing on the amount of the victims' actual damages. The *Yost* presentence investigation report contained general, uncorroborated statements of the victims' damages and little information regarding Yost's ability to satisfy the restitution order. On appeal, this court expressed concern regarding the adequacy of the record regarding actual damages sustained by the victim and reversed the restitution order and remanded the cause, noting, inter alia, that the sentencing court did not meaningfully consider Yost's earning ability, employment status, financial obligations, and family or other legal obligations as mandated by § 29-2281.

In the instant case, the record is well developed regarding the victims' damages, but is insufficiently developed regarding Wells' earning ability and ability to pay "forthwith." To the extent the record contains information regarding Wells' employment status, it suggests that he is a self-employed farmer with title to no less than three quarter sections of land, who provides all of the care for his livestock and most of the labor for his crops. Nothing in the record indicates how Wells' farm, which appears to be his main source of income, will operate or produce income during Wells' incarceration. With respect to Wells' financial obligations, Wells produced uncontroverted evidence that, at the time of sentencing, he was already legally obligated for farm operating loans and related expenses in the amount of at least $470,000. He indicated that he was having difficulty obtaining an additional $220,000 operating loan. The inference from this evidence is that the order of restitution to be paid "forthwith" is not appropriate. The record lacks sworn information or testimony which established the nature of Wells' unencumbered assets which would prove sufficiently liquid to satisfy a court order to pay restitution in the amount of $88,867.12 forthwith.

On appeal, we do not endeavor to reform the trial court's restitution order. Rather, we review the record made in the trial court for compliance with the statutory factors which control restitution orders. *State v. Yost, supra.* The plain language of § 29-2281 and the case law require appropriate sworn documentation in the record of both the actual damages sustained by the victim and the defendant's ability to pay restitution. The statute and case law require that the sentencing court give meaningful consideration to the defendant's earning ability, employment status, financial resources, and family or other legal obligations and that the court meaningfully consider these factors and balance the defendant's financial situation against the defendant's obligation to the victims in imposing an order of restitution as part of a criminal sentence.

We have reviewed the record regarding the order of restitution imposed upon Wells and determine that, due to the state of the record, it does not demonstrate that the trial court meaningfully considered the factors mandated by § 29-2281 with respect

to Wells' ability to pay $88,867.12 in restitution forthwith. We, therefore, vacate the trial court's order regarding restitution and remand this matter to the trial court for such proceedings as are consistent with this opinion and the factors articulated in § 29-2281.

CONCLUSION

Because Wells did not have a legally cognizable defense of justification, the exclusion of evidence regarding Wells' proposed justification defense was not error. We affirm Wells' convictions. The portions of the sentences imposing terms of incarceration are affirmed. The portions of the sentences regarding restitution are vacated, and the cause is remanded for treatment consistent with this opinion.

AFFIRMED IN PART, SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
JAMES E. HITTLE, APPELLANT.
598 N.W.2d 20

Filed July 23, 1999. No. S-98-1074.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Mental Competency: Appeal and Error.** The issue of competency is one of fact, and as reflected by Neb. Rev. Stat. § 29-1823 (Cum. Supp. 1998), the means used to resolve it are discretionary with the court. The fact finder's determination on the issue of competency will not be disturbed unless there is insufficient evidence to support the finding.
3. **Motions to Suppress: Waiver.** A person who is aggrieved by a statement taken from him or her which is claimed to be involuntary may move for suppression of that statement. An objection to such a statement is waived if it is not raised by a motion prior to trial with the exception that a court may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the State.
4. **Criminal Law: Evidence.** Regarding an admission or confession, a defendant may request a hearing on and a determination of voluntariness of a statement, but in the absence of such a request, the defendant cannot complain of the failure of the court to hold such a hearing and make such a determination.

5. **Convictions: Appeal and Error.** A criminal conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Licenses and Permits: Revocation: Prior Convictions: Habitual Criminals: Sentences.** A felony conviction for driving under a suspended license in violation of Neb. Rev. Stat. § 60-6,196(6) (Reissue 1998) may not be used either to trigger application of the habitual criminal statute or as a prior offense for purposes of penalty enhancement pursuant thereto.
7. **Prior Convictions: Habitual Criminals: Sentences.** In order to warrant enhancement of the penalty under the habitual criminal statute, prior convictions, except the first conviction, must be for offenses committed after each preceding conviction.
8. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
9. **Effectiveness of Counsel: Records: Trial: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Richard Register for appellant.

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

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

STEPHAN, J.

Following a jury trial, James E. Hittle was convicted of felony flight to avoid arrest and felony driving under a 15-year license suspension. The district court determined that he was a habitual criminal and sentenced him to terms of 20 to 30 years' imprisonment for each offense, with the sentences to run concurrently. Hittle appeals the convictions and sentences, asserting multiple

assignments of error. We affirm both convictions, but conclude that Hittle was improperly sentenced as a habitual criminal and therefore vacate the sentences imposed and remand the cause to the district court for resentencing.

FACTS AND PROCEDURAL BACKGROUND

On April 15, 1998, Hittle was charged by information with flight to avoid arrest, in violation of Neb. Rev. Stat. § 28-905 (Reissue 1995), and operating a motor vehicle while his license was revoked pursuant to Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993), in violation of § 60-6,196(6), both Class IV felonies. The information charged that the offenses occurred in Dodge County, Nebraska, on or about February 21, 1998. On April 20, an amended information added an additional count, alleging that Hittle was a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995).

A jury trial was held on July 2, 1998. At trial, Bradley J. Hansen, a police officer for the city of Fremont, was asked whether he was so employed and on duty on "December 31st of 1998" and gave an affirmative response. He stated that while patrolling in the area of 23d and Lincoln Streets, he noticed a blue Ford pickup that roughly matched the description of a vehicle involved in a previously reported incident. When Hansen began following the pickup, he observed it enter a turn lane without activating its turn signal and then suddenly turn back into the traffic lane. When Hansen activated his cruiser's emergency lights, the pickup accelerated and a chase ensued for approximately seven blocks. The pickup then turned into a church parking lot and came to a stop in the backyard of a residence adjacent to the church.

From a distance of approximately 50 feet, with his cruiser's headlights illuminating the pickup, Hansen observed a person with long, black hair and wearing a dark-colored baseball cap and maroon sweatshirt jump out of the pickup and run behind the residence. At trial, Hansen identified Hittle as that person. With the assistance of other officers, Hansen found Hittle hiding behind some trash cans at the rear of a residence, and Hittle was apprehended.

Hansen testified that for safety reasons, he checked the interior of the pickup after he observed Hittle exit the vehicle. When he did so, he observed numerous items on the passenger side which would impair the ability of another person to sit on that side. Hansen stated that when the chase began, the driver of the pickup was the only person in the vehicle. Hansen testified without objection that at the time of his apprehension, Hittle stated that he had previously "beat" other charges by stating there was another driver in the vehicle.

On cross-examination, Hansen admitted that Hittle had a substantial beard and mustache on the day of the incident and that he did not mention this in his identification of the occupant of the pickup. Hansen admitted that he did not mention Hittle's comment about previously avoiding charges during his testimony at the preliminary hearing because he was not asked about it, despite the fact that the statement was mentioned in his police report. At the close of the State's case, Hittle's attorney moved to dismiss the flight to avoid arrest count based on insufficiency of the evidence, but made no motion as to the other felony count. The motion was overruled.

Hittle then testified in his own defense. He responded affirmatively when asked whether he was in Fremont "[o]n the evening in question here." According to Hittle, he was a passenger in the pickup which was driven by an individual named "Robert Martin." Hittle testified that when the pickup came to a stop in the church parking lot, Martin "bailed out of the truck" and rolled under it. Hittle then testified that he had to exit the pickup through the door on the driver's side because of a mechanical problem with the door on the passenger side. According to Hittle, in order to exit the pickup, he threw aside a gray box which was in the center of the seat of the pickup, which he claimed accounted for the items Hansen observed on the passenger seat.

Hittle testified that he fled from Hansen because he was frightened. He stated that he has "hypermodal activated anxieties" and that he takes medication for anxiety problems. Hittle denied telling Hansen that he had beat similar charges by saying that somebody else was driving. Rather, Hittle testified that he immediately told Hansen that Martin had been driving the

pickup. Hittle stated that he did not know where to find Martin as of the day of trial and that Martin did not have a permanent residence where he could be served with summons to appear as a witness.

Hittle's father testified that on the night of Hittle's arrest, someone whose name he did not know had driven Hittle from the family's home near Oakland, Nebraska, to Fremont. The father also testified that near midnight, Hittle's friend called and asked to be picked up in Fremont. Hittle's father testified that he went to Fremont and transported the person who had telephoned back to Oakland, but did not obtain his name. Hittle's mother testified that her husband received a call in the middle of the night on the night of Hittle's arrest and that her husband then left the house. She did not see whom he brought back. After resting his case, Hittle moved for dismissal and a directed verdict on the ground that the evidence was insufficient to warrant a conviction. The motion was overruled. The jury found Hittle guilty on both counts charged.

On August 25, 1998, Hittle's trial counsel withdrew at Hittle's request and a new attorney was appointed to represent him. On September 8, a hearing was held on the habitual criminal count. During the hearing, Hittle's new attorney expressed concern that Hittle's mental health and the medications he was taking could affect his ability to understand the proceedings. As a result, the trial court ordered that Hittle be committed to the Lincoln Regional Center for observation to determine his competency for sentencing, and the court continued the hearing on its own motion.

On September 11, 1998, Dr. Scott Moore, a psychiatrist for the Lincoln Regional Center, evaluated Hittle. He testified at the sentencing hearing held on September 22. Moore testified based upon his evaluation, which lasted approximately 90 minutes, that although Hittle was "a bit hypertalkative" and had a demeanor of "mild anxiety," he was not delusional. Moore did not observe any kind of disorganization of Hittle's thoughts or any kind of "slippage of reality testing in his thoughts." Moore also concluded that Hittle's intellectual capacity appeared to be "clinically average." After noting the medications Hittle was taking and their various side effects, Moore concluded that

Hittle was able to comprehend and understand the sentencing procedures. Moore also did not see "any great reason" to recommend a change of medication and wrote in his report, "I do not think that there is a psychiatric reason for delaying sentencing further."

Hittle testified at the hearing that a doctor had previously advised him that he may have a bipolar mood disorder. Hittle also testified that he did not believe he had a "100 percent" grasp of his mental faculties during trial. Hittle testified that he specifically asked his attorney to bring up competency issues prior to sentencing because he felt that his medications were affecting his ability to understand what was going on. When asked what part of the current proceeding he did not understand, he stated: "I don't know. I guess there really isn't a part I don't understand what's going on . . . ."

Based on this evidence and its observations of Hittle, the trial court found that he was competent to be sentenced. As a result, the court proceeded with the hearing regarding the habitual criminal statute. Hittle objected on the basis that although he had previously reviewed the exhibits to be introduced, he did not receive a notice of hearing until the day before and thus did not receive the proper 3-day notice required by § 29-2221(2). The court overruled this objection. At another point in the hearing, Hittle stated that he did not receive a full copy of one of the State's exhibits, requested that he be provided with the 3-day notice required by § 29-2221(2), and renewed his objection. This objection was also overruled.

The State offered two exhibits pertaining to the habitual criminal charge. The first exhibit established that in 1995, he was convicted in a single proceeding filed in the district court for Dodge County on charges of possession of a stolen firearm and possession of a controlled substance, for which he received concurrent sentences of 18-months' imprisonment. The second exhibit showed that in 1996, Hittle was convicted in the district court for Douglas County on a charge of operating a motor vehicle while his operator's license was suspended or revoked pursuant to § 60-6,196 and was sentenced to 1 to 2 years' imprisonment, with 117 days' credit for time served. These exhibits were received over Hittle's objection. The court also received an

exhibit offered by Hittle which reflected the manner in which good time is computed and the actual time served by Hittle on his prior convictions.

The trial court found that Hittle was a habitual criminal and sentenced him to incarceration for a period of not less than 20 nor more than 30 years' imprisonment for each count, with the sentences to run concurrently. Hittle appealed, and we transferred the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Hittle assigns, restated and renumbered, that the district court erred in (1) determining that he was competent to stand trial and to be sentenced, (2) not conducting a separate hearing outside the presence of the jury to determine the admissibility of statements he made to police, (3) overruling his motions to dismiss and for directed verdict based upon insufficiency of the evidence, (4) sentencing him as a habitual criminal without adequate notice and based upon convictions which he contends may not be utilized for enhancement, and (5) imposing excessive sentences. Hittle also assigns that he received ineffective assistance of counsel at trial.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998).

[2] The issue of competency is one of fact, and as reflected by Neb. Rev. Stat. § 29-1823 (Cum. Supp. 1998), the means used to resolve it are discretionary with the court. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). The fact finder's determination on the issue of competency will not be disturbed unless there is insufficient evidence to support the finding. *Id.*

ANALYSIS

COMPETENCY

Hittle contends that the record clearly shows that he was not competent either to stand trial or to be sentenced. We disagree. Section 29-1823(1) provides in part:

> If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems warranted and hold such hearing as he or she deems necessary.

A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense. *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992).

The issue of Hittle's competency was not raised by his counsel until after trial and prior to sentencing. At that time, the trial court properly ordered a competency evaluation which was subsequently conducted by Moore before Hittle was sentenced. Moore's report and his testimony at the competency hearing provide a strong factual basis for the trial court's determination that Hittle was competent to be sentenced and the record as a whole does not reflect that Hittle was incompetent at the time he stood for trial. The issue of competency is one of fact, and as reflected by § 29-1823, the means used to resolve it are discretionary with the court. See *State v. Bradford, supra.* The fact finder's determination on this issue will not be disturbed unless there is insufficient evidence to support the finding. *Id.* Because there was sufficient evidence to support the trial court's finding that Hittle was competent, this assignment of error is without merit.

Admissibility of Hittle's Statement

[3,4] Hittle argues that he was surprised at trial by Hansen's testimony that Hittle stated he had avoided similar charges in the past by saying another person was driving and thus should have have been given a hearing outside the presence of the jury to determine whether this confession was voluntary and admissible. Pursuant to Neb. Rev. Stat. § 29-115 (Cum. Supp. 1998), a

person who is aggrieved by a statement taken from him or her which is claimed to be involuntary may move for suppression of that statement. An objection to such a statement is waived if it is not raised by a motion prior to trial with the exception that a court "may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the state." *Id.* Likewise, we have held that " '[t]he defendant may request a hearing on and a determination of voluntariness, but in the absence of such request, defendant cannot complain of the failure of the court to hold such a hearing and make such determination.' " *State v. Warren*, 227 Neb. 160, 162-63, 416 N.W.2d 249, 251 (1987), quoting *State v. Oliva*, 183 Neb. 620, 163 N.W.2d 112 (1968).

The record reflects that Hittle neither objected to the testimony of Hansen regarding his statement nor requested a hearing regarding its admissibility. Instead, he denied that the statement was made. Having unsuccessfully pursued this course of action at trial, he cannot take the position on appeal that he was entitled to a separate hearing on the issue of whether the statement, which he denies making, was voluntary. This assignment of error is without merit.

Sufficiency of Evidence

Hittle argues that the evidence was insufficient to support his convictions because it reflects that the offenses occurred on December 31, 1998, a date subsequent to his trial. The prosecutor obviously misspoke when, in preliminary questions posed to Hansen, he referred to the date of the events in question as "December 31st, of 1998." However, upon our review of the record as a whole, it is clear that in presenting evidence at trial, both the prosecutor and the defense counsel were referring to events which had occurred on February 21, 1998, the date referred to in the information. A photograph of Hittle in custody, dated February 21, 1998, was received in evidence without objection, and Hansen testified that the photo depicted Hittle as he appeared when he observed him on February 21, with the exception of the shirt he was wearing.

[5] In addition, defense counsel questioned Hittle and his parents regarding events "on the night in question" and the night of

the arrest, which could only refer to the date of the offenses charged in the information. A criminal conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Garza,* 256 Neb. 752, 592 N.W.2d 485 (1999); *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). We conclude that under this standard, the evidence is sufficient to establish that Hittle committed the charged offenses on February 21, 1998, and the trial court did not err in overruling his motions to dismiss and for a directed verdict.

Although Hittle assigns as error the failure of the trial court to grant his motions to dismiss and for a directed verdict, he does not discuss this assignment of error in his brief. Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997). Finding no plain error, we will not address this issue.

Application of Habitual Criminal Statute

Subject to certain exceptions not applicable in the present case, Nebraska's habitual criminal statute, § 29-2221, provides:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

Section 29-2221 further provides:

> (2) When punishment of an accused as an habitual criminal is sought, the facts with reference thereto shall be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony, before sen-

> tence is imposed a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court finds from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state or by the United States, the court shall sentence such person so convicted as an habitual criminal.

Although Hittle challenges his sentencing under the habitual criminal statute on several grounds, his principal argument is that the application of the statute results in a "double enhancement" which is contrary to our holding in *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980). Chapman was convicted of third-offense driving while under the influence of alcoholic liquor (DUI), a felony, and was sentenced as a habitual criminal based upon previous felony convictions for third-offense DUI and malicious destruction of property. Expressing a reluctance "to apply an expansive reading to the Habitual Criminal Act," we held that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute." *Id.* at 370, 287 N.W.2d at 698.

In examining the question whether the most recent felony DUI conviction could trigger the application of the habitual criminal statute, we noted in *Chapman* that the "weight of authority is against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute." *Id.* at 370, 287 N.W.2d at 699. We further recognized the decisions of other courts holding that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable instead of enhancement under a habitual criminal statute, thus avoiding "double penalty enhancement." *Id.* at 371, 287 N.W.2d at 699. We concluded that the specific penalty for third and subsequent offenses as set forth in the DUI statute "exempts offenders such

as Chapman from the operation of the habitual criminal provision." *Id.*

In Nebraska, the felony offense of driving under a suspended license is included in the DUI statute at § 60-6,196(6), which at the time of Hittle's offenses provided:

> Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) [two previous DUI convictions] of this section shall be guilty of a Class IV felony.

In 1998, subsequent to the operative facts of this case, § 60-6,196(6) was amended by the addition of the following sentence: "If such person has had a conviction under this subsection prior to the date of the current conviction under this subsection, such person shall be guilty of a Class III felony." 1998 Neb. Laws, L.B. 309. Under other circumstances, driving under a suspended license is a misdemeanor. See Neb. Rev. Stat. § 60-4,186 (Reissue 1998).

Hittle was twice convicted of driving under a suspended license, in violation of § 60-6,196(6). His second conviction, from which this appeal arises, was utilized as one of the convictions which triggered the application of the habitual criminal statute, while his first conviction was considered as one of the two prior convictions justifying the enhanced penalty specified therein. It is true, as the State argues, that these facts do not fit squarely within our holding in *Chapman* because a violation of § 60-6,196(6) is a felony regardless of whether or not the defendant was previously convicted of the same offense.

[6] However, we regard the holding in *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), as resting upon two general principles: (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute. The felony offense of driving under a suspended license is not included within our general criminal code but exists solely by virtue of a violation of § 60-6,196(6), which is a part of the statutory

scheme designed by the Legislature to criminalize the operation of a motor vehicle while under the influence of alcoholic liquor or drugs. See *State v. Louthan, ante* p. 174, 595 N.W.2d 917 (1999). One can become a felon for driving under a suspended license only by having first committed multiple DUI offenses, at least some of which are misdemeanors, for which the license suspension was imposed. Thus, in a real sense, the penalty for this particular act has been enhanced by virtue of the defendant's prior violations of other provisions within the same statute. Therefore, we hold that a felony conviction for driving under a suspended license in violation of § 60-6,196(6) may not be used either to trigger application of the habitual criminal statute or as a prior offense for purposes of penalty enhancement pursuant thereto.

[7] In order to warrant enhancement of the penalty under the habitual criminal statute, prior convictions, except the first conviction, must be for offenses committed after each preceding conviction. *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983). Hittle's 1995 convictions for possession of a stolen firearm and possession of a controlled substance were based upon an information in which both offenses were alleged to have been committed on the same date and sentence was imposed on each conviction on the same date. Therefore, only one of these convictions may be considered for purposes of the habitual criminal statute. Thus, because of our holding that Hittle's 1995 conviction for felony driving on a suspended license cannot be considered for this purpose, the trial court erred in sentencing him as a habitual criminal and the sentences are hereby vacated, and the cause remanded for resentencing. Accordingly, we do not reach Hittle's assertion that he received inadequate notice under the habitual criminal statute or his separate assignment of error asserting excessive sentences.

Ineffective Assistance of Counsel

Hittle contends that his trial counsel was ineffective because he failed to raise the issue of Hittle's competence to stand trial, failed to request a hearing regarding Hittle's alleged statement to Hansen, failed to make a motion to suppress that statement,

and failed to make a motion to dismiss both counts at the end of the State's evidence.

[8] To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

[9] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied*, 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180. When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

Hittle's contention that his trial counsel's performance was ineffective because he did not raise competency at trial is dependent upon whether the attorney had any factual basis for doing so. This cannot be determined from the record before us, and we therefore do not address this issue on direct appeal.

Hittle's argument regarding his attorney's failure to file a motion to suppress his statement to Hansen and failure to request a hearing on the issue is without merit. As previously stated, Hittle clearly denied making the statement. Thus, any determination of whether the alleged statement was voluntary was unnecessary. Accordingly, Hittle did not receive ineffective assistance of counsel in this regard.

The record indicates that Hittle's trial counsel made a motion for a directed verdict on the count of flight to avoid arrest and chose not to make such a motion on the count regarding driving under a suspended license. The State presented evidence that Hittle was driving the pickup on the night of his arrest and that his license was currently suspended. In view of the evidence, we

cannot say that electing not to move for dismissal of the count regarding driving under a suspended license amounted to deficient performance.

CONCLUSION

Hittle's convictions are affirmed, but because his 1995 conviction for felony driving under a suspended license should not have been considered for purposes of applying the habitual criminal statute, the sentences imposed by the trial court are vacated and the cause remanded for resentencing in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH J. KANARICK, APPELLANT.
598 N.W. 2d 430

Filed July 23, 1999. No. S-98-1082.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Constitutional Law: Statutes: Demurrer.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. This court has repeatedly held that in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer.
3. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.
4. **Motions to Suppress: Evidence: Dismissal and Nonsuit.** A motion to suppress, which merely seeks the exclusion of certain evidence, may not be used as a substitute for a motion to quash, which has as its objective the dismissal of the entire proceedings.
5. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
6. **Constitutional Law: Statutes: Motions to Suppress.** A motion to suppress is not an appropriate procedure by which to bring a facial challenge to the constitutional validity of a statute.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Dawes County, JAMES T. HANSEN, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Joseph J. Kanarick was convicted in the county court for Dawes County of refusal to submit to a preliminary breath test and refusal to submit to a chemical test, and was sentenced accordingly. The district court affirmed the convictions and sentences. Kanarick appeals. On appeal, Kanarick claims that Neb. Rev. Stat. § 60-6,197(10) (Cum. Supp. 1996) is unconstitutional. We conclude that Kanarick waived any and all facial constitutional challenges to the statute, and we affirm the judgment of the district court.

STATEMENT OF FACTS

The county court trial was conducted on a stipulated set of facts, from which we derive the following statement of facts: At approximately 1:45 a.m. on August 28, 1997, a Nebraska State Patrol trooper observed a vehicle driving on Main Street in Chadron, Nebraska. The vehicle "stopped long" at an intersection, blocking the crosswalk. After the light turned green, the vehicle proceeded south and was observed swerving in the roadway. The trooper stopped the vehicle, and the driver identified himself as Kanarick. The trooper smelled alcohol on Kanarick and observed that Kanarick's eyes were red and that he was speaking slowly. Kanarick admitted that he had consumed "six beers or so on the golf course." Kanarick failed three field sobriety tests administered to him by the trooper and when asked for

his date of birth responded, "I have no idea." Kanarick refused to submit to a preliminary breath test. Kanarick was arrested.

After his arrest, the trooper read the postarrest chemical test advisement to Kanarick from form "DMV-01-01/revised 2/96." Pursuant to this form, Kanarick was advised as follows:

> You are under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs. Pursuant to law, I am requiring you to submit to a chemical test or tests of your blood, breath, or urine to determine the concentration of alcohol or drugs in your blood, breath, or urine.
>
> Refusal to submit to such test or tests is a separate crime for which you may be charged.
>
> I have the authority to direct whether the test or tests shall be of your breath, blood or urine, and may direct that more than one test be given.

The trooper directed Kanarick to take a blood test, and Kanarick refused. Thereafter, Kanarick was transported to the Dawes County jail, booked, and released.

A review of the record shows that on September 17, 1997, the State initially filed a three-count complaint against Kanarick. Count I alleged Kanarick was guilty of driving under the influence, see Neb. Rev. Stat. § 60-6,196 (Reissue 1993); count II alleged Kanarick refused to submit to a preliminary breath test, see § 60-6,197(3); and count III alleged Kanarick refused to submit to a chemical test, see § 60-6,197(2). Kanarick entered a plea of not guilty to all counts on December 3. Count I was dropped by the State at trial.

At some point in the county court proceedings, Kanarick evidently made an oral motion to suppress his statements to the trooper and, in the absence of such evidence, a motion to dismiss for lack of evidence. In this regard, we note that the clerk's certificate of May 6, 1998, issued by the county court clerk in connection with the transmission of the record from county court to district court, states that the transcript does not contain Kanarick's motion to suppress and that "[a]fter a diligent search of this case file, the Defendant's Motion to Suppress is not part of the case file. After conferring with David E. Veath [Kanarick's counsel] and Judge James Hansen it appears that

this Motion to Suppress may have been an oral motion." We further note that the record does not contain a motion to quash or a demurrer.

A hearing on Kanarick's motion to suppress in county court was conducted on March 4, 1998, following which the motion was denied. At the hearing, Kanarick's counsel argued, inter alia, that form DMV-01-01/revised 2/96 did not provide Kanarick with adequate notice of the criminal and administrative consequences of refusing to take a chemical test and that § 60-6,197(10) was unconstitutional. Section 60-6,197(10) provides: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." As noted, the motion to suppress was denied.

The case was tried to the county court on April 8, 1998, on stipulated facts. By agreement of the parties, the State amended its complaint against Kanarick, dismissing count I and amending counts II and III by interlineation. At trial, Kanarick reasserted his oral motion to suppress. The motion was again denied, and Kanarick was found guilty of the allegations contained in counts II and III of the amended complaint. Thereafter, Kanarick was sentenced to pay a $100 fine on count II and to 1 year's probation on count III.

Kanarick appealed to the district court. Kanarick's statement of errors cited, inter alia, the county court's denial of his motion to suppress as a basis for appeal. The district court, sitting as an appellate court, conducted a hearing on September 1, 1998, at which Kanarick challenged, inter alia, the constitutionality of § 60-6,197(10). Following the hearing, the district court affirmed the county court's judgment in all respects. This appeal followed.

ASSIGNMENT OF ERROR

On appeal, Kanarick has assigned three errors which can be summarized as one. Kanarick claims that the district court erred in affirming the county court's judgment which denied Kanarick's motion to suppress and concluded that § 60-6,197(10) is not unconstitutional.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law, with respect to which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

ANALYSIS

[2,3] In the proceedings at trial in county court and again on appeal in district court, through the vehicle of his motion to suppress, Kanarick sought both to exclude his statements to the trooper and to have § 60-6,197(10) declared unconstitutional. A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). This court has repeatedly held that in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer. See, e.g., *id.*; *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). See, also, Neb. Rev. Stat. §§ 29-1808, 29-1810, and 29-1812 (Reissue 1995). We have further stated: "All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue." *State v. Roucka*, 253 Neb. at 889, 573 N.W.2d at 421. Indeed, once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *Id.* In the instant case, Kanarick did not file a motion to quash or a demurrer, he entered a plea of not guilty on December 3, 1997, and he did not subsequent thereto seek leave to withdraw his plea.

[4] In this case, Kanarick purported to challenge the constitutionality of § 60-6,197(10) in the context of his motion to suppress. A motion to suppress, which merely seeks the exclusion of certain evidence, may not be used as a substitute for a motion to quash, which has as its objective the dismissal of the entire proceedings.

The distinction between a motion to quash and a motion to suppress is not mere form over substance. The filing of a motion

to quash clearly notifies the State that the defendant's challenge is to the propriety of the entire proceedings. The statutes so provide. Pursuant to § 29-1808, "[a] motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Pursuant to Neb. Rev. Stat. § 29-1807 (Reissue 1995), "[t]he accused may except to an indictment by (1) a motion to quash, (2) a plea in abatement, or (3) a demurrer." Under the cases cited above and the statutes, the failure to properly challenge the proceedings and the entry of a plea result in a waiver of the purported defect. Specifically, we note that under § 29-1812, "[t]he accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

In contrast to a motion to quash, a motion to suppress seeks to exclude certain evidence from being presented at trial. See Neb. Rev. Stat. §§ 29-115 (Cum. Supp. 1998) and 29-822 (Reissue 1995). In this regard, we have observed that it is "beyond question that a motion to suppress is the appropriate remedy to exclude evidence which has been obtained through" a flawed process. *State v. Utterback*, 240 Neb. 981, 985, 485 N.W.2d 760, 766 (1992), *overruled on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Under §§ 29-115 and 29-822, a motion to suppress must be made in writing with certain statutory exceptions not relevant here. See, also, *State v. Donald*, 199 Neb. 70, 256 N.W.2d 107 (1977). The record in this case indicates that the motion to suppress was not made in writing. Most importantly, a motion to suppress does not challenge the validity of the entire proceedings. See, generally, 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.1(b) (1984); *State v. Utterback, supra.*

[5] As noted above, our review is hampered by the absence from the record of any written motions relevant to this appeal. It is incumbent upon an appellant to supply a record which supports his or her appeal. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998). The only indications we have of the matters raised at trial and the relief requested are the oral arguments presented to the county and district courts. To the

extent the record exists, it indicates that Kanarick has waived his constitutional challenge to § 60-6,197(10).

In his brief filed with this court, Kanarick relies on his motion to suppress as the basis upon which he brings his constitutional challenge. Consistent with his position that the constitutionality of § 60-6,197(10) was challenged in the context of his motion to suppress, Kanarick directs us to the following dialog at trial between the county court and counsel for Kanarick regarding Kanarick's purported constitutional objection.

> MR. VEATH [defense counsel]: . . . I wish to object to these proceedings by reason of the Court's overruling the motion to suppress.
>
> . . . .
>
> . . . We are, therefore, objecting to this trial, objecting to this proceeding, and objecting to all facts in evidence, however, for the purpose of — I presume the Court would rule on that again and it has ruled in the motion to suppress, then the matter would be tried on the stipulated facts. I wish to preserve, for the record and for appeal, the issue of insufficient notice with regard to the refusal or taking of the chemical test.
>
> THE COURT: Okay. Well, the objections will be overruled. The stipulated facts will be admitted.
>
> . . . .
>
> . . . Additionally, I assume, Mr. Veath, that you want to object — object to the statement of Mr. Kanarick saying no when he was asked if he would take a blood test?
>
> MR. VEATH: Yes, Your Honor.
>
> THE COURT: For the reason of the motion to suppress?
>
> MR. VEATH: Yes, Your Honor.

[6] From our review of the record, it is apparent that Kanarick raised his constitutional challenge to § 60-6,197(10) as an incident to his motion to suppress rather than as a motion to quash or other approved method for facially challenging the validity of a statute. A motion to suppress is not an appropriate procedure by which to bring a facial challenge to the constitutional validity of a statute, and because Kanarick entered a plea, Kanarick has waived any constitutional objections he may have had to the statute. Accordingly, we do not consider the merits of

Kanarick's constitutional challenge on appeal. See *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996).

CONCLUSION

In this appeal, Kanarick claims that § 60-6,197(10) is invalid on its face. The proper procedure by which to raise a facial constitutional challenge is by either a motion to quash or a demurrer filed initially in the trial court. Kanarick filed neither a motion to quash nor a demurrer and entered a plea. Consequently, he has waived his constitutional objections to the statute. Accordingly, the judgment of the district court, affirming the convictions and the sentences of the county court, is affirmed.

AFFIRMED.

MOBECO INDUSTRIES, INC., APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

BERNARD J. MORELLO, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

598 N.W.2d 445

Filed July 30, 1999. Nos. S-98-112, S-98-113.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **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.
3. **Eminent Domain: Damages.** Neb. Rev. Stat. § 76-710.01 (Reissue 1996) states that condemnation damages shall include all compensable damages suffered by the condemnee including but not limited to reasonable severance damages. By its plain language, § 76-710.01 is not limited to severance damages.
4. **Eminent Domain.** When a public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his or her lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to

be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for a new trial.

Paul Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellant.

David A. Domina and Eric M. Johnson, of Domina Law Office, P.C., for appellees Mobeco Industries and Morello.

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

PER CURIAM.

This appeal arises from a condemnation action instituted by the City of Omaha (City) against seven urban lots. Five of the tracts were owned by appellee Mobeco Industries, Inc., and two were owned by appellee Bernard J. Morello, president and sole shareholder of Mobeco Industries. Aside from the ownership of the property, there is no difference between Mobeco Industries and Morello, and for convenience, they both will be referred to as "Mobeco." We reverse the jury's verdict and remand the cause for a new trial.

BACKGROUND

The City acquired the seven lots by the filing of a condemnation proceeding on January 20, 1995. The underdeveloped subject tracts are located within the Kellom Heights neighborhood, an approximately 39½-acre area bounded by Cumming Street on the south, Hamilton Street on the north, 24th Street on the east, and 27th Street on the west. The Omaha City Council, by a resolution dated November 22, 1977, designated the area as substandard and blighted because of its location, topography, and dated infrastructure. The City recertified the area as substandard and blighted on June 4, 1985, and on June 2, 1992. The record shows that between 1992 and 1995, government-subsidized, multifamily housing was built immediately near the subject properties.

Each party adduced expert testimony as to the value of the subject properties at the time of the taking. Mobeco's expert

opined that the subject property had a value of $363,000, based on $6.41 per square foot. The City's two experts opined that the property had a value of $.25 per square foot, for a total value of $14,080. The trial court granted Mobeco's motion to allow the jury to view the properties. The City objected because the properties had been improved since the date of taking.

At the jury instruction conference, the City requested that the jury be instructed on the third paragraph of NJI2d Civ. 13.02, which states that increases in value of a property due to the public improvement for which it was acquired, or the likelihood that the property would be so acquired, cannot be taken into account in determining the value of the property. This instruction was refused by the trial court.

The jury returned a total valuation of the seven properties of $363,000, or approximately $6.41 per square foot, which was the price testified to by Mobeco's expert. In addition, the trial court awarded Mobeco $40,000 in attorney fees, $2,900 in expert witness fees, and costs. Mobeco cross-appeals that the attorney fees awarded should have reflected the actual attorney fees calculated under a contingency fee agreement.

STANDARD OF REVIEW

[1] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

ASSIGNMENTS OF ERROR

The City assigns that the trial court erred in (1) granting Mobeco's motion for the jury to view the subject property in light of changed conditions since the date of taking, (2) refusing to include the third paragraph of NJI2d Civ. 13.02 in the jury instructions, and (3) refusing to strike Mobeco's expert's opinion on the value of the subject properties for lack of similarity between the subject properties and properties used for comparison purposes.

ANALYSIS

The City argues that the trial court should have given the third paragraph of NJI2d Civ. 13.02 in the jury instructions, which

states that "[i]n determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by the public improvement or by the knowledge that the improvement would be (constructed, altered, et cetera)." NJI2d Civ. 13.02. The City argues that this instruction should have been given because the takings involved land that was part of a public development and the jury was allowed to view the land after some public improvement had taken place. The City also contends that the failure to give this instruction, in light of the jury's having actually viewed the property, was prejudicial.

[2] 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. *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

[3] Mobeco argues that the third paragraph of NJI2d Civ. 13.02 is based on Neb. Rev. Stat. § 76-710.01 (Reissue 1996) and that the statute applies only when severance damages are involved. Mobeco contends that because severance damages are not an issue in this case, the trial court was correct in refusing to include the third paragraph of NJI2d Civ. 13.02 in the jury instructions. We disagree. Section 76-710.01 states that condemnation damages "shall include *all* compensable damages suffered by the condemnee *including but not limited to* reasonable severance damages . . . ." (Emphasis supplied.) By its plain language, § 76-710.01 is not limited to severance damages.

[4] In 4 Julius L. Sackman, Nichols on Eminent Domain § 12B.17[8][b] at 12B-261 (rev. 3d ed. 1999), quoting *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943), it states:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay

their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

The record in this case indicates that the City passed the condemnation ordinance in 1992 and that the Mobeco properties were included within the "Kellom Heights Amendment Two" project from its inception. Thus, Mobeco would not be entitled to be compensated for any increase in the value of the subject properties due to the partial completion of the project prior to the date of taking.

We conclude that the requested instruction was a correct statement of the law and that the evidence warranted the giving of the instruction. The only remaining question is whether the City was prejudiced by the trial court's failure to give the requested instruction. We conclude that the failure to give the requested instruction was prejudicial.

The jury was allowed to view the land after improvements in the blighted area had been completed. Without an instruction to the contrary, the jury could have taken these improvements into account in determining the value of the property. However, as we have previously indicated, the law does not permit compen-

sation for increases in the value of condemned property attributable to partial completion of the public project. Thus, the verdict against the City may have been inflated by the jury's consideration of improvements that it should have been instructed to ignore.

As the City has demonstrated that its requested instruction was a correct statement of the law which was warranted by the evidence and that the failure of the trial court to give the instruction prejudiced the City, the jury's verdict must be reversed, and the cause remanded for a new trial.

CONCLUSION

Because the trial court's refusal to instruct the jury on the requested portion of NJI2d Civ. 13.02 was prejudicial error, we reverse the jury's verdict and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

McCORMACK, J., dissenting.

I respectfully disagree with the holding of the majority stating that the failure of the trial court to include the third paragraph of NJI2d Civ. 13.02 in the jury instructions was, in light of the jury's having actually viewed the property, prejudicial to the City. In this case, the jury had the benefit of hearing expert opinions on behalf of both Mobeco and the City. There were several pictures in evidence that the City's appraiser, Len Buckwalter, agreed accurately depicted the condition of the property in 1992 and 1995 when Buckwalter did his reinspection. I have carefully reviewed the testimony of all three expert witnesses, Ason Okoruwa, Buckwalter, and Dennis Knudson, and none of them speak as to any increases in value due to public improvements. The only reference to a public improvement was by the City's expert, Buckwalter, who testified that between his valuations done in 1992 and 1995, all of the apartments on the east side of 26th Street from the cul-de-sac north were occupied, multiple-family apartments with garages built below them. Yet, Buckwalter still valued this property at $.25 per square foot.

The jury had all of the information it needed to decide which of the appraisers' testimony was the most credible, and it obviously concluded that Mobeco's expert, who testified that the value of the property was $6.41 per square foot, was more cred-

ible than the City's expert, who assessed the fair market value of the property at $.25 per square foot. It should be noted that the City attempted to use 17 parcels of real estate as comparables, but 16 of those were Land Reutilization Commission properties being sold at surplus after their foreclosure.

While the requested portion of NJI2d Civ. 13.02 should have been given, the failure to do so did not constitute prejudicial error requiring a new trial. In order to establish reversible error from the court's failure 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 trial court's failure to give the tendered instruction. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999); *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

I would affirm the judgment of the trial court rendered pursuant to the jury verdict and would also affirm the award of attorney fees in this case.

HENDRY, C.J., and GERRARD, J., join in this dissent.

MICHAEL R. BREEDEN AND CARILYN BREEDEN, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA METHODIST HOSPITAL, A NEBRASKA CORPORATION, ET AL., APPELLEES.

598 N.W.2d 441

Filed July 30, 1999. No. S-98-598.

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. **Jurisdiction: Final Orders: Motions for New Trial: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
3. **Motions for New Trial: Final Orders: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1998), the running of the time for filing an appeal is terminated when a motion for new trial is filed by any party within 10 days after a verdict, report, or decision is rendered.

4. **Courts: Judgments: Time: Appeal and Error.** A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.
5. **Pleadings: Time: Appeal and Error.** Simply labeling a pleading as a motion to reconsider or a motion for rehearing does not toll the time for filing an appeal.
6. **Motions for New Trial: Time: Appeal and Error: Case Overruled.** In order to be treated as a motion for new trial sufficient to terminate the running of the time for filing a notice of appeal, a motion must explicitly state that a new trial is requested and set forth the statutory grounds upon which such request is made. To the extent *St. Joseph Dev. Corp. v. Sequenzia*, 7 Neb. App. 759, 585 N.W.2d 511 (1998), and *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993), hold otherwise, they are overruled.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Appeal dismissed.

Daniel B. Cullan, Denise M. Destache, and Paul W. Madgett, of Cullan & Cullan, for appellants.

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

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

MCCORMACK, J.

NATURE OF CASE

This is a medical malpractice action brought by appellants, Michael R. Breeden and Carilyn Breeden, alleging appellees Nebraska Methodist Hospital; Gregory L. Eakins, M.D.; Wesley K. Hubka, M.D.; and Janet Lemonds, a certified registered nurse anesthetist, provided negligent medical treatment when Michael underwent gallbladder surgery. Pursuant to a motion for summary judgment, the trial court dismissed Methodist Hospital with prejudice as a party defendant on April 10, 1998. The Breedens filed a motion to reconsider on April 20, which was overruled. The Breedens subsequently filed a notice of appeal on June 12, which was summarily dismissed by the Nebraska Court of Appeals as being untimely filed. The Breedens filed a motion for rehearing with the Court of Appeals which was granted, and we removed the matter to our docket pursuant to

our authority to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

On August 16, 1994, Michael underwent gallbladder surgery at Methodist Hospital. Michael and his wife, Carilyn, are now seeking compensation for damages related to an injury suffered by Michael during the surgery. This medical malpractice case was brought against those health care providers who were responsible for Michael's care during his surgery and recovery, specifically, Eakins, the surgeon; Hubka, the anesthesiologist; Lemonds, the nurse anesthetist; and Methodist Hospital as the employer of these individuals.

In their first amended petition, the Breedens allege negligence on the part of Methodist Hospital based on two theories. First, the Breedens allege that the negligence of Methodist Hospital's agents, servants, and employees is imputed to Methodist Hospital under the theory of vicarious liability. Second, the Breedens allege negligence on the part of Methodist Hospital, Eakins, Hubka, and Lemonds based on the theory of res ipsa loquitur. Under this theory, the Breedens allege that while under the exclusive control of Methodist Hospital, Eakins, Hubka, and Lemonds, Michael suffered brain damage which, in the normal course of events, would not have happened in the absence of negligence.

Methodist Hospital motioned for summary judgment, which the trial court granted on April 10, 1998. The trial court found that Eakins, Hubka, and Lemonds were not employees of Methodist Hospital; there could be no imputed liability, and therefore, there was no genuine issue of material fact regarding Methodist Hospital. It was ordered that Methodist Hospital be dismissed with prejudice as a party defendant. The Breedens filed a motion to reconsider with the trial court on April 20, contending that the Breedens submitted sufficient evidence to show the existence of questions of fact regarding the negligence of Methodist Hospital's agents and employees. The motion was overruled.

On June 12, 1998, the Breedens filed a notice of appeal. On August 12, the Court of Appeals entered an order summarily

dismissing the Breedens' appeal. The basis for the dismissal was that the appeal had been filed out of time because the Breedens' motion to reconsider did not toll the time for filing an appeal. The Breedens subsequently filed a motion for rehearing with the Court of Appeals, asking the Court of Appeals to "grant a rehearing on the court's decision," which decision was a summary dismissal of the Breedens' appeal on the grounds that the Breedens' motion to reconsider filed in the district court did not act as a motion for new trial and did not toll the time for filing an appeal.

STANDARD OF REVIEW

[1] 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. *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998).

ASSIGNMENT OF ERROR

The Breedens assign that the Court of Appeals erred when it found that their appeal was filed out of time because their motion to reconsider did not toll the time for filing an appeal.

ANALYSIS

[2,3] In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998). Under Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1998), the running of the time for filing an appeal is terminated when a motion for new trial is filed by any party within 10 days after a verdict, report, or decision is rendered. This case presents us with the issue of whether a motion to reconsider should be treated as a motion for new trial and have the same tolling effect on the time for filing an appeal as a motion for new trial.

[4] We previously addressed whether a motion to reconsider should be treated as a motion for new trial in *Bechtold v. Gomez, supra*. In *Bechtold*, the county court issued its order on May 6, 1996. On May 16, Gomez filed a pleading in the county court entitled "Motion to Reconsider & Motion for Hearing." The pleading moved the county court " 'to reconsider its Opinion

and Order of May 6, 1996 . . . .' " *Id.* at 285, 576 N.W.2d at 188. Gomez did not file a notice of appeal from the May 6 order, but waited to file his appeal until after the trial court's June 11 order on the motion to reconsider. The appeal was filed on July 8, more than 30 days after the entry of the final order on May 6. Therefore, the court considered whether it had jurisdiction to consider the appeal and, in doing so, addressed whether the motion to reconsider constituted a motion for new trial. The court declined to treat the motion to reconsider as a motion for new trial, concluding, "[a] motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment." *Id.* at 288, 576 N.W.2d at 189-90. The court concluded that it did not have jurisdiction to consider the appeal.

However, in *Bechtold*, the court discussed *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993), in which case the Court of Appeals concluded that the contents of certain motions labeled "Motion for Reconsideration" indicated that they were, in fact, motions for new trial because they were based on an allegation that the decision of the court was not sustained by sufficient evidence and was contrary to law. The allegation that the decision of the court was not sustained by sufficient evidence or was contrary to law is one of the reasons a new trial will be granted under Neb. Rev. Stat. § 25-1142 (Reissue 1995). The Court of Appeals in *Horace Mann Cos.* treated the motions for reconsideration as motions for new trial. Although this court discussed *Horace Mann Cos.* in the *Bechtold* opinion, it did not expressly overrule it. Subsequent to the *Bechtold* opinion, the Court of Appeals was again faced with the issue of whether to treat a motion to reconsider as a motion for new trial in *St. Joseph Dev. Corp. v. Sequenzia*, 7 Neb. App. 759, 585 N.W.2d 511 (1998). The motion to reconsider in *St. Joseph Dev. Corp.*, like in *Horace Mann Cos.*, was based on an allegation that the decision of the court was not sustained by sufficient evidence and was contrary to law. In *St. Joseph Dev. Corp.*, the Court of Appeals recognized the *Bechtold* holding but also noted that *Horace Mann Cos.* was not expressly overruled by *Bechtold v.*

Gomez, 254 Neb. 282, 576 N.W.2d 185 (1998). Therefore, the Court of Appeals reasoned:

> Perhaps the *Bechtold* court intended to announce a concrete rule that a postjudgment pleading entitled "Motion for Reconsideration" never acquires the status or office of a motion for new trial so as to toll the running of the 30 days to perfect an appeal to a higher court. However, we are frankly uncertain if that was the intent. But, because *Bechtold* does not overrule *Horace Mann Cos.*, we do not extend the holding of *Bechtold* to a holding that jurisdiction was not perfected in the instant case.

St. Joseph Dev. Corp. v. Sequenzia, 7 Neb. App. at 764, 585 N.W.2d at 514-15.

[5] Simply labeling a pleading as a motion to reconsider or a motion for rehearing does not toll the time for filing an appeal. The only pleading which tolls the time for the filing of an appeal is a motion for new trial as set out in § 25-1142, and the motion must state the statutory grounds found in this section. Mislabeling the pleading has caused confusion, and it should not be an appellate court's duty to try to decipher from ambiguous pleadings what it is the pleader is claiming and what the relief is that is requested.

[6] In an effort to end this confusion, we hold prospectively that from October 1, 1999, forward, if the pleading does not state explicitly that a new trial is requested and does not set forth the statutory grounds for a new trial as provided in § 25-1142, the pleading will not be treated as a motion for new trial and will not toll the time for filing an appeal. This holding will overrule *Horace Mann Cos. v. Pinaire*, 1 Neb. App. 907, 511 N.W.2d 540 (1993), and *St. Joseph Dev. Corp. v. Sequenzia, supra*, to the extent they hold otherwise.

In the instant case, the Breedens' motion for reconsideration filed in the district court stated, "In support of their motion, Plaintiffs state that they submitted sufficient evidence to show the existence of questions of fact regarding the negligence of Methodist Hospital agents and employees. . . . Plaintiffs respectfully request the court to reconsider its previous decision and overrule Defendant Nebraska Methodist Hospital's Motion for Summary Judgment." The Breedens have not, in their motion for

reconsideration filed in the district court, alleged any of the statutory grounds for a motion for new trial as set out in § 25-1142, and in their prayer they have not requested a new trial.

CONCLUSION

The Breedens' motion for reconsideration filed in the district court is not a motion for new trial and does not toll the time for appeal as set forth in § 25-1912(2). Therefore, the summary dismissal of this case by the Court of Appeals was correct.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT WARD, APPELLANT.
597 N.W.2d 614

Filed July 30, 1999. No. S-98-630.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Final Orders: Speedy Trial: Appeal and Error.** A ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.
4. **Final Orders: Speedy Trial: Notice: Appeal and Error.** Where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.
5. **Jurisdiction: Speedy Trial: Time: Appeal and Error.** Where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.

6. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
7. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis.
8. ___:___. The balancing test for a claimed violation of the constitutional right to a speedy trial involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Kristi J. Egger Brown for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

GERRARD, J.

NATURE OF CASE

Robert Ward was convicted by the district court, pursuant to a jury verdict, of sexual assault of a child in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1996). Ward appeals, claiming that he was denied his right to a speedy trial under the Nebraska speedy trial statutes, Neb. Rev. Stat. §§ 29-1207 through 29-1209 (Reissue 1995); Neb. Const. art. I, § 11; and the 6th and 14th Amendments to the U.S. Constitution. For the reasons stated herein, we affirm the judgment of the district court.

FACTUAL BACKGROUND

On April 28, 1997, an information was filed in the district court charging Ward with a violation of § 28-320.01. On April 30, Ward filed, through counsel, motions for discovery and to allow the taking of depositions. The motions were sustained on May 19, and 30 days were allowed for the taking of depositions.

On August 26, the case was set for trial to the September 8 jury term.

The matter came on for docket call on October 16, 1997. The prosecuting attorney averred that the State was ready for trial. The trial was set for October 27.

On October 30, 1997, Ward filed a motion to discharge the charge against him because he had not been tried within 6 months of the filing of the information. The record on appeal does not reflect why the trial did not begin on October 27 as originally scheduled. The State argued, in response, that the trial court should exclude, for speedy trial purposes, the time between the filing of Ward's motion to take depositions and the end of the 30-day period allowed for that purpose.

The prosecutor also expressed his concern:

> I know what is going to happen is, you are going to overrule the motion for discharge and then [the defense] will file a notice of appeal and I'll have to call up an eleven year old boy and tell him, sorry, after you have been ready for this all week, thinking about it and worrying about it.

After some discussion of the motion to discharge, the following colloquy took place:

> [PROSECUTOR]: . . . I, believe it or not, thought of something while this was going on and I guess my request at this time would be for the court to take Mr. Ward's motion to discharge under advisement and allow the trial to begin tomorrow.
>
> THE COURT: And you think I can do that?
>
> [PROSECUTOR]: I don't know why not. I think there is plenty of time to appeal that. That is how it has always been appealed, is following a conviction. Up to this point, and until you have ruled on his motion to discharge, he can't appeal it.

Defense counsel objected that Ward had a right to appeal the denial of his speedy trial motion before trial. Defense counsel stated:

> It is not, I believe, a question as to whether or not the court should take under advisement a claim to which the defendant has a constitutional right to raise. He has a statutory and constitutional right to speedy trial. If the trial is not

> brought within that six month time period, then the defendant is entitled to a mandatory discharge without any trial, without the burden on the defendant of having to sit through the trial and having to do that.

Ultimately, the court determined:

> I am going to take the motion under advisement and we will begin this trial at 10 o'clock. I do that for a number of reasons, not necessarily in any order of importance. . . .
>
> . . . [B]y taking the matter under advisement, Mr. Ward's rights are completely reserved and it seems to be it's the right thing to do under these circumstances. While it is true that the result of that decision means that Mr. Ward will have a trial, that were I to determine later or appellate court trial [sic] determine he ought not to have, that is the only hardship and in balancing all of the factors, I need to consider not only the State's right to a fair trial to have witnesses whose memories are not impeded by the further passage of time, particularly because it is my understanding that there is a child victim in this case that has got to be under some stress and this court's own desire to efficiently and effectively run the system, so to speak. It preserves all of that and that is why I have decided it's the right thing to do. So, the matter will remain under advisement and I will see you back here at 10 o'clock.

Prior to trial, Ward filed a notice of appeal from the "denial" of his speedy trial motion. Defense counsel stated:

> I would advise the court that the reason for filing this notice of appeal is based on the court's decision to take the matter under advisement of the motion to discharge for speedy trial grounds and the court taking that matter under advisement, basically, constitutes a denial of the defendant's motion to discharge on speedy trial grounds. . . .
>
> . . . .
>
> The same effect or the same result is present now when the court is basically not ruling on the motion, that the court is taking the matter under advisement and basically forcing the defendant to have a trial before that issue is

resolved is in effect denying the defendant the right to have his motion ruled upon before trial.

Ward's appeal was dismissed by the Nebraska Court of Appeals for lack of a final, appealable order. *State v. Ward*, 6 Neb. App. xliv (case No. A-97-1146, Jan. 26, 1998). This court denied Ward's petition for further review. *State v. Ward*, 254 Neb. xxviii (case No. A-97-1146, March 18, 1998). The mandate of the Court of Appeals was issued on March 24, 1998, and was received by the district court on March 27. The record does not reflect when the district court first spread the mandate on the record or otherwise acted on the mandate.

Trial commenced in the district court on April 13, 1998. Ward's motion to discharge was renewed and again taken under advisement. Ultimately, the jury found Ward guilty as charged, and he was sentenced to a term of incarceration of not less than 2 nor more than 4 years, with credit for time served. Prior to sentencing, the trial court finally denied Ward's motion to discharge on speedy trial grounds.

ASSIGNMENTS OF ERROR

Ward assigns that the district court erred in (1) taking under advisement the motion to discharge until the trial was over, (2) overruling his motion to discharge, and (3) finding that the State produced sufficient evidence of his guilt.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999); *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Larsen*, 255 Neb. 532, 586

N.W.2d 641 (1998); *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998).

ANALYSIS

TRIAL COURT'S REFUSAL TO RULE ON SPEEDY TRIAL MOTION

We first analyze the question whether the trial court erred in refusing to promptly rule on Ward's motion to discharge, instead taking that motion under advisement until the trial was complete. Ward's motion to discharge was filed pursuant to § 29-1208, which affords a mechanism for enforcement of the statutory right to a speedy trial conferred by § 29-1207. See *State v. Kinser, supra.*

[3] We held in *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), that a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable. Our decision in *State v. Gibbs* was handed down 6 days prior to the filing of Ward's motion for discharge in the present case.

The basis for our holding in *State v. Gibbs*, 253 Neb. at 245, 570 N.W.2d at 330, was our determination that "the rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." See, also, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

We clearly held in *State v. Gibbs, supra*, and *State v. Jacques, supra*, that an accused has the right to appeal, prior to trial, the denial of an accused's motion for discharge based on a nonfrivolous speedy trial claim. The colloquies contained in the record, as noted above, just as clearly indicate that the intent of the State and the trial court in this case was to compel Ward to proceed to trial without being able to exercise his right to appeal. The question thus presented is whether the trial court acted appropriately in attempting to circumvent this court's holdings in *State v. Gibbs* and *State v. Jacques*. The answer is

no—the trial court erred in taking Ward's motion to discharge "under advisement" until after the trial was complete.

Where a defendant has the right to appeal the denial of a motion to discharge on speedy trial grounds prior to the commencement of trial, see *id.*, a necessary concomitant to that right is the right to an appropriate pretrial disposition of the motion. A refusal by the trial court to rule on the motion constitutes an effective denial of the motion, as the rights of the defendant are "significantly undermined" where appellate review of the motion is postponed. See *id.*

The question remains of how this court is to regard an action by the trial court that constitutes an effective, if not literal, denial of a pending motion. The Supreme Court of Alaska confronted a similar issue in *Broeckel v. State, Dept. of Corrections*, 941 P.2d 893 (Alaska 1997). In that case, a prisoner suing the Alaska Department of Corrections (DOC) filed motions to amend his complaint and to add his wife as a plaintiff. The trial court did not rule on the motions, but instead granted the motion of DOC to dismiss the complaint. *Id.* On appeal, the plaintiff appealed the denial of the motions, but the state argued that the appellate court should not consider the motions as they were not ruled on by the trial court. *Id.* The Supreme Court of Alaska determined:

> "Ordinarily, an appellate court does not pass on questions raised but not ruled on in the court below. . . ." 4 C.J.S. *Appeal & Error* § 220, at 299 (1993). However, "[a] ruling by implication may be sufficient to present a question for review, and . . . silence or a failure or refusal to rule may often be given the effect of a ruling, unless the matter was never brought to the attention of the court." *Id.* at 300.
>
> In this case, [plaintiff's] motions were brought to the attention of the court by [plaintiff's] written motions and supporting memoranda and DOC's written response. By granting DOC's motion to dismiss, the superior court effectively denied [plaintiff's] motions. We therefore review the superior court's implied denial for error.

Broeckel v. State, Dept. of Corrections, 941 P.2d at 899.

Similarly, in the present case, Ward made his motion for a speedy trial and asked the trial court for a prompt ruling on the

matter. Ward objected to the prosecutor's suggestion that the matter be taken under advisement and specifically asserted his right to pretrial disposition of his motion. When the court instead took the motion under advisement, Ward again objected and asserted his right to pretrial disposition, and then took an appeal assigning as error the trial court's failure to dispose of his pending motion. When the appeal was dismissed, Ward renewed his motion prior to the commencement of trial and again demanded a ruling. Finally, the motion was ruled upon when Ward, after trial, again renewed his motion and insisted upon a ruling. In short, Ward renewed his motion and asserted his right to a ruling at every opportunity available to him. It cannot be said that Ward failed to bring his motion to the attention of the court, nor can it be said that Ward failed to insist upon a ruling.

Instead, Ward insisted upon a ruling, but the trial court refused to rule on the motion until after the cause was determined on the merits. The trial court acted inconsistently with Ward's right to pretrial disposition of his pending motion to discharge by ordering the commencement of trial, and when it did so, Ward's motion was effectively denied.

[4] Based on the foregoing analysis, we hold, prospectively, that where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal. See *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

This does not end our analysis, however. Based on the prospective nature of our holding, any prejudice to Ward resulting from the delay in ruling on his motion to discharge is necessarily dependent upon the merits of the underlying motion. If Ward was not, in fact, entitled to discharge of the charge against him, then he has not been prejudiced by the delay in ruling to the extent that reversal of the conviction is required in the instant case. If Ward was indeed denied his right to a speedy trial, then he would, in any event, be entitled to a vacation of his conviction and discharge of the charges against him. In other words, in order to prove that he is entitled to relief on his first assignment

of error, Ward must prove that he was entitled to discharge of the charge against him.

Consequently, any relief to which Ward might be entitled regarding his first assignment of error is necessarily subsumed in the relief afforded by his second assignment of error. Although Ward's first assignment of error has merit, it does not, standing alone, require reversal. For that, we must turn to the merits of Ward's speedy trial claims.

Statutory Speedy Trial Claim

The information against Ward was filed on April 28, 1997. Excluding the day the information was filed, see *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981), the last day on which Ward could have been tried within the statutory 6-month period was October 28, unless any period between the filing of the information and commencement of trial must be excluded, see *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998). Therefore, assuming the trial court had timely ruled on Ward's motion to discharge on or about October 30, we analyze whether the State proved by a preponderance of the evidence the existence of a period of time that is excluded under § 29-1207. That section provides, in relevant part:

> (3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant . . . .

§ 29-1207.

The State argues that our speedy trial calculation should exclude the time between the filing of Ward's pretrial motions and the completion of the 30-day period allotted for the taking of depositions, as "the time from filing until final disposition of pretrial motions of the defendant." See § 29-1207(4)(a). We

have held, however, that a pretrial motion of the defendant is "'finally disposed'" on the date that it is granted. *State v. Murphy*, 255 Neb. at 802, 587 N.W.2d at 388, citing *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). The excludable period attributable to the defendant's pretrial motions is calculated from the date the motions were filed until the date the motions were granted. See *State v. Brown, supra*. From April 30 to May 19, 1997, is a period of 20 days. Considering the 20 days of excludable time, Ward's motion to discharge on speedy trial grounds would not have had merit on October 30.

Ward's trial was further delayed, however, by his interlocutory appeal. Although the appeal was ultimately dismissed, it certainly constitutes a "period of delay resulting from other proceedings concerning the defendant," within the meaning of § 29-1207(4)(a).

It is clear that the period to be excluded due to Ward's appeal commenced on and includes October 31, 1997—the date on which he filed his notice of appeal. The date on which this period is to end presents a more difficult question. We have held, with reference to § 29-1207(3), that the 6-month period in which the State is to retry a defendant following a successful appeal is fixed by reference to the date on which the district court first takes action pursuant to the mandate of the appellate court. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). Our rationale for that holding was that the date of the district court's first action on the mandate was the date on which the district court had reacquired jurisdiction over the case from the appellate courts. *Id.* See, also, *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255 (1998).

[5] This rationale also dictates that where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.

The record in this case does not indicate the date on which the district court first reacquired jurisdiction over the cause. The only evidence contained in the record is a copy of the mandate of the Court of Appeals, file stamped by the clerk of the district court on March 27, 1998. This may or may not be the same date

on which the district court first took action on the mandate. For purposes of our present analysis, giving the benefit to Ward, we assume that the mandate was acted upon on March 27, as soon as it was received. The resulting period of excluded time, from October 31, 1997, to March 27, 1998, is 148 days.

Combined, Ward's pretrial motions and appeal result in an excluded period of 168 days. Counting forward from October 28, 1997, this means that the State was obliged to bring Ward to trial on or before April 14, 1998. Ward's trial began on April 13—within the 6-month period, absent excluded periods, required by the statute. Consequently, Ward's statutory speedy trial claim is without merit.

Constitutional Speedy Trial Claim

[6-8] The constitutional right to a speedy trial is found in U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. *State v. Turner, supra*. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *State v. Kula, supra*; *State v. Turner, supra*. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Turner, supra*. See, also, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

In the present case, Ward's trial commenced 350 days after the filing of the information against him. Of that time, however, 168 days are attributable to Ward, as calculated above. This means that the State took 182 days to bring Ward to trial. We have already determined that the length of this delay was insufficient to warrant discharge in the context of § 29-1207, and while the constitutional and statutory speedy trial rights exist

independently of one another, *State v. Kula, supra*, the statute provides a useful standard for assessing whether the length of delay before trial is unreasonable under the Constitution.

With regard to the reason for the delay, Ward has not alleged that the State intentionally sought to delay his trial. In fact, while the State may have intended to impinge on Ward's appellate rights with the suggestion that Ward's motion to discharge be held under advisement, it is evident from the record that the primary motive of the prosecutor was to *avoid* delay in bringing Ward to trial. While we do not approve of the State's tactics, this record indicates that the State did not pursue intentional delay.

Ward has not alleged that he was prejudiced by the delay before his trial. The intervening delay does not appear to have deprived Ward of the benefit of any evidence or the testimony of any defense witnesses, nor does it appear to have interfered in any other way with Ward's ability to present his defense.

The sole argument raised by Ward with reference to his constitutional claim is that the time taken on the interlocutory appeal in this case should somehow be counted against the State, because of the impropriety of the prosecutor's request that the trial court take Ward's motion to discharge under advisement.

This argument is not persuasive. The record suggests that Ward intended to appeal from the denial of his motion to discharge. Instead, Ward appealed from the taking under advisement of his motion to discharge. Had Ward appealed from a proper denial, the appellate process would still have resulted in a delay before Ward's trial. In fact, that delay would likely have been longer, as the appeal would have proceeded through briefing and argument before final disposition, instead of being summarily dismissed. Moreover, given the 20 days of excludable time attributable to Ward's discovery motions, the Court of Appeals would properly have concluded that Ward's appeal lacked merit, and the district court's determination would have been affirmed. Consequently, it is difficult to discern how Ward's position would have been altered for the better had his motion for speedy trial been appropriately ruled on before trial.

Ward's constitutional speedy trial rights were not violated in the instant case by the overall delay before his trial or by the

delay occasioned by his interlocutory appeal. Ward's constitutional speedy trial claim is without merit.

SUFFICIENCY OF EVIDENCE

Finally, Ward claims that the evidence, viewed and construed in the light most favorable to the State, is insufficient to support his conviction. See, *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998). We find this claim to be without merit.

According to the testimony of the male child victim, T.P., Ward often drank with T.P.'s mother, and Ward sometimes spent the night at T.P.'s house and slept with T.P.'s mother. One Sunday night, T.P., then 10 years old, was sitting on the living room couch watching television while his mother was passed out in the back bedroom from drinking alcoholic beverages. Ward came out of the bathroom and into the living room with his pants unzipped. Then, Ward came over to the couch and pulled down his underwear so that his penis was exposed. Ward took T.P.'s hand and placed it on Ward's erect penis.

T.P. further testified that after T.P. objected and backed away, Ward approached and pulled down T.P.'s pants. Ward touched T.P.'s penis and asked T.P. if it felt good. T.P. told Ward, "No." T.P. then told Ward to stop, and T.P. pulled up his own pants. Ward threatened to kill T.P. if T.P. told anyone about what had happened. Ward then returned to the bedroom.

T.P. testified that a short time after Ward left him alone, a friend of his mother's called on the telephone. T.P. said that he told the friend what had occurred and asked the friend to tell his mother. T.P. then went next door and borrowed a portable television from his neighbor, sat in his garage and watched television until he could hear Ward snoring, and then went to bed.

The mother's friend testified that she told T.P.'s mother about T.P.'s report on a Monday, after T.P. went to school. The mother testified that she confronted T.P. about the incident. T.P. reiterated his claim to his mother, but she did not call the police. The mother confirmed, however, that Ward had been at the house on the night in question and that she had been passed out in the bedroom, as T.P. had said. The police became involved after T.P. repeated his accusation to a counselor at his school.

Ward presented himself and one other witness in his defense. Ward testified and generally denied T.P.'s claims. The other defense witness was a 16-year-old girl, A.G., who was acquainted with T.P. through Ward, as Ward worked with A.G.'s father. A.G. testified that some time after the alleged incident, T.P. told her that he had "lied to a counselor at school to get [Ward] out of the house." The substance of T.P.'s alleged falsehood was the accusation of sexual contact.

The sum and substance of Ward's appellate claim is that the testimony of T.P. was not credible. Ward notes certain inconsistencies in T.P.'s testimony, but relies primarily on the testimony of A.G. In reviewing a criminal conviction, however, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, as such matters are for the finder of fact. See, *State v. Larsen, supra*; *State v. Hill, supra.*

Having reviewed the record, we find any inconsistencies in T.P.'s testimony to be insignificant. With reference to A.G.'s testimony, the jurors evidently rejected her testimony and accepted that of T.P., and it was within their province to do so. We determine that the record, taken as a whole, is sufficient to support Ward's conviction. Therefore, his final assignment of error is without merit.

CONCLUSION

While the trial court erred in taking Ward's motion to discharge under advisement until his trial was complete, this error, standing alone, does not warrant reversal of Ward's conviction. Ward's remaining assignments of error are without merit. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. FRANK J. RAMAEKERS III, APPELLANT.

597 N.W.2d 608

Filed July 30, 1999. No. S-98-1030.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision below.
2. **Constitutional Law: Search and Seizure.** To determine whether a person has an interest protected by the Fourth Amendment to the U.S. Constitution, one must question whether the person has a legitimate expectation of privacy in the invaded space. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.
3. **Constitutional Law: Search and Seizure: Words and Phrases.** Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. However, the curtilage, which is that area so intimately tied to the home itself that an individual reasonably may expect that the area in question will be treated as the home itself, is protected.
4. **Search and Seizure.** All curtilage inquiries are by nature fact-specific. The elements that should be considered when determining whether a particular area is within the curtilage are as follows: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. Of these, the third element is of centrally relevant consideration.
5. **Search and Seizure: Streets and Sidewalks.** Our society does not reasonably expect a sidewalk leading to one's front door to be private in the absence of evidence to the contrary.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** Observations made by police officers while they are not within the curtilage of a house do not constitute a search under the Fourth Amendment.

Appeal from the District Court for Platte County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Platte County, FRANK J. ŚKORUPA, Judge. Judgment of District Court affirmed.

Wm. D. Kurtenbach, of Kurtenbach Law Office, for appellant.

Don Stenberg, Attorney General, and Amber Fae Herrick for appellee.

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

CONNOLLY, J.

This case presents the question whether the sidewalk leading to the front door of a person's home is part of the curtilage of the home, so that it receives Fourth Amendment protection against unreasonable search and seizure. In this case, we conclude that the sidewalk is unprotected and that the Fourth Amendment is not implicated. Therefore, we affirm.

I. BACKGROUND

Frank J. Ramaekers III was convicted in county court of two counts of procuring alcoholic liquor for a minor, both Class I misdemeanors, and was sentenced to 60 days in jail on each count, to be served concurrently. Prior to trial, Ramaekers had filed a motion to suppress evidence based on an alleged violation of his Fourth Amendment search and seizure rights, which motion was denied. He appealed to the district court, which affirmed, concluding that Ramaekers' rights against unreasonable search and seizure were not violated and that the motion to suppress was properly overruled.

1. INVESTIGATION

Deputies of the Platte County Sheriff's Department, including Officer Robert W. Blaha, were dispatched to Ramaekers' residence to investigate a report that a party involving minors in possession of alcohol was in progress. Upon arrival, Blaha noticed that the mailbox was decorated with party streamers. Blaha's vehicle proceeded into the gravel driveway. As Blaha's vehicle approached Ramaekers' garage, he saw what appeared to be three juveniles sitting on a fence. Blaha exited his vehicle and spoke with the three juveniles. They admitted that a party was taking place and that two of the three were under the legal age to consume alcohol. Blaha heard voices coming from the front of the house, so he told the three persons sitting on the fence to stay where they were and started walking toward the front door.

While standing on the sidewalk that leads to the front door, Blaha observed a party in the front yard. There were two 16-gal-

lon kegs of beer, and several people, who appeared to be juveniles, were standing around, holding plastic cups. One juvenile yelled, "more beer, more beer." Blaha saw a couple of juveniles drink from the plastic cups. At this point, Blaha started to gather the juveniles for questioning.

Ramaekers approached Blaha and stated that he was in charge of the party. Ramaekers admitted that he knew juveniles were present and consuming alcohol. Blaha then read Ramaekers the *Miranda* warnings, and Ramaekers signed the advisement waiver.

2. Ramaekers' Residence

Ramaekers' residence is not visible from the public road; there is a small rise between the house and the public road, and the area is heavily wooded. The property is enclosed by a fence along the public road, and the driveway leading to the house is gated, although the gate was open on the night Blaha conducted his investigation. The driveway approaches the house generally from the north. The house itself faces south, and the area where the party took place was on the south, or front, side of the house. This area was not immediately visible from the point at which Blaha stopped his vehicle. To observe the party, Blaha had to walk from the driveway to a sidewalk leading through a decorative rail fence, upon which the three individuals with whom Blaha had spoken were sitting, and around to the south, or front, side of the house.

II. ASSIGNMENT OF ERROR

Ramaekers assigns that the trial court erred in overruling his motion to suppress.

III. SCOPE OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision below. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

IV. ANALYSIS

Ramaekers argues that his Fourth Amendment protection against unreasonable search and seizure was violated when

Blaha entered upon Ramaekers' property without a warrant. The State concedes that Blaha entered upon Ramaekers' property without a warrant. The question is whether Blaha's entry constituted an unreasonable search and seizure.

[2] Although " '[e]very trespass, by definition, invades someone's right of possession . . . not every . . . trespass violates the Fourth Amendment.' " *State v. Trahan*, 229 Neb. 683, 688, 428 N.W.2d 619, 623 (1988), quoting *United States v. Kramer*, 711 F.2d 789 (7th Cir. 1983). The " 'Fourth Amendment protects *people, not places*.' " (Emphasis in original.) *State v. Havlat*, 222 Neb. 554, 558, 385 N.W.2d 436, 439 (1986), quoting *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Therefore, to determine whether a person has an interest protected by the Fourth Amendment, one must question whether the person has a legitimate expectation of privacy in the invaded space. *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Id.*

1. Open Fields Doctrine

[3] In this case, Ramaekers asserts that the sidewalk upon which Blaha was standing when he observed the party was within the curtilage of Ramaekers' residence, and was not an open field. The "open fields" doctrine has been used as an aid in determining whether one has a legitimate expectation of privacy in the invaded space. See, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Havlat, supra* (discussing origin of open fields doctrine). According to this doctrine, " '[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance.' " *State v. Havlat*, 222 Neb. at 559, 385 N.W.2d at 440, quoting *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). However, the curtilage of a residence, which is that area " 'so intimately tied to the home itself' that 'an individual reasonably may expect that the area in question [will] be treated as the home itself,' " *Com. v. McCarthy*, 428 Mass. 871, 873, 705 N.E.2d 1110, 1112 (1999), quoting *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987), is protected.

(a) Curtilage

[4] Although this court has generally defined "curtilage" as a small piece of land, not necessarily enclosed, around a dwelling, which may include buildings used for domestic purposes in the conduct of family affairs, *State v. Trahan, supra*, all curtilage inquiries are by nature fact specific. In *United States v. Dunn, supra*, the U.S. Supreme Court described the elements that should be considered when determining whether a particular area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. Of these, the third element is of "centrally relevant consideration." 480 U.S. at 301.

(b) *State v. Merrill*

In *State v. Merrill, supra*, this court addressed whether an individual had a legitimate expectation of privacy in his driveway. In making this determination, we focused on the accessibility and visibility of the driveway from the public roadway. We noted that the driveway was visible from the public roadway and that there was no evidence of a gate, fence, or any other sort of obstruction that limited access to the driveway. Based on these facts, we held that the individual's interest in his driveway was not protected by the Fourth Amendment.

Our opinion in *State v. Merrill, supra*, did not use the term "curtilage," nor did it explicitly apply the test set forth in *United States v. Dunn, supra*. However, as we have previously stated, the ultimate inquiry in any Fourth Amendment analysis is whether the citizen has a legitimate expectation of privacy in the invaded area. The open fields doctrine, and the attendant concept of curtilage, are merely applications of this rule. See *U.S. v. Redmon*, 138 F.3d 1109 (7th Cir. 1998) (Flaum, J., concurring) (stating that curtilage is descriptive, rather than prescriptive, term in our Fourth Amendment jurisprudence).

An analysis of this court's opinion in *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997), demonstrates that its reasoning is consistent with that of the Supreme Court's in *United*

States v. Dunn, supra. The factors considered by this court in *Merrill v. State, supra*, accessibility and visibility, relate to the concepts that are encompassed in the first, second, and third elements of the *Dunn* test. A driveway that is visible from the public roadway is certainly not included within an enclosure surrounding the home, nor have steps been taken by the resident to protect the driveway from observation by people passing by. Likewise, a driveway that is accessible to the public is not in close "proximity" to the home insofar as the concept of proximity represents the "intimacy," see *United States v. Dunn, supra*, of the relationship between the home and the driveway.

The only factor in *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987), that is not explicitly accounted for by the accessibility and visibility test in *Merrill* is the third element of the *Dunn* test, the nature of the uses to which the area is put. However, this element of the *Dunn* test is inherent in the area's description as a driveway—a driveway that is visible to and accessible by the public does not, by its very nature, implicate the type of intimate activity that is associated with the home. See *United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984). Thus, our holding in *State v. Merrill, supra*, is based on the proposition that society does not reasonably expect a driveway to be private in the absence of evidence to the contrary unless, i.e., it is not accessible or not visible to the public.

2. Application of Law to Facts

[5] Similarly, our society does not reasonably expect a sidewalk leading to one's front door to be private in the absence of evidence to the contrary. See, e.g., *U.S. v. Thomas*, 120 F.3d 564 (5th Cir. 1997); *Com. v. McCarthy*, 428 Mass. 871, 705 N.E.2d 1110 (1999); *State v. Hubbel*, 286 Mont. 200, 951 P.2d 971 (1998); *State v. Rose*, 128 Wash. 2d 388, 909 P.2d 280 (1996); *State v. Gabbard*, 129 Or. App. 122, 877 P.2d 1217 (1994). "[A] person impliedly consents to visitors going to the front door of the person's house, provided the person has not manifested an intent to forbid the intrusion of casual visitors onto the property." *State v. Gabbard*, 129 Or. App. at 126, 877 P.2d at 1220. The pathway leading from the driveway to the front door of a home is generally not within the curtilage because it does not

harbor the intimate activity associated with the sanctity of the home and privacy of life. *U.S. v. Rodgers*, 924 F.2d 219 (11th Cir. 1991).

In *U.S. v. Thomas, supra*, the defendants argued that the police had violated the defendants' Fourth Amendment rights by walking through the gate of a privacy fence surrounding the defendants' apartment. The court noted that the gate was open when the officers entered the area and that there was no indication that permission was needed to pass through the gate. The court concluded that the officers could reasonably believe that the gate provided the principal means of access to the apartment through which they could approach the front door and that under those circumstances, the police did not violate the Fourth Amendment by doing so. *Id.*

In the instant case, the entry to the driveway was clearly visible from the public roadway and was marked with streamers. The gate to the property was open when Blaha entered the drive, and no other obstructions blocked the way. There were no signs posted prohibiting entry onto the property. When Blaha stopped his vehicle, he walked through an opening in a decorative fence and onto a sidewalk leading to the front door of Ramaekers' home. There was no gate protecting the opening in the decorative fence, nor was there any other indication that Ramaekers considered his front walk to be private. Put in the terms of *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997), the driveway and front walk were accessible and visible to the public. As stated by the Montana Supreme Court, "if the police had parked in the driveway and walked to the front door to sell policeman ball tickets, they would have had a legitimate right to be on the premises." *State v. Hubbel*, 286 Mont. at 210, 951 P.2d at 977. We conclude that, under these circumstances, Blaha was lawfully on the front walk when he observed the ongoing party.

[6] Moreover, "observations made by [police] officers while they are not within the curtilage of a house do not constitute a search under the Fourth Amendment." *U.S. v. Traynor*, 990 F.2d 1153, 1157 (9th Cir. 1993). Objects' falling within the plain view of an officer, who has the right to be in the position to have such view, does not constitute a search. *State v. Merrill, supra.* Because Blaha was rightfully on the premises when he observed

the party, which was in his plain view, Ramaekers' Fourth Amendment rights were not implicated.

V. CONCLUSION

We conclude that the trial court did not err in overruling Ramaekers' motion to suppress. As a result, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHNNY MEERS, APPELLANT.
598 N.W.2d 435

Filed July 30, 1999. No. S-98-1202.

1. **Convictions: Appeal and Error.** A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
3. **Criminal Law: Trial: Venue.** The right to be tried in the county where the offense is committed is a statutory right.
4. **Constitutional Law: Waiver: Presumptions.** Although a waiver of constitutional rights must be done with sufficient awareness of the relevant circumstances and likely consequences, and courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights and not presume acquiescence in their loss, statutory rights are within the classification of those rights that can be waived by silence or acquiescence.
5. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.
6. **Indictments and Informations: Waiver.** A defendant's failure to file a motion to quash an information generally waives objections to it. This is the case even where the objection is aimed at an amended information superseding the original information filed against a defendant.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Michael P. Burns, of Shoemaker, Witt & Burns, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Johnny Meers was convicted at a bench trial of one count of first degree sexual assault on a child, a Class II felony, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989), and one count of sexual assault of a child, a Class IV felony, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1995). Meers appeals his convictions and sentences. We affirm.

STATEMENT OF FACTS

At the time of the offenses at issue, Meers lived in Hastings, in Adams County, Nebraska. Sometime in 1991, Meers met and soon began living with S.G., who is the mother of C.G. C.G. is the victim who is the subject of count I. C.G.'s mother testified that she dated Meers from 1991 to 1995. Meers lived with C.G.'s mother and her four children, including C.G., for most of that period.

C.G. was almost 7 years old when Meers moved into her family's home in 1991. S.H., the victim identified in count II, was a friend of C.G.'s and was about the same age. C.G. and S.H. often played together on weekends, and S.H. sometimes spent the night at C.G.'s home.

The offenses in this case were alleged by the State to have occurred during the period of February 1993 to June 1994. As described below, the charges against Meers were tried in 1998. At the time of trial, C.G. and S.H. were approximately 13 years old.

C.G. testified at trial that on the first night that Meers stayed in her home, Meers came into her bedroom and fondled her breasts and vaginal area over her clothes. C.G. testified that these incidents progressed to digital penetration and then penile penetration by Meers. The assaults occurred at various locations in C.G.'s home and at a local skating rink where Meers worked and where C.G.'s mother often took C.G. and S.H. to skate on weekends. C.G. testified that Meers assaulted her about every other weekend from the time he moved into the family's home

in 1991 until C.G. was removed from her mother's care and placed in foster care in June 1994.

C.G. and S.H. testified at trial. S.H. testified that she saw Meers fondle C.G. at the skating rink. S.H. testified that Meers tried to fondle her as well at the skating rink, but she was able to evade him. S.H. testified that when she was 9 years old, she spent the night with C.G., and the girls were sleeping in the same bed. S.H. became aware that Meers had come into the bedroom. S.H. saw Meers fondle C.G., remove her clothes, and have sexual intercourse with her. Meers then fondled S.H's genitals and penetrated her with his penis. C.G. testified that she saw Meers assault S.H. on this occasion.

At trial, four adult witnesses, including a medical doctor and a licensed mental health professional, testified that C.G. recounted these and other similar events in the course of professional treatment. There was also trial testimony from the medical doctor and S.H.'s mother that S.H. told them about Meers' sexual assault upon her, which S.H. recounted at trial. Meers called no witnesses at trial.

Criminal charges were filed against Meers in Adams County in October 1994 regarding the alleged assaults upon C.G. and S.H. Several different lawyers represented Meers after the charges were filed, and defense counsel requested numerous continuances that substantially delayed Meers' trial.

The trial court permitted the State to amend the charges against Meers in November 1997. Meers made oral objections during the proceeding on the State's motion to amend and also at trial. However, he did not file a motion to quash.

The amended information reduced the charges against Meers from the four felonies originally charged to two felonies and broadened the period of time during which each crime was alleged to have occurred. In allowing the amendments, the trial court found that it posed no unfair surprise to Meers.

In count I of the amended information, the State alleged that Meers sexually assaulted C.G. during the period of February 8, 1993, to June 10, 1994, a Class II felony, in violation of § 28-319(1)(c). Count II charged Meers with unlawful sexual contact with S.H. during the same period of time, a Class IV felony, in violation of § 28-320.01. Counts I and II were pled in

the amended information using the terminology of §§ 28-319(1)(c) and 28-320.01. The crimes were alleged to have occurred in Adams County.

Meers waived a jury trial. The charges contained in the amended information were tried to the court on April 8, 1998. The bill of exceptions reflects that the trial was conducted in Minden, in Kearney County. Although the case was tried in Kearney County, the Adams County Attorney prosecuted the case for the State and the trial judge from the district court for Adams County, who had conducted pretrial proceedings, heard the evidence at trial. The record is silent as to why the trial was conducted in Kearney County. The record shows no objection by Meers to the conduct of the trial in Kearney County.

In an order filed on July 16, 1998, the trial court found Meers guilty beyond a reasonable doubt of both crimes with which he was charged. A sentencing hearing was held on October 9. The trial court sentenced Meers to terms of 10 to 15 years' imprisonment on count I and 20 months' to 4 years' imprisonment on count II, the latter to be served consecutively to count I.

ASSIGNMENTS OF ERROR

On appeal, Meers claims that the fact that the trial was conducted in Kearney County, rather than Adams County, requires reversal. Meers claims that the amended information which the trial court permitted the State to file was defectively broad and that the trial evidence is insufficient to sustain his convictions. Meers also claims that the sentences imposed upon him are excessive.

STANDARD OF REVIEW

[1] A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the sentencing court's reasons or rulings are

clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999).

ANALYSIS

Venue of Trial.

Meers claims on appeal that because the alleged offense was committed in Adams County and he was tried in Kearney County, his conviction must be set aside. We do not agree.

Meers' right to be tried in the county in which the criminal offense is alleged to have been committed is secured by statute rather than by the federal or Nebraska Constitution. *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). Neb. Rev. Stat. § 29-1301 (Reissue 1995), the trial venue statute, provides as follows:

> All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in section 25-412.03 or sections 29-1301.01 to 29-1301.03, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such case the court, upon motion of the defendant, shall transfer the proceeding to any other district or county in the state as determined by the court.

The amended information charging Meers with the commission of two felony crimes was filed in Adams County and stated that the crimes were committed by Meers in Adams County. The trial evidence, if believed by the finder of fact, established that the crimes were committed in Adams County. See *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989) (holding that evidence that crime was committed in county in which it is charged is essential element of proving accused's guilt).

The bench trial of this case was conducted in Kearney County, and it is undisputed that Meers made no objection to the venue of the trial. Meers argues on appeal that, notwithstanding his failure to object to trial venue, a trial conducted in a county other than the one where the offenses are alleged to have been committed requires a reversal of the convictions.

[3,4] For the reasons recited below, we determine that Meers waived the statutorily designated trial provisions, and he is not entitled to relief. In *Kennison v. State*, 83 Neb. 391, 119 N.W. 768 (1909), cited with approval in *State v. Vejvoda, supra*, we concluded that where a criminal defendant failed to object to trial in a county where the offense was not committed, the defendant acquiesced to the proceedings and waived his right to a trial in the county where the offense was committed. The right to be tried in the county where the offense is committed is a statutory right. *State v. Vejvoda, supra*. Although a waiver of constitutional rights must be done with sufficient awareness of the relevant circumstances and likely consequences, *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997), and courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights and not presume acquiescence in their loss, *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964), *vacated and remanded on other grounds* 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965), statutory rights are within the classification of those rights that can be waived by silence or acquiescence, *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946). In the instant case, Meers acquiesced to the conduct of the trial in Kearney County.

Based on the foregoing, we determine that in this case, where Meers did not object at trial to the conduct of the trial in Kearney County and the record as a whole shows no challenge to the trial being conducted in Kearney County, Meers, through his acquiescence, waived his objection to the statutorily designated trial provision in § 29-1301. Meers' assignment of error relating to trial venue is without merit.

Sufficiency of Amended Information and Trial Evidence.

Meers claims the amended information is overly broad and fails to apprise him of the alleged crimes. For the reasons recited below, we conclude that Meers has waived his challenge to the amended information.

On appeal, Meers claims that the 16-month period alleged in the amended information is impermissibly broad in that it fails to inform him with reasonable certainty of the crimes charged. Because Meers' challenge to the amended information was

made orally at the motion to amend the information proceeding and orally at trial and because no motion to quash the amended information was filed, Meers has waived his challenge to the amended information.

[5] Objections to the form or content of an information should be raised by a motion to quash. Neb. Rev. Stat. § 29-1808 (Reissue 1995). See, also, *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). In this regard, we note that in *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986), and *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), cases involving informations charging the respective defendants with sexual assault of a child in a specified timeframe rather than on a discrete date, the challenges to the informations were raised by motions to quash.

[6] We have held that a defendant's failure to file a motion to quash the information waives objections to it. *State v. Roucka, supra*. See, also, *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987). This is the case even where the objection is aimed at an amended information superseding the original information filed against a defendant. *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987). In *State v. Aldrich*, a child sexual assault prosecution, we concluded that the defendant waived his challenge to the information which was amended during trial where the defendant was aware of the claimed defect in the amended information and objected thereto but did not move to quash.

In the instant case, the trial court permitted the State to file an amended information. Meers verbally objected to it at the hearing on the State's motion to amend the information and also at trial. These oral objections were insufficient. Meers failed to file a motion to quash aimed at the amended information pursuant to § 29-1808 and, under the case law, is deemed to have waived his challenge to the sufficiency of the amended information. *State v. Roucka, supra*.

Meers next claims that trial evidence failed to establish that he was over 19 years of age, an element of the offenses of first degree sexual assault on a child, see § 28-319 (1)(c), and sexual assault of a child, see § 28-320.01. This argument is without merit.

Meers did not testify at trial. However, C.G.'s mother, who was Meers' girl friend for 4 years, testified that she believed Meers was 23 when they began to date in 1991. C.G. testified that when Meers began dating her mother, he said he was 22 years of age. The testimony regarding Meers' age was received without objection. In view of the evidence at trial, this assignment of error is without merit. See, *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *In re Interest of Roy R.*, 3 Neb. App. 816, 533 N.W.2d 107 (1995). See, also, *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987).

Meers next claims that, due to inconsistencies in the testimony of each victim, their individual testimony should not be believed. We reject Meers' argument that minor variances in and between the testimony of C.G. and S.H. render their testimonial evidence unworthy of belief.

In determining whether evidence is sufficient to sustain a conviction, an appellate court does not resolve conflicts in the evidence or pass on the credibility of witnesses. In the absence of prejudicial error, a conviction will be affirmed if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998). There is evidence beyond a reasonable doubt to support the convictions.

Sentences Imposed.

Meers claims that the sentences imposed upon him are excessive. We do not agree.

The sentence imposed upon Meers for each count of which he was convicted is within the statutorily defined minimum and maximum terms prescribed by Neb. Rev. Stat. § 28-105 (Reissue 1989). A sentence will be upheld on appeal if the sentence is within the statutory range and there is no abuse of discretion. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999).

Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990). We find no abuse of discretion.

The evidence at trial and the information included in the presentence report include explicit and unsettling proof, in great detail not repeated here, of the serious and long-term effects of Meers' sexual abuse of C.G. and S.H. Sexual abuse of a child is a serious offense. *State v. White, supra.* We find no error in the sentences imposed on Meers.

CONCLUSION

Based on the record before us, we determine that Meers, through acquiescence, waived his statutory right to trial in the county where the offenses were committed and, by failing to file a motion to quash, waived his challenge to the amended information. The trial evidence sustained Meers' convictions for both of the crimes with which he was charged. The trial court did not abuse its discretion in sentencing Meers. Meers' convictions and sentences are affirmed.

AFFIRMED.

CARY REHBEIN, APPELLANT, V. HAROLD CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

598 N.W.2d 39

Filed August 6, 1999. No. S-97-1289.

1. **Habeas Corpus: Prisoners: Appeal and Error.** When habeas corpus is used to test the validity of adult criminal detention, factual issues are to be reviewed as in actions at law.
2. **Judgments: Appeal and Error.** The findings of a trial court in a law action in which the court served as the finder of fact have the effect of a verdict and will not be set aside unless clearly wrong.
3. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
4. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
5. **Constitutional Law: Habeas Corpus.** A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
6. ___:___. A writ of habeas corpus in the State of Nebraska is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when

he is in custody in violation of the federal Constitution, law, or treaties of the United States.

7. **Judgments: Collateral Attack.** Where a judgment is attacked in a way other than a proceeding in the original action to have the judgment vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is considered a "collateral attack."
8. ___:___. Only a void judgment may be collaterally attacked.
9. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
10. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.
11. **Habeas Corpus: Judgments: Jurisdiction: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
12. **Habeas Corpus.** In a petition for writ of habeas corpus, if the plaintiff sets forth facts which, if true, would entitle him or her to discharge, then the writ is a matter of right, the plaintiff should be produced, and a hearing should be held thereon to determine questions of fact presented. If the plaintiff fails to show by the facts alleged in the petition that he or she is entitled to relief, then the relief is denied.
13. **Habeas Corpus: Demurrer.** Generally, the sufficiency of a writ of habeas corpus is not challenged by demurrer, but, instead, is challenged by a motion to quash. However, a demurrer may be allowed to serve the purpose of a motion to quash or to dismiss a writ of habeas corpus.
14. **Habeas Corpus: Jurisdiction: Collateral Attack: Presumptions.** On a motion to quash a writ of habeas corpus, as in a demurrer, the allegations of the petition are deemed admitted, and the usual presumptions in support of the jurisdiction of a court of general jurisdiction whose proceedings are collaterally attacked will be made.
15. **Habeas Corpus: Sentences.** A writ of habeas corpus is not available to challenge the conditions of confinement of a prisoner under a valid sentence.

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

Cary Rehbein pro se.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

WRIGHT, J.

NATURE OF CASE

This is an appeal from a denial of a petition for a writ of habeas corpus in which Cary Rehbein seeks relief on the grounds that his trial counsel was ineffective and that Rehbein is a hermaphrodite wrongfully confined in a male prison. The Lancaster County District Court sustained the State's demurrer and dismissed Rehbein's petition for failure to state a claim for habeas corpus.

SCOPE OF REVIEW

[1] When habeas corpus is used to test the validity of adult criminal detention, factual issues are to be reviewed as in actions at law. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994).

[2] The findings of a trial court in a law action in which the court served as the finder of fact have the effect of a verdict and will not be set aside unless clearly wrong. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

[3] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

FACTS

On May 30, 1997, Rehbein filed a "Petition for Writ of Habeas Corpus." The State demurred to the petition on the basis that the allegations contained in the petition did not state facts sufficient to constitute a cause of action and that the petition did not have attached to it a copy of Rehbein's commitment and detention order, as required by Neb. Rev. Stat. § 29-2801 (Reissue 1995). Subsequently, Rehbein filed numerous pleadings, including a "Motion to File Amendment to Original Filing" and a "Motion for Hearing of Evidence to Support Action in Docket 556 Page 153 in Judge McGinn[']s Court and Motion to Transport Person From Correction." Rehbein also filed a "Motion to Go to Retrial on a Hearing for State Habe[a]s Filing and Release for Unlawful Incar[c]eration."

On November 17, 1997, the district court sustained the State's demurrer, finding that Rehbein's petition failed to allege

facts constituting a cause of action for habeas corpus. The district court noted that this court had already considered and denied granting relief to Rehbein regarding five of Rehbein's allegations. See *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990). The district court found that Rehbein's sixth allegation, that Rehbein is actually " 'more female than male' " and is therefore improperly confined in a male correctional facility, did not state a cause of action for habeas corpus. The district court thereupon dismissed the petition, noting that it did not believe that Rehbein's petition could be amended so as to correct any defects. Rehbein timely appealed.

ASSIGNMENTS OF ERROR

Those claims which were presented to the district court and properly assigned as error on appeal are as follows: (1) The district court erred in denying Rehbein's petition for habeas corpus relief, because his guilty plea at trial was not entered into voluntarily, as he was under the influence of drugs, and (2) no presentence investigation was performed, so the trial court sent him to a male prison even though he is "more female than male" and, thus, violated his right under the Eighth Amendment of the U.S. Constitution to be free from cruel and unusual punishment.

ANALYSIS

[4,5] Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. See *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944). A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995).

[6,7] A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he is in custody in violation of the federal Constitution, law, or treaties of the United States. *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964), *vacated on other grounds* 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965). It is established that where a judgment is attacked in a

way other than a proceeding in the original action to have the judgment vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is considered a "collateral attack." *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985). An action for habeas corpus is an example of such a collateral attack. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[8-10] Only a void judgment may be collaterally attacked. *Mayfield v. Hartmann, supra.* Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id.* A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990).

Rehbein's initial petition for writ of habeas corpus asserted that his imprisonment was illegal because (1) his trial counsel entered a plea of guilty without Rehbein being present; (2) at the time the plea was entered, Rehbein was on a psychotropic drug and was totally unable to assist in the preparation of his own defense; (3) he received ineffective assistance of counsel; (4) there was no factual basis for his plea; (5) the plea was not knowingly and freely entered; and (6) Rehbein is a hermaphrodite, being "more female than male," and therefore is illegally confined to a male facility.

[11] In *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982), we stated that there was a distinction between want of jurisdiction and error in the exercise of that jurisdiction. Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Nicholson v. Sigler*, 183 Neb. 24, 157 N.W.2d 872 (1968).

[12] In other words, the regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is avail-

able only in a direct proceeding. See *id.* In a petition for writ of habeas corpus, if the plaintiff sets forth facts which, if true, would entitle him or her to discharge, then the writ is a matter of right, the plaintiff should be produced, and a hearing should be held thereon to determine questions of fact presented. If the plaintiff fails to show by the facts alleged in the petition that he or she is entitled to relief, then the relief is denied. See *Lingo v. Hann*, 161 Neb. 67, 71 N.W.2d 716 (1955).

Here, the State filed a "return," or showing, in response to Rehbein's petition for a writ of habeas corpus. The State claimed that Rehbein's petition should be dismissed because the allegations contained therein did not state facts sufficient to constitute a cause of action and because Rehbein had failed to attach a copy of his commitment and detention order, as required by § 29-2801. The district court treated the State's response as a demurrer.

[13] In *Almarez v. Hartmann*, 211 Neb. 243, 318 N.W.2d 98 (1982), the court also treated as a demurrer a motion which requested that the petition for habeas corpus be dismissed on the ground that the allegations, even if true, were wholly insufficient to support the writ. Generally, the sufficiency of a writ of habeas corpus is not challenged by demurrer, but, instead, is challenged by a motion to quash. See *McAvoy v. Jones*, 149 Neb. 613, 31 N.W.2d 740 (1948). We have, however, stated that a demurrer may be allowed to serve the purpose of a motion to quash or to dismiss a writ of habeas corpus. *Id.* Therefore, even though the district court treated the State's motion as a demurrer, a motion which is usually not associated with writs of habeas corpus, we will treat the State's motion as one to quash Rehbein's petition.

[14] On a motion to quash a writ of habeas corpus, as in a demurrer, the allegations of the petition are deemed admitted, and the usual presumptions in support of the jurisdiction of a court of general jurisdiction whose proceedings are collaterally attacked will be made. See *id.* Where the petition is not sufficient to warrant discharge, it should be quashed. *Id.*

In his petition, Rehbein alleges that his guilty plea was not entered voluntarily and that, as a consequence, his trial counsel was ineffective in allowing him to plead. This complaint does not question the jurisdiction of the trial court over the crime or

the defendant. Neither does the complaint question the authority of the trial court to impose the sentence given, and thus, it may not be raised in a writ of habeas corpus.

[15] Next, Rehbein claims that he possesses "46xx" chromosomes and, thus, is a hermaphrodite. He argues that his genetic makeup is more female than male and that he should not be housed in a male prison. We reiterate that habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence has jurisdiction over the offense and the defendant and the sentence was within the power of the court to impose. *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990). Rehbein was convicted of felony murder, and he was sentenced to life in prison pursuant to Neb. Rev. Stat. § 29-2522 (Reissue 1989). Rehbein advances no claim which undermines the jurisdiction of the trial court or which would prove that the court was acting beyond its power when it sentenced him to life in prison. In short, Rehbein does not seek to void his sentence, but, instead, attacks a condition of his confinement. We have held that a writ of habeas corpus is not available to challenge the conditions of confinement of a prisoner under a valid sentence. *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977). Therefore, Rehbein's assigned error is without merit.

We express no opinion as to whether Rehbein may challenge his confinement through a writ of mandamus or other method. See 68 Neb. Admin. Code, ch. 9, § 004 (1987) (directs Department of Correctional Services to assign female inmates to Nebraska Center for Women). See, also, *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996) (transsexual inmate brought action pursuant to 42 U.S.C. § 1983 (1994), claiming inmate was denied appropriate living conditions and medical treatment).

CONCLUSION

The district court's dismissal of Rehbein's petition for a writ of habeas corpus is affirmed.

AFFIRMED.

LaVerne Heinold, individually and as Copersonal Representative of the Estate of Adolph W. Heinold, deceased, appellant, v. Marilyn Siecke, individually and as Copersonal Representative of the Estate of Adolph W. Heinold, deceased, appellee.

598 N.W.2d 58

Filed August 6, 1999. No. S-98-210.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. ___:___. Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
3. **Landlord and Tenant: Crops.** The common-law doctrine of emblements entitles one who holds land for a period subject to termination at a time which he cannot ascertain beforehand to remove from the land after the termination of his tenancy the annual crops or emblements which he has planted thereon prior to such termination, if the termination is brought about without any fault on his part or without any act of his intended to bring about such a result.
4. **Crops: Words and Phrases.** The doctrine of emblements applies to corn and other crops of the earth which are produced annually, not spontaneously but by labor and industry.
5. **Wills: Estates: Landlord and Tenant: Crops.** Unless the instrument creating the life estate provides otherwise, the doctrine of emblements applies in all situations where annual crops planted by a life tenant in possession of the land are growing before the death of the life tenant.
6. **Landlord and Tenant: Tenancy in Common: Crops.** A landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops.
7. **Crops.** Growing crops are personal property.
8. **Joint Tenancy.** Where property is held in joint tenancy, each joint tenant owns the whole of the property from the time at which the interest is created.
9. ___. Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of another.
10. **Wills: Estates: Title.** While the remainderman ultimately succeeds to the possession of the life tenant, he does not succeed to his title, but instead gets his title from another and independent source. He or she takes from the grantor or devisor directly as an estate by purchase, from the time of the death of the life tenant. Thus, the termination of a life estate by reason of the death of the life tenant does not transfer any property interest to the remainderman.

Appeal from the County Court for Stanton County: Philip R. Riley, Judge. Affirmed.

W. Bert Lammli for appellant.

Gary A. Sokolow for appellee.

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

STEPHAN, J.

This is an appeal from a judgment of the county court for Stanton County determining that a life tenant's share of certain annual crops which were planted before his death but harvested thereafter were assets of his estate and were not payable to the remainderman. We affirm.

FACTS

Prior to January 11, 1988, Adolph W. Heinold and his wife, Laura M. Heinold, were the owners in fee of a tract of real estate located in Stanton County, Nebraska. On that date the Heinolds made, executed, and delivered to LaVerne Heinold a warranty deed conveying the real estate in fee, reserving for themselves "the full benefit and use of the above described premises and the rents, issues and profits therefrom for and during their natural lives." The deed conferred the right "*TO HAVE AND TO HOLD the premises above described, together with all the Tenements, Hereditaments and appurtenances thereunto belonging, unto the said* LaVerne R. Heinold." The deed was recorded the same day at the office of the Stanton County register of deeds.

During the existence of the life estate, Adolph Heinold entered into an oral agreement with Matthias Schuetz whereby Schuetz was to farm the property on shares. Pursuant to this agreement, the corn and soybeans produced on the property during the 1996 crop year were to be delivered to a cooperative located at Pilger, Nebraska. At the elevator, the crops were to be split by weight, with Adolph Heinold to receive a 40-percent share and Schuetz to receive a 60-percent share. Laura Heinold predeceased Adolph Heinold, who subsequently died on July 27, 1996, after the crops were planted in May and June of that year but before they were harvested in October, November, and December. The crops were delivered to the elevator and sold. Deposits in the amounts of $7,061.28 and $6,800.30, representing the proceeds of Adolph Heinold's share of the corn and soy-

bean crops, were made to the account of the estate of Adolph Heinold on August 18, 1997.

LaVerne Heinold and Marilyn Siecke, the surviving son and daughter of Adolph Heinold, serve as copersonal representatives of his estate in probate proceedings pending in the county court for Stanton County. They are also the sole devisees under Adolph Heinold's last will and testament. In his representative and personal capacities, LaVerne Heinold filed a petition for declaratory judgment in which he asked the county court to determine, inter alia, that title to the growing corn and soybean crops passed to him under the aforementioned deed upon the death of Adolph Heinold. In her responsive pleading, Siecke denied the allegations and prayed that the court determine the crops to be assets of the estate. Following trial, the county court determined that Adolph Heinold's share of the crops which were growing but unharvested on the date of his death became the property of his estate upon their harvest and that the proceeds from the crops should therefore become part of the distribution of the estate. LaVerne Heinold perfected this appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.

ASSIGNMENT OF ERROR

Heinold asserts, restated and summarized, that the county court erred in finding that the proceeds from the sale of the crops belonged to the estate rather than to the remainderman.

SCOPE OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999); *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998).

[2] Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996).

ANALYSIS

[3,4] This dispute over ownership of annual crops which are growing but unharvested upon the death of a life tenant involves the common-law doctrine of emblements, which

> "entitles one who holds land for a period subject to termination at a time which he cannot ascertain beforehand to remove from the land after the termination of his tenancy the annual crops or emblements which he has planted thereon prior to such termination, if the termination is brought about without any fault on his part or without any act of his intended to bring about such a result."

In re Estate of Mischke, 136 Neb. 875, 879, 287 N.W. 760, 761 (1939), quoting 15 Am. Jur. § 24 (1938). See Annot., 47 A.L.R.3d 784 (1973). The rationale underlying the doctrine was explained in *In re Estate of Mischke*:

> By the common law, "Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblements* or profits of the crop: for the estate was determined by the *act of God,* and it is a maxim in the law, that *actus Dei nemini facit injuriam* (the act of God injures no man). The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it."

136 Neb. at 878-79, 287 N.W. at 761, quoting 1 Thomas M. Cooley, Cooley's Blackstone, bk. 2, ch. 8 (James DeWitt Andrews 4th ed.) (1899). The doctrine applies to " 'corn and other crops of the earth which are produced annually, not spontaneously but by labor and industry.' " *In re Estate of Mischke*, 136 Neb. at 879, 287 N.W. at 761, quoting 15 Am. Jur., *supra*.

[5] It is generally held that unless the instrument creating the life estate provides otherwise, the doctrine of emblements applies in all situations where annual crops planted by a life ten-

ant in possession of the land are growing before the death of the life tenant. See Annot., 47 A.L.R.3d, *supra*. However, the analysis is more complex when, as in the present case, the life tenant permits a third party to farm the land in exchange for a share of the crops. See, *Finley v. McClure, Administratrix*, 222 Kan. 637, 567 P.2d 851 (1977); Restatement of Property § 121 (1936); Annot., 47 A.L.R.3d, *supra*. In this circumstance, courts vary in their interpretation of whether the doctrine of emblements allows the representative of the deceased life tenant to claim his agreed-upon share of the growing crops. *Finley, supra*; Annot., 47 A.L.R.3d, *supra*.

In *Vawter v. Frame*, 48 Ind. App. 481, 96 N.E. 35 (1911), the court held that a sharecrop arrangement creates a tenancy in common whereby the life tenant owns an undivided interest in the growing crop which passes to his or her estate upon the death of the life tenant. Some courts construe such arrangements as leases in which the crop share constitutes rent which, if payable after the death of the life tenant, belongs to the remainderman. *Simpson v. McCormmach*, 125 Or. App. 603, 866 P.2d 489 (1994); *Williams v. Stander*, 143 Colo. 469, 354 P.2d 492 (1960). Other courts have characterized such arrangements as leases but have nevertheless held that the estate of the life tenant was entitled to his or her share of the crops planted during the life tenant's lifetime but harvested after the life tenant's death. *McCraw v. Simpson*, 141 F.2d 789 (10th Cir. 1944) (applying Oklahoma law); *In re Estate of Luke*, 184 N.W.2d 42 (Iowa 1971). See, also, *Wilhoit v. Salmon*, 146 Cal. 444, 80 P. 705 (1905).

The issue presented herein was addressed by this court in *In re Estate of Mischke*, 136 Neb. 875, 287 N.W. 760 (1939). Henriete Mischke held a life estate in a farm in Adams County. Her children were the remaindermen. Mischke leased the farm to her son Robert for a term of 5 years for a one-third portion of all the crops harvested from the land delivered to the market. In the fall of 1937, Robert planted a wheat crop on the land, which was growing but unharvested at the time of Mischke's death in January 1938. The wheat was harvested in July and delivered and sold to an elevator. The estate brought an action demanding

that the elevator turn over the proceeds from the sale of the wheat crop.

[6,7] After characterizing the relationship between Mischke and Robert as that of a landlord and tenant, we reasoned:

> A landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops. . . .
>
> This court has repeatedly held that growing crops are personal property. . . .
>
> It necessarily follows that the life tenant at the time of her death was the owner of an undivided interest in the wheat then growing on the land, and that such interest was a personal property interest, and title thereto passed to her estate.

(Citations omitted.) *Id.* at 877-78, 287 N.W. at 761. We further reasoned:

> It is clear that the rule of emblements applies where the life tenant sows the land for himself. It applies also to the lessee of the life tenant. The reason upon which the doctrine of emblements is based requires that it be applied likewise to that share of the crop which was reserved to the life tenant as rent.

Id. at 879-80, 287 N.W. at 762.

The petition in the present case characterizes the arrangement between Adolph Heinold and Schuetz as "an oral agreement to farm on shares" whereby the former "would pay 40% of row crop expenses, and would receive a 40% share by weight of all row crops grown on the premises . . . ." LaVerne Heinold's testimony at trial was consistent with this characterization. The pertinent facts are therefore similar to those presented in *In re Estate of Mischke, supra*, and the county court's determination was consistent with our holding in that case.

[8-10] LaVerne Heinold contends, however, that *In re Estate of Mischke, supra*, was impliedly overruled by *In re Estate of Kennedy*, 220 Neb. 212, 369 N.W.2d 63 (1985). We disagree. In *In re Estate of Kennedy*, we held that because the life estate was held in joint tenancy, crops growing on the land were not subject to the claims of creditors but passed with the land to the surviving joint tenant. Where property is held in joint tenancy, each joint tenant owns the whole of the property from the time at

which the interest is created. *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996). Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of another. *Youngblood v. American Bible Soc.*, 227 Neb. 472, 418 N.W.2d 554 (1988), *abrogated on other grounds, Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). In contrast, while the remainderman ultimately succeeds to the possession of the life tenant, he does not succeed to his title, but instead gets his title from another and independent source. He or she takes from the grantor or devisor directly as an estate by purchase, from the time of the death of the life tenant. 31 C.J.S. *Estates* § 32 (1996). Thus, the termination of a life estate by reason of the death of the life tenant does not transfer any property interest to the remainderman. *In re Estate of Glaser*, 217 Neb. 104, 348 N.W.2d 127 (1984). *In re Estate of Kennedy, supra*, is thus distinguishable from the present case on the facts and applicable legal principles and therefore does not overrule *In re Estate of Mischke*, 136 Neb. 875, 287 N.W. 760 (1939).

LaVerne Heinold also argues that *In re Estate of Mischke, supra*, was overruled by *Beacom v. Daley*, 164 Neb. 120, 81 N.W.2d 907 (1957), which held that rents accruing after the death of the life tenant belong to the remainderman. This argument ignores our statement in *Estate of Ruwe v. Ruwe*, 190 Neb. 663, 666, 211 N.W.2d 610, 613 (1973), that "[t]he rule announced in Beacom v. Daley, *supra,* is frequently unsuited for application to rentals of agricultural lands, and insofar as it may conflict with In re Estate of Mischke, *supra,* it is overruled."

LaVerne Heinold further contends that the warranty deed creating the life estate represents an intent on the part of the life tenants for their rights to the crops to terminate upon death. LaVerne Heinold correctly states that a life estate terminates on the date of death of the life tenant. See *In re Estate of Glaser, supra*. He further notes that the language in the deed reserves to the grantors " 'the full benefit and use of the above described premises and the rents, issues and profits therefrom for and during their natural lives.' " Brief for appellant at 2. LaVerne Heinold contends that such language indicates that upon the completion of the natural lives of the grantors, their reservation

of "the rents, issues and profits" thereby was intended to immediately terminate, thus leaving the growing crops to the remainderman.

Although this court has not addressed the issue, other courts have held that certain language in the creating instrument can cut off the right of emblements. For example, in *Wilhoit v. Salmon*, 146 Cal. 444, 445, 80 P. 705 (1905), the owner of land granted a deed conveying it in fee " 'together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.' " The deed was deposited in escrow, to be delivered upon the death of the grantor. The court held that such deed postponed only the possession of the premises by the grantees until the grantor's death and that upon the life tenant's death, her estate had no right to emblements. Similarly, in *Williams v. Stander*, 143 Colo. 469, 471, 354 P.2d 492, 494 (1960), an agreement providing that "upon the decease of First Party, all of the rents, profits and all income whatsoever from said land, shall, thereupon, become the exclusive property of Second Parties or the survivor of them" was found to abrogate any right the estate had to emblements. The language in the warranty deed applicable to the present facts contains no similar language, and, assuming without deciding that certain language in the creating instrument can cut off the life tenant's right to emblements, the deed before us here does not demonstrate an intention on the part of the grantors to relinquish such right.

Lastly, LaVerne Heinold contends that the Nebraska Principal and Income Act, Neb. Rev. Stat. §§ 30-3101 to 30-3115 (Reissue 1995), applies to the present facts and that under such act, the income from the growing crops properly belongs to the remainderman. The act provides that it governs "the ascertainment of income and principal and the apportionment of receipts and expenditures in trusts and decedents' estates, to the extent not inconsistent with the provisions of a creating instrument." § 30-3101. As the county court correctly held, the act does not apply to the present facts. The "creating instrument" at issue here is the warranty deed creating the life estate, and it is those

provisions of law pertaining to this type of estate that apply, not those applicable to decedents' estates and trusts.

CONCLUSION

Because the corn and soybean crops at issue were planted during the existence of Adolph Heinold's life estate and harvested after his death, the doctrine of emblements requires that the proceeds of his reserved share of the crops be treated as property of his estate. The judgment of the county court therefore is affirmed.

AFFIRMED.

GERALD KROLIKOWSKI ET AL., APPELLANTS, V. TOM NESBITT, SUPERINTENDENT, NEBRASKA STATE PATROL, ET AL., APPELLEES.

598 N.W.2d 45

Filed August 6, 1999. No. S-98-369.

1. **Mandamus: Words and Phrases.** Mandamus is an extraordinary remedy issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
3. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must exist at the time the writ is applied for, and (3) the duty must be clear.
4. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
5. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. A duty or act is ministerial when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning the propriety or impropriety of the act to be performed.

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

Thom K. Cope, of Polsky, Cope, Knapp & Shiffermiller, for appellants.

Don Stenberg, Attorney General, and Carla Heathershaw Risko for appellees.

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

STEPHAN, J.

This is an appeal from an order of the district court for Lancaster County denying and dismissing the appellants' amended petition seeking a peremptory writ of mandamus. We conclude that the district court did not err in determining that mandamus does not lie and therefore affirm.

BACKGROUND

The evidence consists of affidavits and documentary exhibits which were received without objection. The appellants are 15 carrier enforcement officers employed by the State of Nebraska. The original appellees are Ron Tussing, who served as superintendent of the Nebraska State Patrol at the time this action was initiated; Mollie Anderson, who served as the director of the Department of Administrative Services' state personnel division (DASSP) at the time this action was initiated; Allan L. Abbott, the director of the Department of Roads; Larry Primeau, the director of the Department of Administrative Services (DAS); David Heineman, the Nebraska State Treasurer; and the State of Nebraska. The appellants brought this action against each of these state officials, in both their individual and official capacities. After this appeal was argued and submitted, we sustained the appellants' motion to substitute Tom Nesbitt as the current superintendent of the Nebraska State Patrol for Tussing and Sherri Wimes as the acting director of the DASSP or her successor for Anderson.

Carrier enforcement officers are employees of the Nebraska State Patrol charged with the operation of weighing stations and

portable scales and the enforcement of laws relating to the size, weight, load, and registration of buses, motor trucks, truck-tractors, semitrailers, trailers, and towed vehicles operated on Nebraska highways. Neb. Rev. Stat. §§ 60-1303(2) and 60-1306(1) and (2) (Reissue 1998). In 1994, the Legislature amended § 60-1306 to expand the arrest powers of carrier enforcement officers to allow them to be armed while on duty. Pursuant to the Nebraska Classified System Personnel Rules & Regulations, Tussing submitted a current job description to the DASSP, of which Anderson was the director, for a review of the appellants' job classification. A classification review was then initiated.

Initially, an employee of the DAS, of which Primeau was then the director, recommended reclassification. However, at some point in the process, a specific request was made to the Legislature's Appropriations Committee for additional funding to cover the salary grade increases which would result from reclassification. The Legislature denied this request. Following this denial, the classification review process was terminated and a final reclassification decision was not made. The Nebraska Classified System Personnel Rules & Regulations provide for a classification reconsideration process and for classification appeals to the State Personnel Board. See 273 Neb. Admin. Code, ch. 6, §§ 007 and 007.01 (1993). The appellants did not utilize this process.

In their operative amended petition, the appellants alleged that the appellees had a "clear, unequivocal duty to re-classify their positions and pay them wages withheld since July 16, 1994, and in the future." They sought a peremptory writ of mandamus compelling the appellees to:

> (1) Reclassify each Petitioner to their correct level, according to each individual's rank, into the correct classification as determined by the Personnel Department in 1994;
>
> (2) Pay each Petitioner immediately, as well as in the future, the correct wages commensurate with that classification level, as they would have received had they been correctly re-classified at 0001 Hours on July 16, 1994;

> (3) Pay each Petitioner all withheld wages and benefits, plus interest, since they began exercising their enhanced duties and responsibilities at 0001 Hours on July 16, 1994.

Each appellant submitted an affidavit setting forth his or her rank and an assertion that since July 16, 1994, he or she has been working and compensated at a lower classification and pay grade than the duties of the position demanded. The record also contains affidavits from Anderson, Tussing, and Abbott stating their positions as state officers do not provide them with authority to implement any pay increases absent an appropriation from the Legislature. In addition, Anderson's affidavit states that the director of the DASSP has the authority to delay implementation of any reclassification and would exercise her discretion to do so until such time as funding became available.

The district court determined that mandamus did not lie because the appellees had "not failed to perform a purely ministerial act or duty." This appeal followed, and we moved the case to our docket upon our own motion.

ASSIGNMENT OF ERROR

The appellants assign that the district court erred in denying their petition for a writ of mandamus.

STANDARD OF REVIEW

An action for a writ of mandamus is a law action, and in an appellate review of 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 unless clearly erroneous. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999).

ANALYSIS

[1,2] Mandamus is an extraordinary remedy issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the

respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of law. Neb. Rev. Stat. §§ 25-2156 and 25-2157 (Reissue 1995); *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998). In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

[3-5] To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must exist at the time the writ is applied for, and (3) the duty must be clear. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.*; *State ex rel. Wal-Mart v. Kortum, supra.* We have explained this in *Pratt*, 252 Neb. at 911, 567 N.W.2d at 187, as follows:

> "'"[A] duty or act is ministerial . . . when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning the propriety or impropriety of the act to be performed. . . ."'"

Thus, mandamus will lie to compel the appellees to perform any act that is made mandatory on them pursuant to the personnel rules. However, it will not lie to compel performance of discretionary duties.

Title 273, chapter 6, of the applicable personnel rules are as follows:

> 001 Classification Plan. The classification plan is based on a systematic review and analysis of the duties and responsibilities of all positions in the State Classified

Personnel System. Classification is based on a variety of factors, including duties performed, the scope and level of responsibilities assigned, the nature and extent of supervision received and/or exercised, and the knowledge, abilities and skills required. All positions having similar duties and responsibilities are grouped into classes and are assigned to a salary grade.

002 Class Specifications. Specifications are maintained for each class. Specifications provide a title and description, typical duties and responsibilities, and knowledges, abilities and skills necessary for job performance. The duties outlined in the specification do not limit the assignment of other duties to a position.

. . . .

004 Agency Head Authority and Responsibilities. When significant changes in duties and/or responsibilities are made, or when a new position is created, the agency head shall submit a current job description to the Director of DAS State Personnel for classification review.

004.01 Understaffing. For the purpose of training, an agency head may understaff a position with an employee of a lower class within the same series. The duties and salary shall reflect the employee's classification. Ordinarily, an employee should not hold an understaffed position for more than one year. Positions that have been understaffed longer than one year shall be subject to review by the Director of DAS State Personnel.

005 Requests for Classification Reviews. Classification reviews may be requested by any of the following:

005.01 Employees may request a review of their classification at any time, provided that the position has not been reviewed by the DAS State Personnel Division in the previous six months. Requests are made by completing a job description questionnaire, reviewing it with the employee's supervisor and receiving supervisory remarks, and submitting it along with a letter requesting review to the agency head. Such letter shall contain a concise and specific statement as to why the employee believes the current classification assignment is inappropriate and the specific reasons

therefore [sic]; and a statement of the classification sought. The agency head shall have up to a maximum of forty-five work days to review such information and if necessary change the assignment of duties and responsibilities of a position and shall forward the employee's request to the Director of DAS State Personnel for review.

. . . .

005.03 The Director of DAS State Personnel may review any position at any time by requiring an employee to fill out a job description questionnaire. The Director of DAS State Personnel may access any information necessary for a classification review, including, but not limited to organizational charts, job descriptions, staffing reports and a personal visit to the employee at his/her workplace.

006 Reclassification. No position may be classified or reclassified without written authorization of the Director of DAS State Personnel. The decision of the Director of DAS State Personnel shall be implemented within the next full pay cycle after the written authorization, or at a later date if agreed upon by the agency head and the Director of DAS State Personnel, unless a reconsideration of the classification decision is requested (see 007). Any pay change shall be effective only from the date of final determination.

007 Classification Decision Reconsideration Process. Any employee or agency head may request reconsideration, in writing, within 15 workdays from notification of the classification decision to the Director of DAS State Personnel and shall explain in detail the reasons for such a request. The letter shall contain a concise and specific statement as to why the decision was inappropriate and the specific reasons therefore [sic]; and a statement of the classification sought. An employee request shall be forwarded through the agency head to the Director of DAS State Personnel. Implementation of the classification action including any pay changes, will be delayed until the reconsideration has been formally concluded. In the case of any pay change such change will be made effective the date of the appeal to the Board.

> 007.01 Classification Appeals to the State Personnel Board. If the employee or agency does not agree with the decision of the Director of DAS State Personnel, the decision may be appealed to the State Personnel Board. The purpose of the appeal to the State Personnel Board is to ensure that proper application of the State's classification methodology was utilized in the decision making process and the issues raised by the appellant were taken into consideration and that the information used in the decision making process was accurate and correct. The review of the Board shall be limited to the issues raised by the appellant in the request to the Director of DAS State Personnel for reconsideration of the classification decision. New evidence will not be allowed at this step of the review.

Pursuant to § 004, Tussing submitted a job description to Anderson for classification review and thereby fulfilled the only mandatory duty imposed on him or his successor under the rules. Thus, the determinative issue in the case is whether Anderson had a mandatory duty to reclassify the positions pursuant to § 006. If Anderson had such a duty, mandamus would lie to compel her successor to reclassify the positions. We conclude that she did not. We find nothing in the rules which required Anderson to adopt the recommendation of a DAS employee that the positions be reclassified. Under §§ 006 and 007, the decision whether to reclassify is vested exclusively in the director of the DASSP, subject to administrative review by the State Personnel Board. Read as a whole, the Nebraska Classified System Personnel Rules & Regulations pertaining to reclassification of positions support the averments in Anderson's affidavit that classification review does not necessarily result in reclassification and that the decision to reclassify a position is discretionary in nature. The rules require the director of the DASSP to review a variety of factors and make a subjective determination as to whether a particular position should be reclassified. Although the director's determination is subject to administrative review, the State Personnel Board is required to "show significant deference" to the director's decision and may set that decision aside only when it is found to be "arbitrary, capricious or contrary to rule or law." § 007.01J. Even when

overturned on these grounds, the matter is remanded to the director for a second decision which is final and binding. *Id.* If the director had an absolute ministerial duty to reclassify a position upon receipt of a request for a reclassification study, there would be no reason for a review process, which clearly gives deference to determinations within the legitimate scope of the director's discretion.

Responding to Anderson's averments that no reclassification involving a salary grade change can be implemented without budget approval and that the classification review of the appellants' positions was terminated when it became apparent that necessary legislative appropriations would not be obtained, the appellants argue that the rules do not specifically permit consideration of funding for potential salary increases in determining whether to reclassify a position. While this may be true, the rules also do not require the director of the DASSP to ignore the issue of funding in performing a classification review, and we are unwilling to conclude that Anderson had an absolute duty to make a decision involving the expenditure of public funds in a fiscal vacuum. As such, Anderson's successor also does not have such a duty.

Likewise, we find nothing in the record constituting clear and convincing evidence that the other appellees failed to perform a ministerial act or duty which could be compelled by mandamus. We agree with the district court that the actions which the appellants seek to compel in this action are duties of a discretionary nature and that therefore, mandamus does not lie.

CONCLUSION

The record reflects that Tussing performed his ministerial duty of submitting a job description and request for classification review to the director of the DASSP. The appellants have not shown by clear and convincing evidence that Tussing or any other appellee or their successors failed to perform any other purely ministerial duty so as to entitle them to relief in the form of mandamus. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN D. RAMSAY, APPELLANT.

598 N.W.2d 51

Filed August 6, 1999. No. S-98-1092.

1. **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 properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
3. ___:___. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
4. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such.
5. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct.
6. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with direction to dismiss.

Toney J. Redman for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

STEPHAN, J.

Following a jury trial in the district court for Lancaster County, John D. Ramsay was acquitted of aiding and abetting the use of a weapon to commit a felony but convicted of aiding and abetting the unlawful discharge of a firearm. He was sentenced to incarceration for a period of 7 to 10 years and commenced this direct appeal. We reverse, and remand with direction to dismiss because we conclude that the evidence is insufficient as a matter of law to support the conviction.

FACTS

At approximately 2:35 a.m. on December 20, 1997, police were dispatched to a residence at 2945 Starr Street in Lincoln, Nebraska, regarding a reported shooting. According to witnesses at the scene, shots were fired through the front window of the residence from the outside, and Frankie L. Rhodes, who was inside the house, was struck by gunfire. Rhodes subsequently died.

The residence was owned by Clyde James and Dietra Wilkinson. At trial, James testified that both Maurice "Fleet" Miley and Ramsay were present at the residence between approximately 1 and 1:30 a.m. on December 20. According to James, an argument began between Cedric Jones and an unidentified individual in a room where several partygoers were gambling. After some discussion, James told Jones to leave, and Jones and Miley left the residence together. When they returned approximately 15 minutes later, Jones entered the residence but Miley was detained at the entryway, where he became involved in an argument with Dietra Wilkinson, and James asked him to leave. At that point, unidentified persons pushed Miley out of the residence and did not permit him to reenter. Jones, who had observed at least some of the argument, left at the same time. A few minutes later, Miley reappeared outside the doorway, where he remained for a few minutes and then left after stating his intention to return. James did not see Ramsay leave with Miley but knew that Ramsay was not in the residence after Miley left. Jones eventually returned to the residence and was present when the shooting occurred.

Dana Wilkinson, the niece of Dietra Wilkinson, testified that she arrived at a party at the residence during the early morning hours of December 20. Instead of traveling on the main streets, Dana Wilkinson drove through an alley and parked her vehicle in an area south of the residence. She entered the residence, as did all the other partygoers, through sliding glass doors located on its north side.

While present at the party, Dana Wilkinson saw Miley, whom she recognized as a friend of Jones'. She noticed Miley arguing with Dietra Wilkinson and James, heard Dietra Wilkinson call for Jones, and then saw Miley and Jones walk outside. She left the party approximately 10 to 20 minutes later, and as she walked south on the sidewalk leading toward the alley and her car, she encountered Miley walking toward her. They met near the front window of the residence. Miley was wearing a black ski mask that covered his face, but Dana recognized him because his dreadlocks were arranged in a ponytail and the mask did not fully cover his hair. When she asked him why he was wearing the mask, Miley pointed a firearm at her. She then observed Miley point the firearm at the window of the residence and begin firing. Afraid for her safety, Dana Wilkinson ran to the area where her car was parked and hid behind some garbage cans. While in hiding, she heard footsteps running along the sidewalk and the closing of a car door and then saw a vehicle speed down the alley, kicking up rocks and dust from its tires. Dana Wilkinson identified the vehicle as a dark-colored, four-door Honda with tinted windows. She did not know Ramsay and did not see him at the party, but admitted that it was possible he was at the party and that she did not see him there.

Andre W. Huffman testified that he was about to enter the party when he saw someone shooting into the window. He recognized the shooter as a person he had seen at a party the week before. Huffman later identified Miley as the shooter from a photograph array shown to him by police. Huffman did not know Ramsay and did not see him on the night of the shooting.

Lincoln police officer Sandra L. Myers testified on direct examination that she showed the photograph array to Huffman and generally described this process. On cross-examination, Ramsay's trial counsel asked Myers whether she had talked to

anyone who had "firsthand knowledge of John Ramsay participating in this crime." Myers responded that Jones told her that about 10 minutes prior to the shooting, he saw Ramsay get in the driver's seat and Miley get in the passenger seat of a car when they left the residence. Jones told Myers that he then reentered the residence and was present when the shots were fired. Myers admitted on cross-examination that Jones did not report hearing Ramsay and Miley discussing a shooting or any other unlawful activity.

Dawn Wimes testified that she owned a brown 1989 four-door Honda Accord in December 1997. At that time, she was dating Ramsay's brother, who had borrowed the vehicle at about 5:30 p.m. on December 19. She testified that other members of the Ramsay family frequently used the vehicle. Wimes further testified that on the morning of December 20, she awoke to find both Ramsay and Miley asleep on couches in her living room, which did not seem unusual to her because both men had previously spent the night at her residence.

The trial was interrupted for a hearing outside the presence of the jury on the voluntariness of a statement given by Ramsay to police on December 20, 1997, prior to Ramsay's becoming a suspect in the investigation of the shooting. On cross-examination of Officer James J. Spanel, who had taken the statement, Ramsay's trial counsel asked what had prompted the decision to arrest Ramsay. Spanel replied that Ramsay was arrested because in comparing his statement to one given by Miley, it was apparent Ramsay "was withholding information and was not being a truthful witness." In direct response to another question from Ramsay's trial counsel, Spanel testified that Miley "admitted to discharging a firearm into the [James/Dietra Wilkinson] residence . . . and leaving with John Ramsay and leaving the area in a car that John Ramsay was driving."

After ruling that both the tape-recorded statement of Ramsay and a related diagram were made voluntarily, the trial judge specifically addressed Ramsay's counsel and stated that the court was "concerned" about certain questions counsel had asked of Spanel about what other officers had heard from Miley regarding Ramsay, noting that asking for hearsay evidence "may not be the most appropriate thing."

When trial resumed, Spanel identified the tape-recorded statement given by Ramsay and a typed transcript, as well as the related diagram, which were all received in evidence. In the statement, Ramsay admitted that he was driving Wimes' vehicle on December 19 and 20, 1997, and that he drove Miley to and from the James/Dietra Wilkinson residence. He stated that he parked the car in front of the residence on Starr Street, facing west, and entered the residence with Miley. Ramsay stated that he left the party after less than an hour and waited in the vehicle for Miley, who told him that he wanted to drink a "couple beers" before leaving. Ramsay stated that when Miley subsequently left the party and returned to the vehicle, Ramsay drove to his home. He denied any knowledge of the shooting.

On cross-examination, Spanel admitted that Ramsay made no statement indicating that he was present when Miley fired the shots or that he knew of Miley's intent to do so. Spanel was asked by Ramsay's trial counsel if he had "any evidence that would indicate that [Ramsay] was not, in fact, sitting in his car listening to music when this incident occurred," and Spanel responded in the negative. Ramsay's trial counsel then asked what evidence in Ramsay's statement prompted his arrest. Spanel replied that Ramsay lied to him about where the car had been parked when the shooting occurred. Following this, Ramsay's trial counsel asked Spanel whether he had "any evidence that you can share with this Court and this jury that would indicate that John Ramsay aided and abetted the discharge of a firearm into that residence?" Before a response was given, the trial judge called counsel to the bench and restated his previously expressed concern regarding the elicitation of hearsay testimony during cross-examination of the State's witness. Ramsay's counsel then withdrew the pending question.

After the State rested, Ramsay moved for dismissal and a directed verdict. Both motions were denied. Ramsay presented no evidence. Before closing arguments, Ramsay's counsel made an oral motion in limine, requesting that the State not be allowed to use the terms "agreement" and "getaway car" in closing because there was no evidence to support the use of the terms. In overruling the motion, the court noted that on cross-examination, Myers relayed what Jones told her about Ramsay and

Miley getting into the car and stated, "Quite frankly, that's one of the main reasons this case is still pending for the jury to look at." The jury found Ramsay guilty of count I, aiding and abetting the unlawful discharge of a firearm, and not guilty of count II, aiding and abetting the use of a deadly weapon to commit a felony. Ramsay was sentenced to 7 to 10 years' imprisonment, and now appeals.

ASSIGNMENTS OF ERROR

Ramsay asserts, restated, that (1) the evidence presented at trial was insufficient to sustain his conviction; (2) he was denied effective assistance of counsel due to his trial counsel's reckless cross-examination of witnesses which introduced prejudicial hearsay into evidence; (3) the trial court erred in not declaring, on its own motion, a mistrial due to his trial counsel's ineffective assistance; and (4) he was denied effective assistance of counsel due to his trial counsel's failure to request a suppression hearing regarding his statement to police and due to his trial counsel's ineffectiveness during the hearing on the voluntariness of the statement Ramsay had made to police.

SCOPE OF REVIEW

[1] 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 properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Garza,* 256 Neb. 752, 592 N.W.2d 485 (1999); *State v. Larsen,* 255 Neb. 532, 586 N.W.2d 641 (1998).

ANALYSIS

[2-4] Ramsay was convicted of aiding and abetting the unlawful discharge of a firearm in violation of Neb. Rev. Stat. § 28-1212.02 (Reissue 1995), which provides that "[a]ny person

who intentionally discharges a firearm at an inhabited dwelling house . . . shall be guilty of a Class III felony," and Neb. Rev. Stat. § 28-206 (Reissue 1995), which provides that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Larsen, supra*; *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory. *State v. Larsen, supra*; *State v. Arnold, supra*; *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990). When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such. *State v. Arnold, supra*; *State v. Mantich, supra*; *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

The eyewitness testimony of Huffman and Dana Wilkinson constitutes direct evidence that Miley intentionally discharged a firearm into an inhabited residence during the early morning hours of December 20, 1997. In the statement he gave to police, Ramsay admitted that he transported Miley to the residence on the date of the shooting. However, because the offense of unlawful discharge of a firearm requires a specific intent, in order to convict Ramsay as an aider and abettor, the State was required to prove either that he intended to discharge a firearm into the residence or that he knew that Miley possessed such an intent prior to committing the act. See *State v. Mantich, supra.*

[5] Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397

(1998); *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997). Two cases arising from the same factual circumstances, *State v. Mantich, supra*, and *State v. Brunzo, supra*, provide examples of evidence sufficient to establish the requisite intent under an aider and abettor theory. Gary Brunzo and Douglas Mantich were among a group of 40 to 50 people who gathered following a gang-related killing. The general mood of those attending the gathering was one of depression or anger over the death. Several members of the group, including Brunzo, Daniel Eona, and Juan Carrera, carried guns to the gathering, and Carrera said that he wanted to shoot a member of the gang thought to be involved in the killing. As the larger group began to disperse, a smaller group consisting of Mantich, Brunzo, Eona, Carrera, and Angel Huerta were standing together when Eona expressed an intent to steal an automobile. Brunzo and Eona then left, returning a short time later in a minivan which had been carjacked. Henry Thompson, who had been driving the minivan at the time of the carjacking, was hunched over in the front between Eona, who was driving, and Brunzo. Against the urging of his girl friend, Mantich entered the minivan along with Carrera and Huerta, and Eona drove away as others in the minivan verbally taunted Thompson, demanded money, and threatened to shoot him. After several minutes of this, someone in the minivan shot and killed Thompson, but the identity of the shooter was not determined.

Mantich was convicted of felony murder and on appeal asserted that the evidence was insufficient to sustain his conviction. Noting that the State was required to prove that Mantich either personally intended to commit the underlying felonies of robbery or kidnapping or aided and abetted another person whom he knew to have such intent, we concluded that the evidence was sufficient to sustain his conviction because he participated in and encouraged the restraint and verbal terrorization of Thompson, which immediately preceded Thompson's death at the hands of someone in the group that included Mantich. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). Brunzo was also convicted of felony murder and on appeal argued that the evidence was insufficient to establish that he had the requisite intent as an aider and abettor. We rejected this argument based

upon evidence which included proof that Brunzo had a gun in his possession when Eona initially suggested a carjacking, that he and Eona appeared a short time later in an unfamiliar minivan with Thompson kneeling between the front seats with his hands behind his head, and that Brunzo dragged Thompson's body from the minivan after the shooting, leaving it in the street as he reentered the vehicle. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

In the present case, the record is devoid of any statements by Ramsay from which the requisite intent could be inferred. There is no evidence that Ramsay heard Miley express an intent to discharge a firearm into the residence or that he observed any conduct on the part of Miley which would have suggested such intent. There is no evidence that Ramsay was involved in or observed the argument which resulted in Miley's ejection from the party, and the only evidence that he was even aware of the argument was his statement to police that Miley told him that "there had been a little argument at the party, but it was all over." Dietra Wilkinson stated that she did not hear anyone at the party encourage Miley to commit any unlawful act. Of particular significance is the complete absence of any evidence, direct or circumstantial, supporting an inference that Ramsay knew that Miley had a firearm in his possession prior to the shooting. Dana Wilkinson and Huffman testified that they did not observe Ramsay anywhere in the vicinity when they observed Miley firing the weapon at the residence. Dana Wilkinson testified that when she encountered Miley outside the residence, she did not notice the firearm in his hand until he "raised his arms up" and pointed it at her. The weapon fired by Miley was not received in evidence, but Dana Wilkinson testified that "it looked like a flat box, like a VCR tape with a silver thing sticking out of it," suggesting a handgun capable of being concealed on Miley's person.

The record does contain evidence from which a jury could conclude beyond a reasonable doubt that Ramsay drove the vehicle which transported Miley from the scene of the shooting and that he was not truthful in his statements to police regarding where the vehicle had been parked and where he and Miley had gone after leaving the scene. While it may be argued that this

evidence supports an inference that Ramsay became aware of the shooting after it occurred, it does not tend to prove that Ramsay intended to commit the shooting or that he knew that Miley had such an intention prior to the act itself. We note that Ramsay was not charged with being an accessory to a felony under Neb. Rev. Stat. § 28-204 (Reissue 1995), which encompasses acts committed "with intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense."

[6] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Brunzo, supra*; *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993), *postconviction relief granted* 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). We conclude that this is such a case because there is no direct or circumstantial evidence from which a jury could conclude beyond a reasonable doubt that Ramsay had the requisite intent to aid and abet Miley in the commission of the charged offense. Having reached this conclusion, we need not address Ramsay's other assignments of error.

CONCLUSION

Because there is no evidence that Ramsay acted with the requisite criminal intent, we conclude, as a matter of law, that the evidence is insufficient to sustain his conviction for aiding and abetting the unlawful discharge of a firearm. The judgment of conviction and sentence is therefore reversed, and the cause remanded with direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.